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Peter D. Holmes, Chairperson BorgWarner Inc. 3850 Hamlin Road Auburn Hills, Michigan 48326 (248) 754-0889	Robert L. Schroder, Editor Robert L. Schroder, PLLC 8921 Margo Drive Brighton, Michigan 48114 (810) 229-0326	Peter D. Holmes, Assistant Editor BorgWarner Inc. 3850 Hamlin Road Auburn Hills, Michigan 48326 (248) 754-0889

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**CARABELL/RAPANOS**  
**DID THE UNITED STATES SUPREME COURT DECISION**  
**RESOLVE THE ISSUE OF FEDERAL JURISDICTION OVER WETLANDS?**

By Timothy A. Stoepker\* and Paul R. Bernard\*\*

## INTRODUCTION

On October 11, 2005 the Supreme Court of the United States granted the separate petitions for writ of certiorari submitted by June and Keith Carabell and John A. Rapanos on cases involving four separate wetlands in Michigan. The two cases were consolidated, but separately argued on February 21, 2006. *Rapanos v. United States* and *Carabell v. Army Corps of Engineers* 126 S. Ct. 2208 (2006). (collectively "Rapanos/Carabell" and individually "Rapanos", "Carabell"). The central issue was the extent of federal jurisdiction pursuant to the Clean Water Act 86 Stat. 884 ("CWA") over wetlands adjacent to non-navigable ditches and/or tributaries alleged to ultimately drain into navigable bodies of water.

Between the time the petitions for writ of certiorari were granted and the date the cases were argued, over fifty amicus briefs were filed by various associations, interest groups, congressmen and by 35 States in a consolidated brief. The New York Times asserted on its editorial page that the decision of the Supreme Court would impact over twenty million acres of wetlands across the country.

The goal of Rapanos/Carabell and their allies was to limit the Army Corps of Engineers and the Environmental Protection Agency ("EPA") ever broadening sweep of federal jurisdiction over what Rapanos/Carabell argued were State of Michigan wetlands.

In sharp contrast, the Army Corps and its contingent of alleged environmental interest groups argued that the Army Corps had jurisdiction over the wetlands based on mere adjacency to the nonnavigable ditches or tributaries. The Army Corps argued that actual impact on "waters of the United States" need not be proven.

This article will focus on the plurality opinion authored by Justice Scalia and the concurring opinion of Justice Kennedy. We will explore the impact of those opinions on Carabell and Rapanos and will examine the everyday reality that the opinions will have on attorneys advising property owners and developers in the State of Michigan.

As the authors of this article briefed and argued Carabell, there will be a greater emphasis on the Carabell factual and procedural history. However, since the critical analysis in the plurality opinion and in the Justice Kennedy opinion pertains to both cases we will also reference the Rapanos facts and history.

## QUESTIONS PRESENTED

While both Carabell and Rapanos argued that the Army Corps claimed jurisdiction violated the Commerce Clause, that question will not be discussed in this article as the Supreme Court decided the case without having to decide the question. However, it should be noted that the plurality was of the opinion that the Army Corps claimed jurisdiction was at the very edge of federal powers. In stark contrast the four dissenting Justices, led by Justice Stevens were not persuaded that State authority was being invaded by the Army Corps and the existing rules.

### Carabell Question

Does the CWA extend to wetlands that are hydrologically isolated from any of the navigable waters of the United States?

### Rapanos Question

Whether wetlands that are adjacent to, and have a surface hydrological connection with; nonnavigable tributaries of the traditional navigable water are of the "waters of the United States" within the meaning of the CWA. 33 U.S.C. 1362(7).

## PROCEDURAL AND FACTUAL BACKGROUND

### Carabell Property

The Carabell property is a 19.6 acre parcel in Chesterfield Township, Macomb County, Michigan. It is surrounded by development including housing for the Selfridge Airfield. The parcel contains 15 acres of forested wetland and is adjacent to an unnamed ditch running approximately 1800 feet along easterly border. The ditch was dug by Macomb County to install sanitary sewer to serve the Carabell property and other neighboring parcels. At the time the ditch was dug the day spoils were side cast onto the Carabell parcel so as to create a clay berm. The wetland area formed beyond the edge of the berm on all but 4.6 acres of the Carabell property.

The unnamed ditch which is dry much of the year connects to Macomb County's Sutherland-Oemig drain. This man-made County drain eventually connects to a nonnavigable creek which ultimately empties into Lake St. Clair.

The joint appendix submitted by Carabell and the Army Corps identifies the following facts: (1) the wetland is not adjacent to navigable water, (2) is not a tributary, (3) is not a headwater, (4) is not part of the watershed, (5) is isolated from any drain, and (6) does not send or receive water. (Carabell Joint Appendix pgs. 81-83, 93 97, 100, 106) Simply stated, Carabells' wetland was and is hydrologically isolated from any water, navigable and not navigable.

Unlike Rapanos, Carabell while contesting jurisdiction sought and was denied a permit by the Army Corps. While the denial of the permit was pursued in the lower court case, for purposes of the petition of writ of certiorari said claim, while meritorious was not pursued.

Also, unlike Rapanos, Carabell sought and obtained a wetland permit from the Michigan Department of Environmental Quality ("MDEQ"). The permit was issued after the same was ordered by a Michigan Administrative Law Judge ("ALJ") subsequent to a lengthy contested case hearing. In ordering the permit, the ALJ found that the mitigation plan advanced the environmental objectives of a forested wetland better than the existing wetland.

After Carabell's MDEQ permit was issued the Army Corps and the EPA intervened claiming federal jurisdiction and denied a permit. Thereafter, Carabell pursued an action in the United States District Court for the Eastern District, Southern Division (USDC). After an adverse ruling from the USDC, Carabell appealed to the Court of Appeals for the 6<sup>th</sup> Circuit ("6<sup>th</sup> Circuit"). The 6<sup>th</sup> Circuit denied the appeal citing *United States v Riverside Baywood*, 474 U.S. 121, 135 (1988) holding that Carabell's wetland had a "significant nexus" to the navigable water of the United States. However, the 6<sup>th</sup> Circuit never identified what characteristic of the wetland provided "significant nexus" to navigable waters. The 6<sup>th</sup> Circuit Opinion is found at 391 F.3d 704 (6<sup>th</sup> Cir. 2004) while the USDC decision is published at 257 F.Supp.2d 917 (E.D. Mich. 2003).

As a consequence of these decisions, Carabell sought relief in the United States Supreme Court arguing that absent a surface water or groundwater connection between the Carabell wetland and Lake St. Clair (the navigable water), that there was not a "significant nexus" and thus no federal jurisdiction. Simply stated, Carabell argued that hydrologically isolated wetlands are not subject to federal jurisdiction.

While the Army Corps conceded that the unnamed ditch, the Sutherland-Oemig drain and creek were not navigable bodies of water, it claimed that some undefined historical science had previously demonstrated impact and that requiring a jurisdictional analysis would be overly burdensome. Thus, the Army Corps argued that jurisdiction should be presumed.

### Rapanos Property

Unlike Carabell, the Rapanos case arose out of civil and criminal claims initiated by the United States. It was claimed that Rapanos' man-made ditches violated the CWA as the ditches drained wetlands via a series of downstream nonnavigable tributaries that ultimately flowed into navigable water 20 miles away.

Rapanos argued that since his wetlands did not directly abut a navigable in fact waterway that there was no federal jurisdiction.

The 6<sup>th</sup> Circuit rejected Rapanos' argument holding that the CWA does not require a common border between a wetland and a navigable body of water, but instead all that needs to be established is a "significant nexus" to the traditional navigable water. In Rapanos, the 6<sup>th</sup> Circuit found that the hydrological connection to the contributing tributary 20 miles away was sufficient to fall within the ambit of the Army Corps authority.

Like Carabell, Rapanos filed his petition for writ of certiorari which was granted October 11, 2003.

### The Decision

While Carabell, Rapanos and all other interested groups awaited a definitive and clear statement of law providing a bright line test to determine federal jurisdiction, such was not the case.

While Justice Scalia endeavored to provide such a test, his opinion was only supported by Chief Justice Roberts, Justice Thomas and Justice Alito. Justice Kennedy while joining with the four other Justices in reversing the 6<sup>th</sup> Circuit, set forth in his own rationale and separate test in a concurring opinion stating that federal jurisdiction would be resolved in a case by case method until rules conforming to his opinion were adopted by the Army Corps. 126 S.Ct. 2249.

Dissenting opinions were authored by Justice Stevens and Justice Breyer. Justice Stevens opinion was concurred with by Justices Souter, Ginsberg and Breyer. 126 S.Ct. 2252. While Justice Breyer concurred with Justice Stevens, his dissenting opinion stated that the Army Corps rules were not properly drafted and must be completely revised. 126 S.Ct. 2266.

While there was substantial disagreement among the plurality and Justice Kennedy, they did agree that the purpose of the CWA was to prohibit discharge of pollutants into navigable waters and that the Army Corps claim of jurisdiction to enforce that objective had gone too far. Justice Kennedy likewise asserted that the dissents complete deference to the Army Corps exceeded the CWA's scope of jurisdiction. 126 S.Ct. 2247. Serious and complete disagreement surfaced between the plurality and Justice Kennedy as to what constituted a significant connection or nexus between the wetland and the navigable "in fact water".

### Plurality Opinion

The plurality opinion of Justice Scalia provided the following test:

"The lower courts should determine, in the first instance whether the ditches or drains near each wetland are "waters" in the ordinary sense of containing a permanent flow; and (if they are) whether the wetlands in question are 'adjacent to these water' in the sense of possessing a continuous surface connection . . . " Rapanos/Carabell 126 S.Ct at 2233.

The plurality opinion contemplated that this two-prong test would be the instrument by which the Army Corps determine, as a matter of law, whether the Carabell wetland, or Rapanos wetlands or any other wetland had a "significant nexus" to navigable "in fact waters" of the United States. [Navigable "in fact" meaning waters which are subject to the ebb and flow of the tide or were navigable or are navigable or are susceptible for navigation. *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*, 531 U.S. 159, 169-172 (2001) ("SWANCC").

The judgment issued by the Supreme Court, filed July 21, 2006 and dated June 19, 2006, provided, in part:

"In Consideration Whereof, it is ordered and adjudged by this Court that the judgments of the above are vacated with costs and remanded to the United States Court of Appeals for the Sixth Circuit for further proceedings."

The plurality test responded to what Justice Scalia saw as the Army Corps deliberate attempt to extend the definition of "waters of the United States" to the outer limits of Congress' commerce power. See 33 U.S.C. 1362(7). 126 S.Ct. 2216. A reading of Justice Scalia's plurality opinion reveals a frustration with the Army Corps for not adopting rules conforming to the Supreme Court's decisions in *Riverside Bayview* at 134 and SWANCC at 171. In *Riverside Bayview*, the Supreme Court acknowledged that wetlands actually abutting navigable water were subject to federal jurisdiction. When however, the Army Corps attempted via migratory birds to expand federal jurisdiction to isolated ponds, the Supreme Court held that "non navigable, isolated intrastate water" which did not "actually abut on a navigable waterway", were not included as "water of the United States". SWANCC at 167.

In rejecting the dissenting opinions focus on ecological factors with total deference to the Army Corps ecological judgment, Justice Scalia stated that such interpretation "would permit the Corps to regulate the entire county as waters of the United States." 126 S.Ct. 2216-2218, 2230. Since the CWA was not a comprehensive national wetlands protection act, and since the term "water of the United States" is tied to navigable in fact waters, such phrase "does not include channels through which water flows intermittently or ephemerally or channels that periodically provide drainage for rainfall". 126 S.Ct. 2225, See also 126 S.Ct. 2222, 2226, 2227.

Based on the foregoing rationale and test, Carabell has argued that they were remanded to the 6<sup>th</sup> Circuit to apply the two prong test.

#### Justice Kennedy Opinion

Whether one agrees or disagrees with the plurality opinion, the two prong test which defines "significant nexus" for wetlands which are not adjacent to navigable in fact water is at least clear.

Unfortunately, such clarity could not capture five votes. Instead, the concurring vote of Justice Kennedy is based on a broad set of ecological criteria subject to much debate and interpretation.

While Justice Kennedy rejects the plurality opinion requiring continuous flow in the stream and continuous flow from the wetland to the stream, he also rejects the dissents complete deference to complete and total federal jurisdiction without regard to how remote or insubstantial the flow to navigable in fact waters.

Justice Kennedy's "significant nexus" test appears to be premised more on ecological factors which were rejected by plurality than on the limitations in the text of CWA which ties regulation to navigable waters and notes the primary responsibility of

the States to regulate pollution. Focusing on ecological criteria, Justice Kennedy rejects federal jurisdiction where the effects on water quality are speculative or insubstantial.

Asserting that CWA's goal is to restore and maintain the chemical, physical and biological integrity of the Nation's waters, to the extent wetlands perform such critical function, such wetland would constitute a "water of the United States". Thus Justice Kennedy's opined:

"Accordingly, wetlands possess the requisite nexus and thus come within the statutory phrase "navigable waters", if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'. When, in contrast, wetlands effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters". 126 S.Ct. 2248.

While Justice Kennedy acknowledged the possibility that a "significant nexus" existed, he determined that the record was not developed sufficiently under his ecological standard to make such a determination. Accordingly, he suggested that Rapanos should be remanded to the USDC to reconsider the evidence in light of his proposed standard. 126 S.Ct. 2251. As to Carabell, at one point he suggests the case should be remanded to the 6<sup>th</sup> Circuit while at the end of his opinion he implies that the case should return to the Army Corps to apply his proposed standard. 126 S.Ct. 2252.

## **IMPACT OF THE RAPANOS/CARABELL DECISION**

### Status of Carabell

As of the writing of this Article, the Army Corps has filed a motion with the 6<sup>th</sup> Circuit seeking a remand of Carabell to the Army Corps. However, in seeking such remand the Army Corps has not taken a definitive position as to what standard of law should be applied by the Army Corps. The Army Corps merely suggests that plurality test should be applied or that the Justice Kennedy ecological standards should be applied because parts of those standards are accepted by the four dissenting Justices.

Carabell has answered the Army Corps' motion by asserting that the administrative record is complete and contains all of the information necessary for the 6<sup>th</sup> Circuit to determine whether the decision of the Army Corps was within its authority under either the plurality test or under Justice Kennedy standards. See *Florida Power & Light Co. v Lorion*, 470 U.S. 729, 744 (1985); see also *Citizens to Preserve Overton Park v Volpe*, 401 U.S. 402 (1971) As is evident from the opinions of the Justice Scalia, and Justice Kennedy, the error or deficiency in fact-finding occurred in the 6<sup>th</sup> Circuits and USDC's review of the record and not in breadth of the Army Corps investigation. Accordingly, Carabell has argued against remand and a protracted and costly reinvestigation.

Whether Carabell is or is not remanded, it is Carabell's position that Justice Scalia's plurality position controls the jurisdictional analysis because it is the "narrowest ground" upon which those Justices who concurred in the judgment agreed.

Where, as in this case, there is no single rationale which commands a majority of the Supreme Court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest of grounds." *Marks v. United States*, 430 U.S. 188, 1993 (1997). A plurality opinion may contain the narrowest grounds for a decision by the Supreme Court when it effects the least change in the existing law and cleaves most closely to existing Supreme Court precedent on the relevant issues. See *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 765 n. 9 (1988).

Both the plurality and concurring opinions agree that the Supreme Court's decisions in *Riverside*, 474 U.S. 121 (1985) and *SWANCC* were correct and remain binding applicable law. Compare *Rapanos*, 126 S. Ct. at 2225-27 and *Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring) ("*Riverside* and *SWANCC* establish the framework for the inquiry in the cases now before the Court").

Justice Scalia's plurality opinion represents the narrowest ground for confirming and extending these two decisions because it most clearly applies the rulings from those cases, especially *SWANCC*. In both *Riverside* and *SWANCC*, the Supreme Court focused on finding an immediate and tangible physical connection between a water body and a navigable water as the basis for Clean Water Act jurisdiction. In *Riverside*, a wetland was found to be within federal jurisdiction because it was directly adjacent to "navigable waters," as traditionally defined; while, in *SWANCC*, a pond was found to be outside of federal jurisdiction because it was physically "isolated" from any navigable waters. Moreover, in *SWANCC*, the Supreme Court ruled that Clean Water Act jurisdiction could not arise from a purely ecological connection between a water body and the navigable waters of the United States. *SWANCC*, 531 U.S. at 171-72. An isolated pond does not have a "significant nexus" to a navigable water just because both serve the same ecological function, such as providing a habitat for migratory birds. See *id.* Thus, a significant nexus can exist only where there is something more than a purely ecological connection. In this case, the Army Corps ignored the holding and focus of both *Riverside* and *SWANCC* and ignored the Clean Water Act's mandate that States have the primary role in controlling pollution. See 33 U.S.C. § 1251(a). Justice Scalia's plurality opinion corrects the Army Corps' error in this respect by developing a narrow, two-pronged jurisdictional inquiry to define the "significant nexus" standard, which was first indicated in *Riverside* and more fully explicated in *SWANCC*. See *Rapanos*, 126 S. Ct. at 2233-35.

Justice Kennedy's concurrence constitutes a broad departure from the rationale and holdings of *Riverside* and *SWANCC*. Most importantly, Justice Kennedy indicates that, at least in some situations, the rejected "ecological connection" analysis might be sufficient to provide a basis for federal jurisdiction. See *Rapanos*, 126 S. Ct. at 2251-52 (Kennedy, J., concurring). Moreover, Justice Kennedy's suggestion that ecological significance can be evaluated on a case-by-case basis was specifically rejected in *Riverside*, 474 U.S. at 134 n. 35. Thus, the case-by-case approach advocated by Justice Kennedy exceeds the limitations of *Riverside* and *SWANCC*, leaving Justice Scalia's two-pronged inquiry as the proper analysis for determining the jurisdictional issue in this case.

If Carabell is remanded to the Army Corps, Carabell and the reviewing Courts will need to carefully scrutinize the remand process to ensure that the Army Corps actually engages in a genuine reconsideration as opposed to merely preserving its prior decision by formulating a post-hoc rationalization of its prior decision. *Food Marketing Inst. v I.C.C.*, 587 F2d 1285, 129 (D.C. Cir. 1979).

### Impact of Rapanos/Carabell on the Wetland Practitioner

Since it is highly unlikely that fractured opinions in the United States Supreme Court will be clarified or revisited within the foreseeable future, it would appear that the standard of law to be applied for all practical purposes will be determined by the various district courts and then the various circuit courts of appeal. Reconciliation of varying decisions in the United States Supreme Court is unlikely. Accordingly, the practitioner must be prepared to address Justice Scalia's two prong test and Justice Kennedy's ecological based test.

Applying the plurality test, one must demonstrate that water in the ditch/drain does not flow continuously and that the wetland does not continuously flow into the ditch/drain.

As to Justice Kennedy's standards, the applicant will in all cases need to engage a qualified scientist who can quantify by an empirical analysis the impact of the wetland locally and regionally in combination with other wetlands in the area. Specific emphasis should be placed on the chemical, physical and biological integrity of the wetlands in relation to the local and regional impact on the navigable body of water. This analysis will be time consuming and costly. The applicant must demonstrate to the Army Corps that removal of the wetland or portion thereof will only have a speculative or insubstantial impact on "navigable-waters".

Since Justice Kennedy's standard is to be applied on a case by case basis, predicting federal jurisdiction will be nearly impossible. Thus, the applicant may want to consider a simultaneous Army Corps and MDEQ determination. Since the Army Corps in some locations is now considering jurisdiction first, subject to administrative appeals; a simultaneous review may reduce the delay that will be encountered if the review is first conducted by MDEQ and then by the Army Corps.

### **CONCLUSION**

As Rapanos/Carabell provides no clear bright line test, the wetland practitioner must be prepared to be subjected to either Justice Scalia's plurality test or Justice Kennedy's ecological standards. In addition, we should expect a variety of opinions from the federal courts, since ultimate resolution by the Supreme Court is not likely in the foreseeable future.

Until the 6<sup>th</sup> Circuit declares which test is the law in the 6<sup>th</sup> Circuit, the applicant and attorney must gather and submit data on both tests. The applicant and the attorney must also evaluate time lines, the costs of the jurisdictional evaluation, the likelihood of defeating federal jurisdiction, exhaustion of administrative remedies under the Army Corps bifurcated review and the relationship of the foregoing to MDEQ's permit process. Unfortunately, unless the plurality test is accepted as the law of the 6<sup>th</sup> Circuit the

property owner and developer still face significant hurdles in the development of property containing state and federally regulated wetland.

*\*Timothy A. Stoepker is a Member of Dickinson Wright PLLC practicing in the areas of real estate law, land use, zoning, wetlands, natural features and development law. Mr. Stoepker has represented Carabells since the early 1990's and argued the case before the United States Supreme Court.*

*\*\*Paul R. Bernard is a Member of Dickinson Wright PLLC practicing in the area of appellate law with a specialty in zoning, wetland and development law. Mr. Bernard was the primary drafter of the United States Supreme Court brief.*

## **REGULATION OF NON-FERROUS METALLIC MINERAL MINING IN MICHIGAN**

**By Eugene E. Smary \* and Dennis J. Donohue \*\***

### **I. INTRODUCTION**

Most Michigan residents are aware of the rich mining history of Michigan's Upper Peninsula. What first appeared as a bad deal, awarding the State of Michigan the entire Upper Peninsula in exchange for the "Toledo Strip" proved to be a bonanza for the state and its people. Hundreds of copper mines and iron mines were developed and became the principal source of supply for the United States during the Civil War and after. Only two production mines remain in the Upper Peninsula, both producing iron ore.

Advances in mineral exploration technology over the last several decades, however, may be about to change that. Over the last decade a significant amount of mineral exploration has been going on in the Upper Peninsula, both on private land and public lands. Mineral collectors have known for decades that there is still a lot of copper to be found in the western end of the Upper Peninsula, although the pure copper may not be in sufficient quantity to make it economic to mine. The new technology has been able to focus on non-ferrous minerals that are bound up in sulfide deposits, particularly zinc, nickel, as well as copper and other metallic minerals.

There has not been a new mine developed in Michigan, especially an underground mine, in since the development of detailed environmental laws. Michigan's mining reclamation statute, Part 631, does not have provisions for reclamation of underground mines—only open pit mines. That is because the statute reflects the regulation of the existing iron mines. While there were initial efforts to amend Part 631 to include underground mines within its scope, for a variety of political and nonpolitical reasons, it was determined to create a new part of NREPA to deal with non-oxide, non-ferrous metallic mining. While the statute and rules rely upon existing regulatory regimes to control air, water and waste, the new Part 632 created new processes that a

potential permit applicant would have to follow in order to permit a new non-ferrous metallic mineral mine, whether it be open pit or underground.

This article intends to give a brief overview of this new statute.

## II. MICHIGAN'S REGULATORY FRAMEWORK

The legislature enacted Part 632<sup>1</sup> of the Michigan Natural Resources and Environmental Protection Act ("NREPA") in December 2004. The Michigan Department of Environmental Quality ("MDEQ") adopted extensive regulations implementing Part 632 in February of this year.<sup>2</sup> Both the statute and rules reflect the efforts of a mining work group comprised of representatives from environmental organizations, the mining industry, the MDEQ, local governments and tribal interests. While the Part 632 program does not reflect unanimous consent by all group members on every facet of the program or how it will be implemented, the statute and rule package do represent a general consensus on the basic regulatory framework and balance needed to assure environmentally safe extraction of metallic minerals in Michigan.

### A. The Statute.

Part 632 specifically applies only to "nonferrous" metallic mineral mining. Because iron is typically not bound with sulfur in subterranean rock formations, Part 632 does not apply to mines where iron or iron minerals are the primary target of extraction.<sup>3</sup> The statute specifically finds that metallic mineral mining is a potentially "important contributor to Michigan's economic vitality," but also identifies ARD risks associated with such mining as an environmental risk warranting targeted regulation.<sup>4</sup> The legislature's findings therefore recognize the importance of environmental protection and validate modern mining techniques and the notion that metallic mineral mining should proceed if the standards and requirements of the statute are met. In adopting Part 632, then, the legislature rejected the idea that metallic mineral mining should simply be prohibited as inherently too environmentally risky, as advocated by certain interest groups.

#### 1. Permit Requirement

The heart of the statute is found in Section 63205's permit requirement.<sup>5</sup> Section 63205 prohibits metallic mineral mining by any person without first applying for and obtaining a permit to do so from the MDEQ.<sup>6</sup> In addition to a \$5000 application fee, the application must be accompanied by: (1) an environmental impact assessment of the proposed mining operation, (2) a mining, reclamation and environmental protection plan, (3) a contingency plan, and (4) a financial assurance mechanism to ensure that the requirements of the statute will be met in the case of insolvency.<sup>7</sup> Section 63205 also provides for extensive public participation in the permitting process that, while holding the MDEQ to strict timelines for reviewing and reaching a decision on a permit application, also provides for a public meeting and a separate public hearing on the application, and two corresponding rounds of public comment.<sup>8</sup> Part 632 states that the MDEQ must approve an application if the proposed mine will meet the requirements of the statute and the mining operation will not "pollute, impair, or destroy the air, water, or other

natural resources or the public trust in those resources, in accordance with Part 17<sup>9</sup> of this act.”<sup>10</sup> Importantly, in determining whether the environmental protection standard of Part 17 (also known as the Michigan Environmental Protection Act or “MEPA”) is met, the MDEQ must take into consideration “the extent to which other permit determinations afford protection to natural resources.”<sup>11</sup>

Section 63205 provisions thus reflect three key policy decisions by the legislature. First, the legislature chose not to include “siting requirements” (and risk the associated takings issues) that would impose an absolute prohibition on the issuance of mining permits in the remote and generally underdeveloped areas where newly discovered deposits are likely to be found. Instead, the statute obligates the permit applicant and MDEQ to evaluate a given project’s environmental impacts on a case by case basis through review and analysis of the required environmental impact assessment (“EIA”). For example, while it is doubtful that a person proposing an open pit mine immediately adjacent to a protected state wilderness area would meet the environmental protection standards of Section 63205, the statute at least provides the applicant with an opportunity to demonstrate that the impact is acceptable. Second, the statute’s public participation requirements seek to strike a balance between public participation and timely permitting decisions by providing for multiple opportunities for written public comment – but within clear time limits designed to compel a permitting decision within a reasonable time frame. Third, the statute adopts MEPA’s “pollution, impairment or destruction” language as the overarching standard for issuing permits, but requires the MDEQ to take into account the environmental protections provided by other media-specific permits issued for the project. This aspect of the statute brings MEPA (and its extensive body of caselaw) into play – but only to the extent an aspect of the mining operation is not otherwise regulated by NREPA’s existing permitting programs. The MDEQ has acknowledged that Part 632 is not intended to establish a platform for development of different media-specific environmental protection standards for metallic mining than would otherwise apply under NREPA’s existing regulatory programs.<sup>12</sup>

## 2. General Duties of Permittees.

Section 63209<sup>13</sup> delineates the general duties of the permittees, which are primarily focused on mine reclamation and environmental monitoring of mine operations. Of particular importance is the requirement that the permitted “mining area” (i.e., the actual mine site) and the area “affected” by mining operations “be reclaimed and remediated to achieve a self-sustaining ecosystem appropriate for the region that does not require perpetual care following closure ....”<sup>14</sup> This prohibition on “perpetual care” would preclude establishment of an ecosystem that needs perpetual active management – like periodic restocking of fish in a river. This language would not, however, preclude a reclamation plan that requires perpetual monitoring or care of closed mines or ancillary facilities in every instance. Section 63209(8) further underscores this concept by setting a “goal” of returning areas “affected”

by mining (but not the "mining area" itself) "to the ecological conditions that approximate pre-mining conditions, subject to changes caused by non-mining activities or other natural events."<sup>15</sup> Thus, the statute does not require that tailing basins or other alterations to the landscape within the "mining area" necessarily be removed as part of reclamation if it is not an impediment to a self-sustaining ecosystem.

### 3. Financial Assurance.

Part 632 requires that the mine operator maintain financial assurance sufficient to cover the cost of administering and hiring a third party to implement the mine reclamation plan and any contamination of the environment that is in violation of the mining permit.<sup>16</sup> The statute provides the mine operator with different options for meeting its financial assurance obligations, including bonds, escrows, certificates of deposit and letters of credit. These financial assurance instruments must cover at least 75% of the cost of assurance – any remaining amount must consist of a statement of financial responsibility from the operator. The permittee must update its financial assurance every three years, or earlier if required to do so by the MDEQ.<sup>17</sup>

### 4. Administration and Enforcement.

The balance of the Part 632 addresses the administrative authorities needed to properly implement and enforce the statute, such as establishing a surveillance fee based on the amount of material mined, investing the MDEQ with investigation and rule-making authority, and requiring the permittee to file annual reports on mining and reclamation activities with the MDEQ.<sup>18</sup> The statute also provides the MDEQ with the authority to issue orders enforcing the statutes requirements (including and/or revoking of the permit after holding an evidentiary hearing) and grants the Attorney General the authority to bring actions for civil and criminal penalties.<sup>19</sup>

## **B. The Rules.**

The MDEQ regulations implementing Part 632 were the product of a work group comprised of many of the same stakeholders that developed the statute. Accordingly, the rules track the statute very closely in most respects. The primary purpose of the rules is to spell out in detail the issues that need to be addressed in the environmental impact assessment, mine plan, contingency plan and reclamation plan. In addressing implementation details that were not addressed in the statute, many issues emerged as points of contention among work group members: detailed discussion of all of the various points of disagreement and how they were resolved goes beyond the scope of this article. Instead, this article briefly touches on selected issues, to illustrate key policies underlying the rules. These three issues are: (1) augmenting the public participation provisions in the statute; (2) determining the time period needed to get a representative assessment of flora and fauna in the mining area; and (3) determination of groundwater "action" levels. A brief summary as to how the final rule package resolved each of these issues follows below.

1. Augmenting the Statute's Public Participation Process.

In developing the rules, substantial deliberation focused on whether the rules should augment the public participation process delineated in the statute. Most of the discussion focused on whether the rules should require the MDEQ to hold a pre-application public "scoping" meeting where the applicant presents the project and public comment is taken on it before actually filing an application. The contrary view was that additional public meetings or hearings could not be added by rule and that doing so would contravene the intent of the legislature. In the end, rules included a provision that allowed (but do not require) the MDEQ to hold a public "meeting or meetings at any time after [MDEQ] that there is a reasonable likelihood that a person will apply for a permit"<sup>20</sup> under Part 632.

2. Flora and Fauna Evaluations in the Environmental Impact Statement.

The work group devoted much attention to issues pertaining to the Environmental Impact Assessment ("EIA") and what constituted representative data to establish baseline environmental conditions. A particular point of contention was the length of time needed to assess flora and fauna in the mining area and affected area. Some work group members advocated for at least two years of site-specific data on flora and fauna to support an EIA. Others advocated for one year of site-specific data. In the end, MDEQ determined that it would require two years of "relevant information" on species and abundance of flora and fauna. "Relevant information" can include pertinent data from other sites with similar conditions or credible regional studies, but must include at least one year of site-specific information.<sup>21</sup>

3. Groundwater Action Levels.

Much of the work group's focus in developing the Part 632 rule package targeted protection of surface water and groundwater. The result of these efforts was Rule 406,<sup>22</sup> which delineates monitoring and other requirements designed to protect water resources.

Extensive discussion was devoted to the issue of "action levels" to address impacts to groundwater – i.e., establishment of criteria that, if exceeded, would trigger response obligations on the part of the permittee. Driving this discussion were two fundamentally different viewpoints as to how NREPA – as amended by Part 632 – is applied to metallic mineral mining. One viewpoint held that Part 632 authorized the development (through rulemaking) of mining – specific groundwater protection and cleanup criteria – standing apart from the criteria that would otherwise apply under Parts 201 and 31 of NREPA. The other viewpoint emphatically rejected the notion that Part 632 was intended to authorize mining-specific cleanup criteria, and held that existing parts of NREPA more than adequately protected water resources.

In the end, compromise language prevailed. Under Rule 406(6)-(7), a permittee must notify the MDEQ if leachate monitoring or compliance monitoring detect "concentrations of a solute 2 standard deviations above the long term average background level for two consecutive sampling events."<sup>23</sup> At that point, MDEQ may order additional sampling. If the additional sampling shows that an "action level" is exceeded, then the permittee shall perform any increased monitoring that MDEQ may direct, conduct a source investigation, and implement a "plan for response activity as approved by the [MDEQ]."<sup>24</sup> "Action levels" are defined as concentrations of a solute that equal or exceed  $\frac{1}{2}$  of the level between the long term average background and the drinking water standard for two consecutive sampling events, or pH levels exceeding the long term average background level by 0.5 standard units for two consecutive sampling events.<sup>25</sup> Thus, Rule 406 does not establish new cleanup criteria for metallic mineral mining – it requires close monitoring of mining-related impacts to groundwater and directs the MDEQ to determine what, if any, response action is needed. Based on statements from MDEQ during the work group process, it was understood that Park 201, Part 31 and other applicable parts of NREPA would govern the permitted plan for response activity and MDEQ's review of such plan. Ultimately, Rule 406 reflects a resource protection approach to metallic mineral mining, as opposed to an antidegradation approach. The rules recognize that some impact to environmental media from mining-related activity may be tolerated, so long as the impact is within the levels established in other parts of NREPA to that natural resources and the environment are protected.

### III. CONCLUSION

Part 632 and its implementing rule package reflect a consensus effort to allow metallic mineral mining to move forward in Michigan with stringent environmental protections. Time will tell whether the statute facilitates a resurgence of the Michigan mineral extraction industry. It will also act as a litmus test of sorts, measuring the bona fides of this negotiating strategy of the stakeholders who participated in the unique status and rule development process.

*\*Eugene E. Smary is a partner with the law firm of Warner Norcross & Judd LLP in its Grand Rapids office. He has concentrated his practice in the areas of environmental and natural resources law for the last 25 years. He has served as the chair of the American Bar Association's Section of Environment Energy and Resources, Chair of the Environmental Law Section of the State Bar of Michigan, and chair of the Environmental Law Section of the Grand Rapids Bar Association. He has also served as an adjunct associate professor of law at the University of Notre Dame Law School teaching a course in environmental law. He received his law degree from the University of Notre Dame in 1975 and served as a judicial clerk on the United States Court of Appeals for the District of Columbia Circuit.*

*\*\*Dennis J. Donohue is a partner in the law firm of Warner Norcross & Judd LLP where he practices exclusively in the environmental area. Mr. Donohue concentrates on a variety of environmental law issues, including NPDES permit development and other water regulation issues. He has coauthored articles for the Environmental Law Journal (State Bar of Michigan), the American Bar Association's Natural Resources, Energy and Environmental Law Year in Review, and A Guide for Michigan Business (Michigan Chamber of Commerce). He graduated from the University of Michigan and received his J.D. degree, magna cum laude, from Wayne State University.*

*Messrs. Smary and Donohue serve as counsel to the Kennecott Eagle Minerals Corporation, the first company to submit a permit application under new Part 632. The views expressed in this article are the opinions of Messrs. Smary and Donohue and are not to be taken as reflecting the views of Kennecott with respect to the Part 632 program.*

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<sup>1</sup> MCL § 324.63201 *et seq.*

<sup>2</sup> MAC R 425.101, *et seq.*

<sup>3</sup> MCL § 324.63201(j).

<sup>4</sup> MCL § 324.63202(c)-(e).

<sup>5</sup> MCL § 324.63205.

<sup>6</sup> MCL § 324.63205(1).

<sup>7</sup> MCL § 324.63205(2).

<sup>8</sup> MCL § 324.63205(4)-(9).

<sup>9</sup> MCL § 324.1701 *et seq.*

<sup>10</sup> MCL § 324.63205(11)(b).

<sup>11</sup> *Id.*

<sup>12</sup> MCL § 324.63205(11)(b).

<sup>13</sup> MCL § 324.63209.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> MCL § 324.63211(2).

<sup>17</sup> MCL § 324.63211(3).

<sup>18</sup> MCL §§ 324.63213. The rule making authority of the agency was confined to a period of approximately one year.

<sup>19</sup> MCL § 324.63221.

<sup>20</sup> MAC R 425.601.

<sup>21</sup> MAC R 425.202(2)(Y).

<sup>22</sup> MAC R 425.406.

<sup>23</sup> MAC R 425.406.

<sup>24</sup> MAC R 425.406(6).

<sup>25</sup> MAC R 424.406(7).

## **GREEN ALTERNATIVES TO POST CONSTRUCTION STORM WATER MANAGEMENT**

By Brian J. Considine, Dawda, Mann, Mulcahy & Sadler, PLC  
&  
Stephen Pawlaczyk, PE, Atwell-Hicks

### **INTRODUCTION**

As of 2000, there were approximately 116 million residential buildings and nearly 4.7 million office buildings in the United States.<sup>1</sup> There are also approximately 38,000 square miles of pavement in the United States<sup>2</sup> and, on an annual basis, one acre of parking lot can collect up to 4 gallons of oil and other petroleum hydrocarbons.<sup>3</sup> An area of medium density single family homes can be comprised of 25 to 60 percent of impervious surfaces.<sup>4</sup>

Storm water runoff from rooftops, parking lots and other impervious surfaces may contain heavy metals, pathogens, toxins and organic material,<sup>5</sup> and therefore, can significantly degrade the quality of adjacent surface waters (streams, ponds and lakes). The amount of impervious surfaces in an area strongly correlates with the quality of nearby surface waters.<sup>6</sup> Other research has shown significant adverse effects on the biological integrity of receiving waters when development of an area exceeds 5 percent.<sup>7</sup>

Although currently there are no federal regulations directly imposing obligations on property owners to manage storm water runoff from parking lots, driveways and buildings, the federal government, United States Environmental Protection Agency ("EPA"), has indirectly imposed such obligations through the regulation of municipal separate storm sewer systems ("MS4s") under Phase I and Phase II of its National Pollution Discharge Elimination System ("NPDES") storm water program regulations that were issued on November 16, 1990 and December 8, 1999 respectively.<sup>8</sup>

### **HOW A DEVELOPMENT MAY BE REGULATED**

A municipal separate storm sewer system is any system of conveyances (including streets, catch basins and storm drains) that are owned or operated by a State, county or other public body that are designed for collecting storm water and which is not a combined sewer or part of a publicly owned treatment works.<sup>9</sup> A large MS4 is located in an area with a population greater than 250,000 and a medium MS4 is located in an area with a population between 100,000 and 250,000.<sup>10</sup>

Michigan was authorized to administer the EPA's NPDES program on October 17, 1973. Michigan regulations govern two types of MS4s: those in *urbanized areas* and those in *urbanizing areas*.<sup>11</sup> The MDEQ has published a list of such urbanized areas (UAs) which can be downloaded from its website at: <http://www.deq.state.mi.us/documents/deq-swq-stormwater-Phase2MS4CommunitiesMichigan.doc>.

An entity (typically the local government) that operates an MS4 in urbanized and urbanizing areas and who discharges storm water and who is subject to regulation by Clean Water Act ("CWA") §402(p) and 40 CFR 122.26 must apply for a national permit.<sup>12</sup> Michigan has issued two general permits that potentially regulated entities can apply for: a watershed based general permit<sup>13</sup> and the jurisdictional general permit.<sup>14</sup> Regulated MS4s must have storm water management programs that include a plan for implementing a program to address post-construction storm water runoff from new development and redevelopment projects that disturb 1 or more acres (including projects involving less than 1 acre if part of a larger common plan), that discharge to the regulated MS4. The watershed and jurisdictional general permits have similar requirements.

How does this potentially apply to a construction project? *A local government with an MS4 has to adopt a storm water program that includes an ordinance "or other regulatory mechanism" that addresses post-construction storm water runoff.*<sup>15</sup> The ordinance must include requirements for a review of post-construction storm water best management practices ("BMPs")<sup>16</sup> during site plan approval, strategies for implementing structural and non-structural best management practices, and long-term operation and maintenance of best management practices.<sup>17</sup>

Therefore, any local municipality with a MS4 that is subject to R 323.2161a of Michigan's Administrative Code, must adopt an ordinance (or similar mechanism) that regulates post-construction storm water runoff from new developments or redevelopments. If a development is located in one of the urbanized areas and storm water will discharge to the municipalities' separate storm sewer system, the local municipality may have an ordinance that requires your development to include design features for controlling storm water from the development after it is constructed. In that event, depending upon the design of your development, it may be worthwhile to consider one of the many "green" alternatives to post construction storm water management that have been recently developed. For example, the City of DeWitt, Michigan adopted a storm water management ordinance that requires the submittal of a storm water management plan for any earth change.<sup>18</sup> Pursuant to the DeWitt ordinance, all storm water must be conveyed "through swales and vegetated buffer strips so as to decrease runoff velocity, allow for natural infiltration and passive storage, allow suspended sediment to settle, and to remove pollutants."<sup>19</sup>

## **GREEN ALTERNATIVES FOR POST CONSTRUCTION STORM WATER MANAGEMENT**

### *Green Roofs*

Typically commercial retail and office buildings are designed with flat roofs that are "gravel ballasted" - covered with a membrane material that is sealed with tar or some other type of coating. Because of this design, the roofs of commercial buildings are like giant funnels - simply collecting large amounts of water and ultimately discharging that water through drains and ditches to detention ponds, sewers, or directly to streams. In fact, the run-off coefficient for a conventional roof is 0.95.<sup>20</sup> As a result, commercial roofs play a large role in storm water production.

Roof derived storm water can be managed by constructing a "green" roof. In addition to traditional surfacing materials, green roofs incorporate a layer of soil planted with various

types of vegetation including grasses, flowering plants and trees (thereby making it "green"). Rain falling on a green roof soaks into the soil and is then absorbed by the plants. Compared to conventional roofs, run-off coefficient's for a green roof is 0.30.<sup>21</sup> For rain events up to one inch or less, three to five inches of soil can absorb as much as 75% of the rain falling on the roof.<sup>22</sup> The water that is taken up by the vegetation is then returned to the atmosphere through the vegetations' biological transpiration process. Green roofs not only manage storm water by acting as a "sponge." Such roofing systems are also aesthetically attractive, serve as wildlife habitat, and insulate the building interior from extreme temperatures.<sup>23</sup> Such insulation could serve to decrease long-term HVAC investment and energy costs.

The City of Portland, Oregon promotes the use of green roofs in new building designs; however, Chicago was the leader in the U.S. in 2005 with an 80% increase in green roof space.<sup>24</sup> In addition, some corporations such as Wal-Mart and Ford Motor Company are beginning to install them. The Ford Rouge Center in Dearborn, Michigan hosts the world's largest "living roof", roughly 11 acres in size, dramatically affecting the Rouge River area watershed by holding several inches of rainfall. (<http://www.ford.com/en/goodWorks/environment/cleanerManufacturing/rougeRenovation.htm>)

Despite the benefits, there are some downsides to green roofs. Green roofs are heavier than traditional roofing surfaces. Some designs can add up to 150 pounds per square foot to the load of the building structure.<sup>25</sup> In addition, green roofs cost more than a traditional roof to construct. An extensive green roof costs around \$8.00 per square foot compared to \$1.25 per square foot for a traditional roof.<sup>26</sup> However, other factors such as energy savings, roof longevity, and increased property value should be considered when determining if a green roof is a viable alternative for a given project.

### *Porous Surfacing Materials*

Because impervious surfaces such as parking lots and roadways are the main contributor to urban storm water generation, using more porous surfacing materials could significantly reduce the amount of storm water generated. Porous **concrete**, asphalt, and pavers are products that allow a percentage of the rain water that would normally collect on a parking lot to filter down into the sub-base and soil below. Porous pavements also aid in pollutant removal. According to studies cited by the United States EPA, porous pavements have removal efficiencies of 82-85% for sediments, 65% for total phosphorous and 80-85% for total nitrogen.<sup>27</sup>

Porous asphalt and concrete are both made by increasing the amount of larger diameter aggregate mix and reducing the smaller diameter aggregates. This increases the porosity of the material, thereby allowing water to filter down to the sub-base below.<sup>28</sup> Increasing the porosity decreases the run-off coefficient from 0.95 for conventional pavement to 0.60.<sup>29</sup> Porous surfacing systems in parking lots usually are constructed over a layer of crushed stone and fabric that temporarily collects the rain water before it migrates to the soil surface below. According to the United States EPA, the recommended storm detention time is 24 hours.<sup>30</sup>

Porous paving materials cost \$2.00 - \$3.00 per square foot as compared to traditional pavements, which cost \$1.50 - \$2.50 per square foot. Further, due to the porous nature

of these surfacing materials, they should not be used in areas where hazardous substances are used or there is a potential to contaminate ground water drinking supplies. Furthermore, the materials can become clogged by winter time sand applications and therefore periodic maintenance, such as vacuuming or high-pressure washing, is required.<sup>31</sup>

Modular pavers and paving blocks are another form of porous surfacing system that can be used to reduce storm water. These paving systems are pre-formed blocks containing large diameter cells or openings which are filled with gravel, soil and/or grass. Like porous pavements, modular pavers can be constructed over filter fabric/gravel bed to create a reservoir for storm water storage. As with all porous paving systems, modular pavers are subject to clogging and should not be used if there is a risk of ground water contamination from hazardous substance use.<sup>32</sup>

### *Bioswales (Bioretention)*

Bioswales are essentially scaled-down versions of traditional storm water detention ponds and are used to manage storm water run off from small parking lots. However they typically contain more vegetation than the traditional detention pond.

Bioswale design is fairly straight-forward - an elongated area of surface soil is excavated in a parking lot island or immediately adjacent to a parking lot to collect storm water from the parking lot. The bioswale is excavated to a sufficient depth to allow it to be partially backfilled with a fine sand and bed of planting soil. Water tolerant plant species are then planted in the middle of the depression where storm water will collect, and eventually infiltrate to the subsurface soils. A layer of mulch or similar organic material is also placed in the bioswale to encourage biodegradation of petroleum based products.<sup>33</sup> According to studies cited by the US EPA, bioswales can have removal rates of 70-83 percent for total phosphorous, 93-98 percent for metals, 60-80 percent for total nitrogen, 90 percent for total solids and 90 percent for organics.<sup>34</sup>

While one of the primary functions of a bioswale is to slow the rate of water runoff and filter it before returning to its natural drainage course, the landscaping surrounding such a feature can add aesthetic value and improve its functionality. Fairlane Green, a retail power center built on a redeveloped landfill in Allen Park, Michigan features landscaped bioswales with native shrubs and wildflowers that are adapted to wet soils and even periodic flooding. These natural plants, once fully established, such as Michigan Holly, Blue Flag Iris and Joe Pye Weed, will provide habitat for natural wildlife, and further the visual appeal of the development.

Overall, bioswale construction is significantly more affordable than conventional storm sewers, but can take up more land, with costs being relatively inexpensive compared to other storm water management techniques. In general terms, the construction of a bioswale costs approximately \$1.00 per square foot, not including excavation. When possible, construction should take place in areas already dedicated to open space, to avoid additional costs associated with using space available for building construction, parking, etc.

## **LEED STANDARDS**

LEED (Leadership in Energy & Environmental Design) is a voluntary building certification standard that was established by the U.S. Green Building Council. Version 2 of the Council's Green Building Rating System was issued in March, 2000.<sup>35</sup> The rating system is similar to the federal government's Energy Star program for appliances. The goal of LEED is to set standards by which the environmental performance of a building can be measured. There are five environmental categories (Sustainable Sites, Water Efficiency, Energy & Atmosphere, Indoor Environmental Quality and Materials & Resources) and credits are earned for meeting the criteria of each category.<sup>36</sup> LEED Sustainable Site credits can be earned by implementing storm water management plans that reduces impervious cover and promotes infiltration by using such BMPs as vegetated roofs, grid pavers and rain gardens.<sup>37</sup>

The aforementioned Fairlane Green project, developed both by Ford Land, the real estate division of Ford Motor Company, and Irving, Texas-based Archon Group, received LEED CS Gold Certification. Ford Land, the original developer/land owner, encouraged tenants at Fairlane Green to embrace green practices as well, and developed a tenant handbook to educate future tenants about LEED and sustainability.

Besides numerous building attributes that support green building and energy savings, several efficient items relevant to storm water are also featured. Target Corporation, in addition to sustainable elements found in all Target stores, included a cistern that recycles half of the rainwater to be used as building gray water or for everyday use such as toilet flushing in lieu of runoff. The other half of the rainwater that hits the roof of the 125,000 square foot store flows through the rain garden, prominently located along 75 percent of the storefront, which is the primary means of conveyance to the on-site detention system. This detention system eventually connects to an adjacent county drain.

## **CITY OF GRAYLING STORM WATER INITIATIVE**

Grayling, Michigan is located adjacent to the Au Sable River - one of the most famous cold water trout fisheries in the United States. Because this river is a yearly destination point for many anglers, the Au Sable is a key source of revenue for the City each year. However, what the City was giving back to the river each year (in the form of storm water discharges) was negatively impacting the quality of the stream.

Recognizing this concern, the City has adopted a zoning ordinance that regulates storm water run-off from new and existing developments. Pursuant to the ordinance, each new industrial or commercial development, expansion of an existing industrial or commercial establishment greater than 500 square feet, and subdivision developments must have an approved storm water management plan which not only limits run-off to pre-development run-off volumes but also must protect water quality through the use of swales, vegetated buffer strips and wetlands.<sup>38</sup> Even exempt developments may be required to provide a storm water plan that incorporates rain gardens and bioswales.

In addition, relying on a Clean Michigan Initiative (CMI) grant from the MDEQ and funding from a variety of conservation groups, the City has undertaken a multiple phase project to install vegetated swales (rain gardens) in City easements along City streets and

mechanical grit collectors at outfalls leading to the Au Sable.<sup>39</sup> The goal of the project is to reduce the volume of storm water that is discharged to the Au Sable by 80%, as well as increase its quality.<sup>40</sup>

## CONCLUSION

Municipalities that have separate storm water sewer systems are required to meet the MDEQ's MS4 regulations. As a result of these regulations, developers within the jurisdiction of such municipalities must comply with the municipality's requirements for post construction storm water management.

There are a variety of methods for managing storm water from newly developed sites, including traditional and those designated as "green" because of their use of natural systems to reduce the volume of water as well as pollutants. Green storm water management systems such as green roofs, porous pavement and bioswales have been shown to be very effective at reducing water volume and pollutants. Although the upfront cost of constructing and maintaining these alternatives may be more than traditional systems, they have benefits (such as energy savings and aesthetics) that should be taken into account when determining whether to incorporate such alternatives into the design of a particular development.

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<sup>1</sup> Buildings and the Environment: A Statistical Summary, United States EPA, December 29, 2004 retrievable at [www.epa.gov/greenbuilding/pubs/gbstats.pdf](http://www.epa.gov/greenbuilding/pubs/gbstats.pdf)

<sup>2</sup> Porous Pavement: A Win-Win Stormwater Strategy, Environmental Building News, Volume 13, No. 9, Sept. 2004.

<sup>3</sup> Cleaning Up Stormwater: Understanding Pollutant Removal from Runoff, Environmental Building News, Volume February 2002.

<sup>4</sup> 64 FR at 68725

<sup>5</sup> 64 FR at 68724

<sup>6</sup> 64 FR at 68725

<sup>7</sup> Id.

<sup>8</sup> 55 FR 47990 and 64 FR 68722.

<sup>9</sup> 40 CFR 122.26(b)(8)

<sup>10</sup> 40 CFR 122.26(b)(4) & (7).

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<sup>11</sup> An "urbanized area" is an area that has a population of at least 50,000 people. R 323.2104(u). An "urbanizing area" is an area of contiguous census blocks with a population density of 1,000 or more per square mile that have a population of 10,000 or more. R. 323.2104(u).

<sup>12</sup> R 323.2161.

<sup>13</sup> Permit No. MIG619000. This permit has been approved by the EPA and was reissued December 5, 2002. It expires April 1, 2008.

<sup>14</sup> Permit No. MIS040000. This permit was issued on February 25, 2003 and expires on April 1, 2008.

<sup>15</sup> R 323.2161a(3)(e)

<sup>16</sup> The MDEQ has a list of BMPs which can be viewed at: [http://www.michigan.gov/deq/0,1607,7-135-3313\\_3682\\_](http://www.michigan.gov/deq/0,1607,7-135-3313_3682_)

3714-118554--,00.html. The EPA also has a description of post-construction BMPs at: <http://cfpub.epa.gov/>

[npdes/stormwater/menuofbmps/post.cfm](http://cfpub.epa.gov/npdes/stormwater/menuofbmps/post.cfm)

<sup>17</sup> R 323.2161a(3)(e)(i)-(iii)

<sup>18</sup> Ord. Sec 78-991(a).

<sup>19</sup> Ord. Sec 78-1005(b)(4).

<sup>20</sup> Leadership in Energy & Environmental Design, Reference Guide 2.0, U.S. Green Building Council, June, 2001, p. 48.

<sup>21</sup> Id., p. 49.

<sup>22</sup> . See, Green Roofs viewable at [www.epa.gov/heatisland/strategies/greenroofs.html](http://www.epa.gov/heatisland/strategies/greenroofs.html).

<sup>23</sup> The surface of a vegetated roof top can be cooler than the surrounding air temperature while the surface of a traditional roof can be as much as 90 F hotter than the air temperature. See, Green Roofs viewable at [www.epa.gov/heatisland/strategies/greenroofs.html](http://www.epa.gov/heatisland/strategies/greenroofs.html).

<sup>24</sup> See "Green Roofs Growing More Popular, CNN.com, April 28, 2006 viewable at [www.cnn.com/2006/TECH/04/27/green.roofs.ap/index.html](http://www.cnn.com/2006/TECH/04/27/green.roofs.ap/index.html)

<sup>25</sup> Id.

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<sup>26</sup> Id.

<sup>27</sup> Storm Water Technology Fact Sheet, Porous Pavement, US EPA, EPA 832-F-99-023, September, 1999

<sup>28</sup> Id.

<sup>29</sup> Leadership in Energy & Environmental Design, Reference Guide 2.0, U.S. Green Building Council, June, 2001, p. 49

<sup>30</sup> Id.

<sup>31</sup> Storm Water Technology Fact Sheet, Porous Pavement, US EPA, EPA 832-F-99-023, September, 1999.

<sup>32</sup> Guidebook of Best Management Practices for Michigan Watersheds, Modular Pavement, Michigan Department of Environmental Quality, reprinted October, 1998.

<sup>33</sup> Storm Water Technology Fact Sheet, Bioretention, EPA 832-F-99-012, USEPA, September, 1999.

<sup>34</sup> Id.

<sup>35</sup> Leadership in Energy & Environmental Design, Reference Guide 2.0, U.S. Green Building Council, June, 2001, p. 2. The current version of the rating system for new construction is Version 2.2.

<sup>36</sup> Id. pp 2-3.

<sup>37</sup> LEED-NC, Reference Guide 2.2, U.S. Green Building Council, October, 2005, p. 21.

<sup>38</sup> Grayling Zoning Ordinance, Sections 13.02 - 13.06.

<sup>39</sup> Stormwater Management Project Update: Grayling Rain Gardens, Huron Pines Resource Conservation & Development Council, September 12, 2005.

<sup>40</sup> Id.

**DAVID TRIPP  
ENVIRONMENTAL LAW ESSAY CONTEST  
2006 WINNER**

Each year the Environmental Law Section of the State Bar of Michigan sponsors an environmental law essay contest open to all students enrolled in any U.S. or Canadian law school. The winning essay receives a cash prize and the opportunity to be published in the Michigan Environmental Law Journal.

This year the Environmental Law Section honors the memory of David Tripp, who was one of Michigan's pioneers of environmental law. David Tripp served as Chairman of the Superfund Committee of the Environmental Law Section and subsequently served as Section Chairperson. David Tripp founded Dykema's Environmental Practice Group and served for many years as its Practice Group Leader.

The 2006 winning environmental law essay, published below, was written by Tara Spoon, a law student at Michigan State University College of Law, East Lansing, Michigan.

***PROTECTING MICHIGAN'S WATER RESOURCES THROUGH PRIVATE  
CONSERVATION EASEMENTS***

**By Tara Spoon**

**INTRODUCTION**

Michigan is bordered by four of the five Great Lakes, a littoral system representing 18% of the world's fresh surface water supply.<sup>1</sup> Although Michigan is blessed with great wealth in fresh surface water, Michigan also has a great need to protect its water resources from the impending threats of over-use and diversion beyond the Great Lakes watershed basin. Recently, Michigan's legislature has taken many steps to protect Michigan's water resources through public regulation. In addition, the legislature has provided private mechanisms for its citizens to protect these water resources.

The private mechanisms are called conservation easements and they allow individual landowners to protect water bodies bordering their land. The Michigan conservation easement enabling statute is unusual because expressly recognizes that landowners may convey an interest in land that protects a water body. This paper will: 1) define a conservation easement; 2) discuss what interest may be granted in a water conservation easements under Michigan statute and riparian common law doctrine; 3) determine whether the grantor of a water conservation easement in Michigan may qualify for an income tax deduction under Internal Revenue Code §170(h); and 4) discuss the importance of a water conservation easement from a policy perspective.

## I. WHAT IS A CONSERVATION EASEMENT?

### A. Background and Purpose.

Property rights in land are often described as “a bundle of rights,” implying that rights in real property are separate and distinct.<sup>2</sup> Examples of such rights include the right to transfer the land, the right to exclude others, the right to possess the land, the right to allow others to use the land, the right to give a remainder away while retaining current use of the land, and the right to use or develop the land. When an owner grants a conservation easement on his parcel, he is voluntarily giving away his right to develop that land while retaining his other rights with respect to the land.<sup>3</sup> Additionally, he may give up other rights ancillary to the conservation easement, such as the right to exclude others should the conservation easement require access by the conservancy or by the public.

Over the past three decades, the use of conservation easements has grown dramatically.<sup>4</sup> This recent increase in conservation easements was driven largely by the 1976 federal Tax Reform Act that authorized a charitable deduction for the granting of a conservation easement.<sup>5</sup> Later, Congress also enacted an estate tax exclusion for taxpayers who die owning property subject to a conservation easement<sup>6</sup> and an estate tax deduction for post-mortem conservation easement donations.<sup>7</sup> The tax advantages of conservation easements will be described later in this paper.

As conservation easements became more popular, questions arose as to whether such easements could be enforceable against successive property owners.<sup>8</sup> Specifically, a conservation easement is a certain type of easement known as an “easement in gross.” Commonly, an easement benefits one tract of land to the detriment of another tract of land. For example, the owner of tract A will grant an easement to the owner of tract B for the purpose of constructing a private drive because tract B is landlocked without access to a public road. An easement gross is an easement that encumbers one tract of land without benefiting another tract of land. For example, a conservation easement will restrict the rights of the grantor-landowner, without providing benefit to another tract of land. Historically, easements in gross were unenforceable against subsequent property owners.<sup>9</sup>

Subsequent to the 1976 federal tax legislation and to allow their citizens to gain the federal tax advantages available for using conservation easements, states began to enact complementary legislation to ensure enforceability of conservation easements within the states under property common law principles.<sup>10</sup> To date, forty-eight states, including Michigan, have enacted some form of conservation easement enabling legislation.<sup>11</sup> Michigan's enabling statute was first enacted in Public Act 197 of 1980. Today, the same language is found in the superceding Public Act 451 of 1994.

Two important public policy goals support the use of tax incentives for conservation easements. First, the legislature seeks to protect landowners from rising land values by allowing them: 1) to exclude the value of their right to develop the land from their federal income tax base through a charitable deduction, and 2) to exclude that value as well from their local property tax base. Allowing landowners to reduce their land value in this way may help them to avoid selling their land.<sup>12</sup> To explain further, this situation is commonly described as the “land rich, cash poor” taxpayer. Such a taxpayer may find her property taxed at rapidly increasing rates as the land around her is sold for

development. By placing a conservation easement on the undeveloped portion of her property, her financial burden is reduced through a federal income tax charitable deduction. In addition, in Michigan, subsequent property taxes are assessed by taking the conservation easement in consideration, most likely resulting lower property value.<sup>13</sup> Thus, the taxpayer will also benefit from a decrease in his local property taxation burden.

Second, tax incentives for conservation easements encourage protection of important environmental resources through private, voluntary restrictions rather than through public regulation.<sup>14</sup> Importantly, about “one-half of all threatened and endangered species in the United States are found exclusively on private lands, and twenty percent of the remainder spends half of their time on private lands.”<sup>15</sup> While public regulation of private land has often been met with fierce resistance, tax incentives for conservation donations, by contrast, have generally found public and bipartisan support due to their voluntary nature.<sup>16</sup> Furthermore, with an estimated five million acres protected by conservation easements, they provide an effective method for conservation as well.<sup>17</sup>

### **B. Requirements for, and Legal Consequences of, Conservation Easements.**

Generally, an easement allows a property owner to grant certain rights to a third party while retaining all other rights for himself.<sup>18</sup> Conservation easements may be granted in a myriad of acceptable forms under the various state laws. A property owner may grant a conservation easement for open space, yet retain the right to farm. Similarly, a property owner may grant a conservation easement for protection of a forest, while retaining the right to cut timber selectively. The potential combinations of rights granted and rights retained are endless; however, if a property owner retains rights that conflict with the donative intent of the conservation purpose, such as a retention of a commercial interest in the land, then he will not qualify for an income tax deduction under the Internal Revenue Code.<sup>19</sup>

The Michigan enabling statutes defining conservation easements are found at MCL 324.2140 through 324.2144. Under Michigan law, a conservation easement is an interest in land that retains or maintains “land or [a] body of water, predominantly in its natural, scenic or open condition, or in an agricultural, open space, or forest use, or similar use or condition.”<sup>20</sup> Although commonly referred to as a conservation easement, such an interest may also be “in the form of a restriction, easement, covenant, or condition in a deed, will, or other instrument.”<sup>21</sup> The Michigan statute provides for affirmative easements as well as negative easements.<sup>22</sup> A negative easement is an easement that restricts the landowner’s rights on the parcel.<sup>23</sup> An example would be a conservation easement that restricts the owner’s rights to place or construct any buildings, structures or improvements on the parcel.<sup>24</sup> An affirmative easement grants rights to the landowner or the conservation entity.<sup>25</sup> A common example is when the conservation easement grants access to the conservation entity for the purposes of monitoring and enforcement.

Under Michigan statute, the easement must be recorded with the register of deed. Once recorded, the easement runs with the land.<sup>26</sup> Also, to be valid, the conservation easement must be granted to “a governmental entity or to a charitable or education association, corporation, trust or other legal entity.”<sup>27</sup> Common examples of

such legal entities are conservancies and land trusts. These legal entities will ensure compliance with the conservation easement through monitoring and enforcement.

As previously noted, conservation easements must meet additional requirements to qualify for an income tax deduction under Internal Revenue Code (I.R.C.) § 170(h), as discussed later in greater detail.

## II. WHAT RIGHTS ARE GRANTED IN A MICHIGAN WATER CONSERVATION EASEMENT?

The definition of “conservation easement” under the Michigan statute is “an interest in land” that either 1) “provides limitation on the use of land or a body of water,” or 2) “requires or prohibits certain acts on or with respect to the land or body of water.”<sup>28</sup> Michigan’s definition of a conservation easement is uncommon because it incorporates the conservation of water bodies as well as land. This statute begs the question: What “interest in land” could limit or otherwise restrict “the use of . . . a body of water?”

While land trusts have been steadily growing over the past few decades, the concept of “water trusts” and “water conservation easements” have only recently been developed. The first water trust, Oregon Water Trust, was organized in 1993.<sup>29</sup> Since then, other water trusts have followed; however, they have been limited mainly to the western States.<sup>30</sup> This geographical development is a result of two different types of water law systems in the United States.

The first water law system used in the United States was the riparian rights doctrine adopted from England.<sup>31</sup> The general tenets of the doctrine are simple. First, rights to water are derived from ownership of land adjacent to the water, and the rights to the water pass with the land.<sup>32</sup> Second, the quantity of water available for use is what is “reasonable” under the circumstances.<sup>33</sup> The first user in time is not given priority over a later user; rather, reasonableness is determined by fact specific inquiry into the uses of the water.<sup>34</sup>

The riparian doctrine has been followed in nearly every state east of the Mississippi River including Michigan, where rivers and lakes are frequently replenished with rainfall.<sup>35</sup> As the United States expanded into the arid west, however, a water law system of prior appropriation was adopted to ensure water remained available for the first settlers who made beneficial use of it.<sup>36</sup> Under this system, water rights are property rights that can be separated from land rights.<sup>37</sup> Water rights are acquired, or appropriated, through use and can be lost by non-use.<sup>38</sup> Generally, the first user in time has priority over subsequent users, regardless of whether he is downstream of the subsequent users.<sup>39</sup> Further, as separate property rights, water rights are divisible from the riparian land and are independently transferable.<sup>40</sup>

Given the nature of prior appropriation, it is easy to understand why water trusts began in the western states. Appropriated water rights, as separate property interests, are defined as a volume of water, usually in cubic feet per second. Water trusts are able to acquire these water rights to preserve instream flows, and for other water conservation purposes.<sup>41</sup> Because water rights are separated from land rights, water trusts acquire water rights outright, through sale, lease or gift.<sup>42</sup>

The question becomes, what rights are implicated under the riparian doctrine when a water conservation easement provides for a limitation on use of a water body

pursuant to Michigan statute? The Michigan statute specifically states that the limitation on a body of water is derived from an interest in land.<sup>43</sup> Thus, the first step in the analysis is to determine an owner's interest in riparian land and the adjacent water body.

The paramount principle of the riparian doctrine is that riparian rights are gained through actual contact of the land with the water.<sup>44</sup> Michigan courts have recognized that because "riparian rights are derived from and are dependent on ownership of 'land' which abuts a natural body of water, . . . they constitute part of the property possessed by riparian landowners and become their property rights."<sup>45</sup> As such, riparian rights represent "certain exclusive" sticks found in the bundle of real property rights in riparian land.<sup>46</sup>

The Michigan Supreme Court discussed ownership in riparian land on rivers and lakes in *Collins v. Gerhardt*.<sup>47</sup> The starting point of the Court's analysis was to determine who first held title to the land. Michigan was part of the Northwest Territory, and this territory was held in trust by the United States of America, which had acquired the territory from the British Crown.<sup>48, 49</sup>

When Michigan attained statehood, the land and waterways passed in trust to the state as a sovereign.<sup>50</sup> As riparian land title passed from the state to individuals, Michigan followed British common law to define the interest in the land. Thus, under Michigan common law riparian doctrine, a riparian landowner owns the submerged land to the "thread" or center of navigable rivers or lakes.<sup>51</sup> Importantly, the Court in *Collins* stated that the riparian owner does not own the water, itself, only the submerged land.<sup>52</sup> Rather, "so far as [water is] capable of ownership, [it] belong[s] to the state for the common benefit of the people."<sup>53</sup>

One exception to this common law rule of riparian ownership exists when the land is riparian to the Great Lakes. The United States Supreme Court held that the title to submerged lands under the water of Lake Michigan and all Great Lakes is held in trust by the bordering state, rather than by the individual property owner.<sup>54</sup> As such, the Michigan Supreme Court held that land abutting a Great Lake was owned by the landowner to the low water mark.<sup>55</sup> However, Great Lakes riparian owners continue possess and enjoy riparian rights despite the fact that they do not own submerged lands.<sup>56</sup>

While title to submerged land passed to the riparian landowners, the state retained certain public rights in trust on navigable rivers and lakes. In Michigan, a river or lake is navigable if, in its natural state, it is capable of floating logs.<sup>57</sup> The river or lake may dry up or become too shallow to float a log at some point during the year, yet it still can qualify as a navigable body of water under the log-float test.<sup>58</sup> If a river or lake is navigable, the state cannot surrender certain public rights to private landowners. These public rights include the right to navigate the waters, to carry on commerce over the waters, and to fish the waters.<sup>59</sup> Because the landowner never owned these rights, he may not limit, restrict or grant them through a conservation easement.

What riparian rights does the landowner hold? Four types of riparian rights exist under Michigan law.<sup>60</sup> The first right is the right to use the water.<sup>61</sup> While a landowner may not own the water, he has a right to reasonable use of the water for a multitude of purposes. Uses are divided into two categories.<sup>62</sup> The first type is use for natural or

domestic purposes.<sup>63</sup> In early days, this included use for household purposes, for bathing, and for watering farm animals. The second use is for artificial purposes, including commercial profit, such as irrigation and industrial purposes, as well as recreation.<sup>64</sup>

The second type of riparian right in Michigan is the right to access natural waters. Riparian owners commonly grant access by easement to nearby non-riparian owners. Recently, the Michigan Supreme Court found that the state holds submerged land in public trust, up to the high water mark.<sup>65,66</sup> Thus, a conservation easement cannot grant access to the public between the high water mark and the water's edge, as right to this land has retained by the state in public trust.

The third riparian right in Michigan is the right to erect docks and wharves, either on the shoreline or arising from the submerged bed.<sup>67</sup> This right is separate and distinct from general access to the shore.<sup>68</sup>

The right of accretion is the final riparian right.<sup>69</sup> The only substantial application of this right occurs in the context of the Great Lakes. An accretion is “[an] addition to land . . . by the action of the water, which [is] so gradual as to be imperceptible.”<sup>70</sup> Therefore, the right to accretion confers upon the landowner a right to own the new land between his old property boundary and the new shoreline.

Having determined what rights are unique to riparian land, what is the nature of these rights? Michigan law is well-settled: “riparian rights are not alienable, severable, divisible or assignable apart from the land which includes therein or is bounded by a natural watercourse.”<sup>71</sup> Thus, riparian rights cannot be acquired outright, as separate property interests. Rather, the rights are derived from, and therefore, must remain with the riparian parcel. While such rights may not become independent from the riparian land through severance or otherwise, easements may give a non-riparian owner an interest in the riparian land.<sup>72</sup> The scope of the interest conferred under the easement is determined by the intent of the parties, as determined by the language of the easement and the surrounding circumstances.<sup>73</sup>

Easements granting non-riparians the right of access are very common in Michigan.<sup>74</sup> An easement granting access is an affirmative easement because it grants a right to another.<sup>75</sup> An easement granting access to the water body is crucial to a water conservation easement because the conservation entity must be able to gain access to the land and water body for monitoring and enforcement. However, a conservation easement may also restrict access to the water body for other third parties.

When addressing the landowner's right to use the water body, MCL 324.2140(a) requires conservation easements to be negative easements. Specifically, it states that a conservation easement is “an interest in land that provides limitation on the use of . . . a body of water.” Thus, the conservation easement must restrict the riparian landowner's right to use the water body. This is a logical and necessary provision of a conservation easement, as the purpose of the easement is to prevent development of the eased land. Unlike some other state enabling statutes, Michigan also allows affirmative easement to be granted. Specifically MCL 324.2140(a) provides that a conservation easement may “require . . . certain acts on or with respect to . . . [a] body of water.” For example, a landowner could grant to the conservation entity the right to use the water body to protect trout species.

Does a landowner run afoul of basic riparian law principles by severing riparian rights from the riparian parcel when he grants an affirmative right to the conservation entity to use water? In *Thompson v. Enz*, the Michigan Supreme Court concluded that a riparian landowner may not convey his riparian rights to a non-riparian landowner; however, a riparian landowner may grant access to these rights through an easement.<sup>76</sup> While the Court characterized the easement as an easement of access, it directed the trial court to consider the reasonableness of the **use** proposed by the non-riparian landowners before deciding whether the use under the easement may be permitted by common law riparian doctrine. Thus, a conservation entity may also be granted use of the water for conservation purposes, in addition to the negative restriction limiting the riparian landowner's use. As discussed later, an affirmative easement would provide additional protection for the conservation easement.

The right to build docks and wharves may also be prohibited by the conservation easement through a negative easement. Finally, the right to accretion serves a limited purpose in the context of conservation easements.

### III. HOW CAN A WATER CONSERVATION EASEMENT GRANTOR UTILIZE TAX INCENTIVES?

In 1995, a graduate student at the University of Michigan surveyed landowners who had donated conservation easements to Michigan conservancies about the reasons why they donated their easements. The three top reasons for donation were, in order: "(i) a deep and personal commitment to the future of the land, (ii) a concern about ecological stewardship, and (iii) economic concerns, including the ability to claim a tax deduction as a result of the donation."<sup>77</sup> Logically, one who donates a conservation easement will be dedicated to conserving the land and its unique attributes for future generations. On a pragmatic level, however, one who donates an easement instead of an entire interest in the property is likely to be motivated by financial incentives as well as conservation purposes. For this reason, a water conservation easement should ideally be structured to qualify it for an income tax deduction under I.R.C. § 170. In addition to an income tax deduction, an estate tax exclusion may be available for qualified conservation easements under certain circumstances; however, the estate tax exclusion is not discussed in this paper.

Generally, the Internal Revenue Code does not allow taxpayers to take deductions for a donation that is less than the entire interest in a piece of property, such as an easement.<sup>78</sup> However, exceptions to this rule exist.<sup>79</sup> One such exception is I.R.C. § 170(f)(3)(B)(iii), which provides that a taxpayer may take a charitable income tax deduction for a transfer of an interest in property that is less than an entire interest in the property if such transfer is a "qualified conservation contribution" pursuant to I.R.C. § 170(h). To be a qualified conservation contribution under § 170(h), three criteria must be met: 1) the contribution must be a qualified real property interest, 2) it must be made to a qualified organization, and 3) it must be made exclusively for conservation purposes.<sup>80</sup>

The question of whether donation of a riparian right may qualify as a "qualified conservation contribution" under § 170(h) has garnered little discussion in tax literature despite its importance to land trusts and conservancies.<sup>81</sup> Generally, there is a presumption against deductibility, yet inadequate explanations have been offered for this presumption. In the single law review article discussing deductibility of riparian rights,

the author concluded that donated riparian rights were not deductible because such rights failed to meet the first prong as qualified real property rights under I.R.C. § 170(h).<sup>82</sup>

I.R.C. § 170(h)(2) provides the definition for a qualified real property interest. If an entire interest or remainder interest is not transferred, then qualified real property interest must be a restriction on the use of the real property, granted in perpetuity.<sup>83</sup> This restriction on use is often referred to as a conservation easement. Importantly, although § 170(h)(2) refers to the qualified real property interest as a “restriction,” such a definition “is not intended to preclude the deductibility of a donation of affirmative rights to use a land or water area.”<sup>84</sup>

In the aforementioned article, the author, Kelly Cole, concluded that a riparian water right was not a real property right, and thus, could not be a “qualified real property interest” under I.R.C. § 170(h).<sup>85</sup> The article focused on the landowner’s right in the water, not in the land. Specifically, the author focused on the fact that water is a fugitive resource, which is constantly moving across one’s property. As such, a riparian landowner could only have a usufructuary right in the water, or “a temporary right of using a thing, without having the ultimate property, or the full dominion of the substance.”<sup>86</sup> Thus, she concludes that “because the right to water is so uncertain, it may qualify as something less than a full-fledged [real] property right.”<sup>87</sup> Following Cole’s reasoning, a “water right” under Michigan law would most surely fail, as rights in the water were held in public trust, and never granted to the riparian landowner.

Thus, the § 170(h) inquiry would end here if the interest granted in a water conservation easement was an interest in the water, itself. When discussing the interest granted in a “qualified real property interest,” however, the state’s real property law must be consulted.<sup>88</sup> In Michigan, riparian rights are interests in the land adjacent to a water body.<sup>89</sup> Unlike separate and distinct water property rights in western appropriation states, riparian water rights in Michigan are an additional “twig” in the “bundle of rights” that accompany riparian real property. The right to use water is not granted in the water itself, rather it is an interest in the riparian real property that can be granted through an easement to a third party, as previously discussed. Therefore, I conclude that, as an interest in real property, a water conservation easement granted under MCL 324.2140(a) which limited the right to use water for perpetuity would be a qualified real property interest under § 170(h)(2)(C).

After successfully showing that a water conservation easement is a “qualified real property interest,” the remaining requirements under § 170(h) are easily met. The second requirement is that the conservation easement is donated to a qualified organization. A common example of an acceptable organization in a 501(c)(3) non-profit organization. Importantly, the definition of a qualified organization under § 170(h)(3) is narrower than acceptable grantees under Michigan law,<sup>90</sup> therefore, a Michigan landowner wishing to take advantage of the income tax deduction must be cognizant of § 170(h)(3).

The final requirement under § 170(h) is that the conservation easement must be made “exclusively for conservation purposes.”<sup>91</sup> I.R.C § 170(h)(4)(A) defines various acceptable “conservation purposes.” Satisfaction of any one purpose listed under § 170(h)(4)(A), will satisfy a “conservation purpose.”<sup>92</sup> Further, to be “exclusive,” the easement must be granted in perpetuity.<sup>93</sup>

One acceptable conservation purpose listed under I.R.C. § 170(h)(4) is for “the protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystems.”<sup>94</sup> This conservation purpose is probably the most relevant to the purpose for granting a water conservation easement. The Treasury Regulations provide additional guidance to determine whether this purpose has been met.<sup>95</sup> For example, under Treas. Reg. 1.170A-14(3), “natural habitat” as referenced in I.R.C. § 170(h)(4) includes: habitats utilized by rare, threatened or endangered species; natural areas supporting “high quality” aquatic communities; and natural areas which “contribute to the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.”<sup>96</sup> The fact that human activity may have altered the habitat does not defeat the conservation purpose “if the fish, wildlife, or plants continue to exist there in a relatively natural state.”<sup>97</sup> Finally, while some conservation purposes listed under § 170(h)(4) require the landowner to grant public access, a conservation easement granted for the purpose of protecting natural habitat does not require the landowner to grant public access.<sup>98</sup>

In addition to meeting the three criteria laid out in § 170(h), one additional implied criterion exists: the conservation purpose of the qualified conservation contribution cannot be subordinate to any other right. As discussed above, the landowner may not retain rights which run contrary to the conservation purpose.<sup>99</sup> If the donor or another third party has retained certain mineral interests, a case-by-case evaluation is necessary to determine whether the retention of such rights would interfere with the conservation purpose.<sup>100</sup> If the property is encumbered by a mortgage, the mortgagee-lender must subordinate its rights to the conservation entity.<sup>101</sup>

#### **IV. THE SCOPE OF USE OF WATER CONSERVATION EASEMENTS**

The most important restriction in a water conservation easement is the restriction on the riparian landowner’s use of water. This restriction ensures that water will not be withdrawn or otherwise used by the owner of the riparian parcel in a manner that is inconsistent with the conservation purpose of the easement. However, a simple restriction on the riparian use right will not sufficiently protect a water body. Limitations on land development near the river bank or shore line are necessary to sustain a conservation purpose. The easement should provide for a buffer zone, where adjacent land development is restricted.

A water conservation easement, when coupled with a restriction on land development, can become a very valuable tool in conservation. The main sources of pollution today are caused by non-point pollution sources, including sediment loading from agriculture and construction bordering riparian water bodies.<sup>102</sup> Additionally, diversion of water from water bodies is becoming a growing concern in Michigan. A water conservation easement will allow landowners to protect the water body in perpetuity against these pressures in much the same manner that land conservation easements address the pressures of urban sprawl. Similarly, water conservation easements may be granted to protect ecologically sensitive water bodies, such as trout and salmonoid streams.

An affirmative conservation easement, which requires the conservation entity to use the water body for the protection of fish and other aquatic species, will provide additional protection to the water body apart from a simple restriction on use by the

landowner. By granting use rights through the easement, the conservation entity can acquire a stake in the reasonableness test under the riparian doctrine. When a conflict between users of water arises, Michigan courts apply the reasonable-use test.<sup>103</sup> Thus, if another riparian use is conflicting with the use granted under the conservation easement, the court must evaluate the two uses to determine whether the competing use unreasonably interferes with the conservation use under the easement.

The reasonable use test has three main parts. First, the court should look to the type of water body involved, "including its size, character and natural state."<sup>104</sup> By considering the natural state, the court might find unreasonable a conflicting use that degrades or depletes a sensitive environment protected by a conservation easement. Second, the court should "examine the use itself as to its type, extent, necessity, effect on the quantity, quality, and level of the water, and the purposes of the users."<sup>105</sup> This second requirement will balance the uses against each other. The balance of necessity may weigh against the conservation easement depending on the competing use; however, the conservation use will not deplete the level of the water or diminish the quality. Third, the court should "examine the proposed . . . use in relation to the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights and interests of other riparian proprietors and also on the interests of the State, including fishing, navigation, and conservation."<sup>106</sup> Under this test, another riparian user may be permitted to interfere with the conservation use under the easement if the competing use is a reasonable use of riparian rights; however, by granting an affirmative easement, a conservation entity may enforce its conservation use against another user who is unreasonably interfering with its rights under the easement.

Enforcing the purpose of a conservation easement against upstream owners who are using water in conflict with the conservation purpose is not unprecedented. In *Nebraska v. Rural Electrification Administration*, the Platte River Whooping Crane Maintenance Trust sought to intervene in the Federal Energy Regulation Commission (FERC) re-licensing procedures for certain dam projects.<sup>107</sup> The State of Nebraska brought suit to limit the Trust's participation, arguing that it had exceeded the scope of its authority.<sup>108</sup> The Trust had acquired 7,000 acres of whooping crane migration corridor outright and protected another 1,600 acres through conservation easements.<sup>109</sup> After reviewing the Trust's powers and obligations under the Trust Declaration, the court concluded: "participation in litigation that bears directly on the supply of water flowing to the critical crane habitat is within the powers and duties of the Trustees and directly related to the administration of the Trust."<sup>110</sup>

Importantly, the Trust Declaration stated that "no substantial part of the activities of this Trust shall be the carrying on of propaganda, or otherwise attempting to influence legislation."<sup>111</sup> This language is also found in I.R.C § 501(h)(1), which limits § 501(c)(3) non-profit organizations from making expenditures to influence legislation. The State claimed that the Trust was engaged in "aggressive, policy-making legislation;" however, the court found that the Trustees' actions were permissible because they had focused their efforts solely on protecting the habitat of the whooping crane, and thus they were performing their duties under the Trust Declaration.<sup>112</sup> To illustrate the benefit of an affirmative water conservation easement, such an easement in this case would have eliminated the need for the court to discern whether the Trustees' activities were within the scope of the Trust Declaration.

Water conservation easements should not be granted as a politically-motivated response to recent local development, or for the purpose of seeking immediate enforcement under the easement against an existing upstream user. Such actions would undermine the credibility of conservancies and land trusts, and could be found to conflict with § 501(c)(3) requirements of many of these organizations. Also, in balancing uses, a court may find that an upstream user does not unreasonably interfere with the conservation use granted in water conservation easements on water bodies of unremarkable water quality. Rather, water conservation easements should be utilized to close loopholes in comprehensive watershed conservation plans. While many conservation entities have acquired conservation easements in watersheds of exceptional quality, their efforts may be thwarted by an upstream riparian user. A water conservation easement will ensure that the conservation entity can enforce the conservation purpose against unreasonable interference by an upstream user.

## **CONCLUSION**

Conservation easements are statutory mechanisms that enable landowners to donate certain land interests for conservation purposes while allowing them to retain the land for their enjoyment and for otherwise unrestricted sale or transfer. To encourage such donations, Congress has provided an income tax deduction and an estate tax exclusion for certain qualified conservation contributions. As a result of these tax incentives, the donation of conservation easements has grown exponentially over the past few decades. Today, comprehensive conservation plans have been developed to protect high quality habitats primarily through private, voluntary land restrictions. Until recently, efforts have focused solely on protecting the land; however, conservation organizations are recognizing the increasing need to protect their rights in adjacent water bodies.

While water trusts in western states have been able to acquire appropriated water rights, the question of whether riparian rights in the East can be transferred by a water conservation easement has been largely unanswered. To resolve this issue, one must examine the real property common law in the state where the water conservation easement would be granted. In Michigan, the courts have held that riparian rights are attached to land that is adjacent to a water body. Due to their relation with the land, riparian rights are real property rights. Additionally, while riparian rights cannot be severed from the land, they may be granted through an easement. Thus, under Michigan law, riparian rights, as an interest in land, can be transferred through a conservation easement. Importantly, because riparian rights are real property rights, they can be a qualified real property interest for the purpose of an income tax deduction, assuming that the other requirements of § 170 (h) are met.

By acquiring water conservation easements, conservation entities can eliminate a potential vulnerability to their conservation efforts. Without riparian use rights, a conservation entity aiming to protect a watershed may be unable to enjoin an upstream user who is unreasonably interfering with its conservation purpose. An affirmative easement granting conservation use rights will ensure that a conservation entity can enforce its purpose.

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<sup>1</sup> See JAMES S. LOCKHEAD, et al., REPORT TO THE COUNCIL OF THE GREAT LAKES GOVERNORS: GOVERNING THE WITHDRAWAL FROM THE GREAT LAKES, at 2 (1999).

<sup>2</sup> See C. Timothy Lindstrom, *Tax Notes – The Tax Benefits of Conservation Easements*, 79 MI BAR JNL. 690 (2000).

<sup>3</sup> *Id.*

<sup>4</sup> See Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Land*, in PROTECTING THE LAND: CONSERVATION EASEMENTS, PAST, PRESENT, AND FUTURE, 9, 9 (Julie Ann Gustanski & Roderick H. Squires, eds., 2000).

<sup>5</sup> *Id.* at 14.

<sup>6</sup> See I.R.C. § 2031(c)

<sup>7</sup> See I.R.C. § 2055

<sup>8</sup> See Janet L. Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL. AFF. L. REV. 105, 119 (1983).

<sup>9</sup> *Id.*

<sup>10</sup> See Harwell E. Coale, *Conservation Easements as Qualified Conservation Contributions*, 66 ALA. LAW 124, 125 (2005); Lindstrom, *supra* note 3.

<sup>11</sup> See Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Protection into the Twenty-First Century*, in PROTECTING THE LAND: CONSERVATION EASEMENTS, PAST, PRESENT, AND FUTURE, 55, 65 (Julie Ann Gustanski & Roderick H. Squires, eds., 2000).

<sup>12</sup> See Lindstrom, *supra*.

<sup>13</sup> See *Indian Garden Group v. Resort Township*, Mich. Tax Trib. Docket No. 157543, 205036 (1995).

<sup>14</sup> See Coale, *supra* note 11.

<sup>15</sup> See Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment On Private Lands*, 41 NAT. RESOURCES J. 373, 373 (2001).

<sup>16</sup> See Nancy A. McLaughlin, *Increasing Tax Incentives for Conservation Easement Donations – A Responsible Approach*, 31 ECOLOGY L.Q. 1, 4 (2004).

<sup>17</sup> See Press Release, Land Trust Alliance, Private Land Conservation in U.S. Soars, November 18, 2004, available at <http://www.lta.org>.

<sup>18</sup> See Kari Gathen, *The Use of Conservation Easements to Preserve New York State's Natural Resources*, 7 ALB. L. ENVTL. OUTLOOK 188, 190 (2002).

<sup>19</sup> Cf. Priv. Ltr. Rul. 97306016 (permitting §170(h) deduction for conservation easement despite retention of right to remove water from the reservoir) and Treas. Reg. 1.170A-14(f)(3), Example 4 with Treas. Reg. 1.170A-14(f)(3), Example 3.

<sup>20</sup> See MCL 324.2140(a)

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<sup>21</sup> See MCL 324.2140(a)

<sup>22</sup> See MCL 324.2140(a)

<sup>23</sup> See Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS, PAST, PRESENT, AND FUTURE*, 26, 31-35 (Julie Ann Gustanski & Roderick H. Squires, eds., 2000).

<sup>24</sup> See *THE CONSERVATION EASEMENT HANDBOOK* 180 (Janet Diehl & Thomas S. Barrett eds., 1988).

<sup>25</sup> See Mayo, *supra* note 24, at 31.

<sup>26</sup> See MCL 324.2141

<sup>27</sup> See MCL 324.2141

<sup>28</sup> See MCL 324.2140(a)

<sup>29</sup> See Mary Ann King, *Getting Our Feet Wet: An Introduction to Water Trusts*, 28 *HARV. ENVTL. L. REV.* 495, 496-7 (2004).

<sup>30</sup> *Id.*

<sup>31</sup> The word “riparian” refers specifically to rights along a river or stream, but may be used generally to describe rights along a water body. The word “littoral” refers to rights along a lake shoreline. The use of “riparian rights” in this paper refers to rights along any water body, whether river, stream or lake.

<sup>32</sup> See *WATER LAW*, 8-11 (George A. Gould & Douglas L. Grant, eds., 6<sup>th</sup> ed. 2000).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Peter D. Nichols, *Do Conservation Easements And Water Rights Mix (In Colorado)?* 5 *U. DENV. WATER L. REV.* 504, 506 (2002).

<sup>38</sup> See *WATER LAW*, *supra* note 33.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See King, *supra* note 30, at 506.

<sup>42</sup> *Id.*

<sup>43</sup> See MCL 324.2140

<sup>44</sup> See *Hilt v. Weber*, 252 Mich. 198, 219, 233 (1930).

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<sup>45</sup> Hess v. West Bloomfield Township, 439 Mich. 550, 562 (1992).

<sup>46</sup> *Id.* citing Thies v. Howland, 424 Mich. 282 (1985).

<sup>47</sup> See Collins v. Gerhardt, 237 Mich. 38 (1926).

<sup>48</sup> *Id.* at 46.

<sup>49</sup> Britain acquired the land from France, which had acquired the land by conquest. "Here are lands once under the domain of France, acquired by England by the Treaty of Paris in 1763, which continued under English occupation until acquired by the United States under the Jay Treaty in 1794." Klais v. Danowski, 373 Mich. 262, 273 (1964).

<sup>50</sup> See Collins, *supra* note 48.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 45.

<sup>53</sup> *Id.*

<sup>54</sup> See Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892).

<sup>55</sup> See Hilt, *supra* note 45, at 209.

<sup>56</sup> *Id.*

<sup>57</sup> See Collins, *supra* note 48 at 43.

<sup>58</sup> *Id.* at 44.

<sup>59</sup> *Id.* at 46.

<sup>60</sup> See Hilt, *supra* note 45, at 225.

<sup>61</sup> *Id.*

<sup>62</sup> See Thompson v. Enz, 379 Mich. 667 (1967).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See Glass v. Goeckel, 473 Mich. 667 (2005).

<sup>66</sup> *Id.* at 687.

<sup>67</sup> See Hilt, *supra* note 45, at 225.

<sup>68</sup> See Hilt, *supra* note 45, at 225; Little v. Kin, 249 Mich. App. 502 (2002).

<sup>69</sup> See Hilt, *supra* note 45, at 225.

<sup>70</sup> See People v. Warner, 116 Mich. 228, 239 (1898).

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<sup>71</sup> See Thompson, *supra* note 63, at 686.

<sup>72</sup> See Thompson, *supra* note 63, at 686; Thies v. Howland, 424 Mich. 282, 289 (1985).

<sup>73</sup> See Thies, *supra* note 73, at 293.

<sup>74</sup> See Thompson, *supra* note 63, at 686.

<sup>75</sup> See Daniel Markey, *Money from Heaven: Should Qualified Air Rights be Characterized as Interests in Land or Buildings? Why Does It Matter?* CLEV. ST. L. REV. 283, 286 (2002).

<sup>76</sup> See Thompson, *supra* note 63.

<sup>77</sup> See Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations--A Responsible Approach*, 31 ECOLOGY L.Q. 1, 43 (2004) (citing James A. Ochterski, *Why is Land Protected? Motivations Underlying Real Estate Donations to Land Conservancies*, in SUMMARY REPORT OF THE 1995-96 MICHIGAN LAND CONSERVANCY RESEARCH PROJECT (University of Michigan School of Natural Resources and Environment)).

<sup>78</sup> See I.R.C. § 170(f)(3)(A)

<sup>79</sup> See I.R.C. § 170(f)(3)(B)

<sup>80</sup> See I.R.C. § 170(h)(1)

<sup>81</sup> See Personal communication with Noah Levy, Lands Program Coordinator, Sanctuary Forest, California; Land Trust Alliance listserv communications, *Donating Water Rights As Partial Interests*, April 20, 2005, available at <http://www.lta.org/resources/listserv.htm>.

<sup>82</sup> See Kelly A. Cole, *A Market-Based Approach to the Protection of Instream Flow: Allowing a Charitable Contribution Deduction for the Donation of Conservation Easement in Water Rights*, 6 HASTINGS W.-N.W.J. ENVTL. L. & POL'Y 325, 327 (2000).

<sup>83</sup> See I.R.C. § 170(h)(2)(C)

<sup>84</sup> See Treas. Reg. 1.170A-14(b)(2)

<sup>85</sup> See Cole, *supra* note 83.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 328.

<sup>88</sup> See Rev. Rul. 55-749

<sup>89</sup> See Collins, *supra* note 48, at 48.

<sup>90</sup> See MCL 324.2141

<sup>91</sup> See I.R.C. 170(h)(1)(C)

<sup>92</sup> See Glass v. Commissioner, 124 T.C. No. 16 (2005).

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<sup>93</sup> See I.R.C. § 170(h)(5)(A)

<sup>94</sup> See I.R.C. 170(h)(4)(A)(ii)

<sup>95</sup> See Treas. Reg. 1.170A-14(d)(3)

<sup>96</sup> Treas. Reg. 1.170A-14(d)(3)(ii)

<sup>97</sup> Treas. Reg. 1.170A-14(d)(3)(i)

<sup>98</sup> See. Treas. Reg. 1.170A-14(d)(3)(iii)

<sup>99</sup> See Treas. Reg. 1.170A-14(g)(1)

<sup>100</sup> See Treas. Reg. 1.170A-14(g)(4)

<sup>101</sup> See Treas. Reg. 1.170A-14(g)(2)

<sup>102</sup> See NONPOINT SOURCE CONTROL BRANCH, U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA841-F-96-004A, NONPOINT SOURCE POLLUTION: THE NATION'S LARGEST WATER QUALITY PROBLEM.

<sup>103</sup> See *Hoover v. Crane*, 362 Mich. 36, 40 (1960).

<sup>104</sup> See *Thompson*, *supra* note 63, at 688.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 689.

<sup>107</sup> See *State v. Rural Electrification Admin.*, 23 F.3d 1336 (1994).

<sup>108</sup> *Id.* at 1338.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1339.

<sup>111</sup> *Id.* at 1338.

<sup>112</sup> *Id.* at 1340.

## ENVIRONMENTAL LAW SECTION 2005-2006 ANNUAL REPORT

The Environmental Law Section is celebrating its 25<sup>th</sup> anniversary this year. Over the past year, the Section continued to provide professionally useful programs, meetings, and publications to its members, and also increased its outreach to students and professors at law schools in Michigan who have interests in environmental law.

The Council, as well as Chairs of Section Committees, meets four times a year. Section meetings traditionally have been held in Lansing at the State Bar building, except for the annual meeting, which is held in conjunction with the State Bar's annual meeting, and the June meeting, which is held at the MacMullen Center in Higgins Lake, Michigan. This year, as part of our outreach to area law schools, the February meeting was held at Ave Maria Law School in Ann Arbor in conjunction with a panel discussion described below. The success of that effort suggests that the Section should continue to hold some of its meetings or programs at area law schools.

The Program Committee, directed by Susan Topp, continued its yeoman's work in presenting several useful and well-attended programs. The fall update program in Lansing covered air issues, Part 201 developments, enforcement issues, Sarbanes-Oxley disclosures, the refined petroleum fuel advisory board and Brownfields. A panel discussion on two Michigan wetlands cases currently before the U.S. Supreme Court – *Rapanos* and *Carabell* – was presented at Ave Maria Law School in February 2006. In addition, a February 2006 program at Crystal Lake, chaired by Joe Quandt, addressed EPA's "all appropriate inquiry" rule, revisions to ASTM 1527 (Phase I Environmental Site Assessments), Brownfield redevelopment, and environmental issues in business and estate planning. In May, the spring program in Lansing covered Michigan's new water withdrawal legislation, the *Glass v Goedal* case on public trust rights applicable to private lands bordering the Great Lakes, and regulation of concentrated animal feed lots.

The Higgins Lake program in June will include MDEQ speakers and lawyers in private practice discussing MDEQ's remedial action plan process and uniform administrative consent orders. The annual program in September 2006, to be held in Ypsilanti in conjunction with the State Bar's annual meeting, will highlight wetlands issues and another discussion of the *Rapanos* and *Carabell* cases, which are expected to be decided by the U.S. Supreme Court this summer. Finally, as another example of our outreach to area law schools, the Section will co-sponsor a Great Lakes Symposium with the University of Michigan Law School Environmental Law Society next fall.

The Section is participating, through Steve Kohl, in the State Bar's Task Force on Attorney-Client Privilege.

The Section continued to publish the Michigan Environmental Law Journal, which includes articles by Section members and case summaries prepared by the University of Michigan Environmental Law Society. It also included the winning essay in the Section's 4<sup>th</sup> Annual Environmental Law Essay Contest, submitted by Tammy Helminski of the

University of Michigan, and the runner-up essay submitted by Melissa Bozell of Thomas M. Cooley Law School. That Essay Contest was named in honor of Stewart Freeman, a dedicated and highly regarded environmental lawyer in the Office of the Attorney General, who had died the previous year. This year's Essay Contest is being named in honor of David Tripp, a former Section Chair and one of the preeminent environmental lawyers in Michigan, who died last year.

Jeff Haynes and Gene Smary have been organizing a complete updating of the Michigan Environmental Law Deskbook, with a planned publication in late 2006. Many members of the Section have volunteered their time to draft or edit deskbook chapters.

As a result of activities taken by my predecessors, the Section's budget preserves a healthy balance. Section committees have undergone further reorganization and reinvigoration.

I would especially like to thank Chair-Elect John Byl and Secretary/Treasurer Susan Topp for their many contributions and invaluable assistance this year. Special thanks also should go to John Tatum, our technology wizard, for all his work on our website.

It has been a real honor to work with so many talented colleagues in the Section; I have learned much from them and appreciate all their efforts in support of the Section.

Peter D. Holmes  
Chairperson

## **COMMITTEE REPORTS**

### **NOMINATING COMMITTEE**

On June 8, 2006, Chairperson, Peter Holmes, of the Environmental Law Section appointed a Nominating Committee consisting of John Byl, Susan Topp, Chris Bzdok and Peter Holmes (Chair of the Committee). 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 17, 2006, approved the slate of nominees recommended by the Nominating Committee. Susan Topp has been nominated for Chairperson-Elect, Charles Barbieri has been nominated for

Secretary-Treasurer, and Dr. Ernest Chiodo and James O'Brien 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. To be eligible for election to the Council, a person "shall have served 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**

The Nominating Committee conferred to review the available candidates and the requirements for service as officers and as members of the Environmental Law Section Council. Based on that review, the committee makes the following recommendations (John Byl will automatically become Chair by operation of the Bylaws): Susan Topp for Chairperson-Elect; Charles Barbieri for Secretary-Treasurer; Christopher Dunsky, Scott Hubbard and Timothy Lozen for their second 3-year terms as members of the Council; and Dr. Ernest Chiodo and James O'Brien for their first 3-year terms as members of the Council. Because the Council voted at its June 17 meeting to amend the Bylaws (subject to Section approval at the Annual Meeting on September 14, 2006) to reduce the size of the Council by one position this year, and by two positions next year, only two candidates were nominated to be new Council members. The nominees' addresses and brief summaries of their qualifications are provided below.

Susan Topp  
Topp Law, PLC  
213 E. Main  
Box 1977  
Gaylord, MI 49734

Susan Topp is a solo practitioner in Gaylord. She is completing her year of service as the Section's Secretary-Treasurer and has previously served for six years as a Council member. She also currently serves as the Chair of the Program Committee and has been instrumental in organizing many Section programs.

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

Charles Barbieri is a partner in Foster Swift Collins & Smith's Lansing office. He is completing his second 3-year term as a Council member. He also has served as Chair of the Section's Hazardous Substances Committee and has organized and hosted several Committee programs.

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

Christopher Dunsky is a partner in Honigman Miller Schwartz & Cohn's Detroit office. He is completing his first 3-year term as a Council member and also has served as Chair of the Section's Hazardous Substances Committee.

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

Scott Hubbard is a partner in Warner Norcross & Judd's Grand Rapids office. He is completing his first 3-year term as a Council member and also has served as Chair of the Section's Water Committee.

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

Timothy Lozen is a partner in Jaffe Raitt Heuer & Weiss' Port Huron office. He is completing his first 3-year term as Council member. He has also served as an active member of the Section's Hazardous Substances Committee.

Dr. Ernest Chiodo  
Ernest Chiodo, PC  
35770 Harper Avenue  
Clinton Township, MI 48035

Dr. Ernest Chiodo is a practicing physician and solo legal practitioner in Clinton Township. Dr. Chiodo has been an active member of the Environmental Litigation and Administrative Practice Committee for two years, serving as its Vice-Chair for the past year, and organized two presentations jointly with the Committee and the Michigan Industrial Hygiene Society.

James O'Brien  
Dean & Fulkerson, PC  
801 W. Big Beaver Road, Suite 500  
Troy, MI 48084

James O'Brien is a partner and Chair of the Environmental Practice group of Dean & Fulkerson in Troy. He has been an active member of the Program Committee for the past five years and co-moderated a water law program this past Spring.

Respectfully submitted,

Peter D. Holmes  
Nominating Committee Chairperson

## PROGRAM COMMITTEE

### Meeting Minutes – April 20, 2006

The meeting was called to order at 5:30 pm. The Attendees were Jim O'Brien, Susan Topp, John Byl, Mat Eugster, Peter Holmes, and Kurt Kissling.

- A. **Spring Program 2006.** The program will be May 11<sup>th</sup> from 1:00 to 4:30 PM at the State Bar Building in Lansing. The moderators will be Jim O'Brien and Kurt Brauer.  
*Agenda.* Mary Erickson is putting agenda together.  
Must get to Sue Topp by April 24.
- B. **Higgins Program.** RAP approval process; Speakers: Any Hogarth, Lynell, and Grant Trigger for panel discussion. Uniform Administrative Consent Orders; suggested speaker: Peter Manning. Susan Topp to contact Peter. John Byl will contact Lynell, Andy and Grant.
- C. **Annual Program.** Rapanos and Carabell cases; wetland update.
- D. **Fall Program.** Co-sponsor with University of Michigan.
- E. **Next Meeting.** The next meeting will be held on May 18, 2006 at 5:30 p.m.

### Meeting Minutes – June 22, 2006

The meeting was called to order at 5:30 pm. The Attendees were Jim O'Brien, Susan Topp, Kurt Kissling, Bill Schikora, Charlie Denton, Scott Hubbard, Grant Trigger.

- A. **Higgins Program.** The program was held June 16, 2006 from 1:30 PM to 4:30 PM. There were approximately 20 attendees and good discussion was held. The program was as follows:
- a. RAP approval process: Speakers: Patty Brandt, Pat McKay from the MDEQ, and Grant Trigger for panel discussion.
  - b. Uniform Administrative Consent Order under Part 201: Tim McGary ; Scott Hubbard, WNJ
- B. **Annual Program.** Plans for the annual program were reviewed. This will be the 25<sup>th</sup> ELS Anniversary
- a. Rapanos and Carabell cases. Supreme Court decision is out but offers no guidance.
    - i. Paul Bernard on Carabell
    - ii. Reed Hopper on Rapanos
  - b. Wetland update. Saulius Mikolonis
  - c. Joe Sax is not available. Grant will try to get Gov. Milliken. Chris Bzdock will contact hotel for arrangements. Trigger to make arrangement for print to give to Milliken. Reception from 4:30 to 6:00 and dinner after. Peter Holmes will make arrangements for that. Kennedy may be possible back up, Grant will check with Charlie Toy.
- C. **Fall Program.** Still exploring whether to co-sponsor with University of Michigan. Discussion about the Pace environmental moot court. Law students from U of D Mercy team finished in the top 3 and a student from Cooley was the top oralist. The legal problem involved Clean Water Act issues. Perhaps there would be a way to get them involved in our fall program to present their arguments or otherwise educate us. Bill Schikora will follow up with the U of M ELS on the Great Lakes Symposium. Jim O' Brien volunteered to help on this also.
- D. **Next Meeting.** The next meeting will be held on July 12, 2006 at 5:30 p.m.

### Meeting Minutes - July 12, 2006

The meeting was called to order at 5:30 pm. The Attendees were John Tatum, Jim Enright, Bill Schikora, Scott Hubbard, Kurt Brauer, and Susan Topp (late).

- A. **Annual Meeting.** Topp reported on the progress of the annual meeting. Confirmed that Reed Hopper, Paul Bernard and Saulius Mikalonis will speak at the annual meeting on wetlands and the Supreme Court decisions. Because it is the 25<sup>th</sup> Anniversary of the Section, a special reception is being planned following the program. Grant Trigger is working on obtaining speakers for this event. Inquiries have been made to Joe Sax, Frank Kelly, Governor Milliken, Lana Pollack, Ken Sikkema, Sam Washington, Steve Chester, Skip Pruss, Rob Reichel, John Dingell and Mr. Kennedy. As soon as we know who the honorees will be, the program announcement should be finalized and distributed.
- B. **Fall Meeting.** Bill Schikora has been communicating via email with members of the University of Michigan Environmental Law Society. Until they get back to Ann Arbor in August, it doesn't appear that much progress will be made on the Great Lakes Symposium. Schikora will continue to communicate with the society members on the involvement of the Environmental Law Section in the fall Great Lakes Symposium.
- C. **Winter Program.** Winter program was discussed, and the suggested topics at this time are (1) Water Withdrawal Legislation; (2) Mining Issues. The Mining Issues will involve sandstone, sand and gravel, as well as non-ferrous metal mining. Susan Topp will contact several professors/experts in the solid mining area on their willingness to present at a program. Jim Enright will contact potential speakers in the sandstone, sand and gravel area, and report at the next meeting. Venues being considered for the Winter Program include Boyne Mountain or the Otsego Club in Gaylord.
- D. **Other.** Kurt Brauer volunteered to contact the Section Chairs to solicit their input on any topics for future programs.
- E. **Next Meeting.** The next meeting will be held on August 23, 2006 at 5:30 p.m.

### Meeting Minutes – August 23, 2006

Attendees: Peter Holmes; John Byl; Susan Topp; Kurt Brauer; William Schikora; Matt Eugster

1. **Annual Program/September 14, 2006:** The Annual Program will be from 2:00 p.m. to 4:00 p.m. and will focus on water-law topics, including the Rapanos/Carabel decision. The speakers for the annual program have been confirmed. They will be: Bill Richards (MDEQ); Saulius Mikalonis (Butzel Long); Reed Hopper (Pacific Legal Foundation); and Paul Bernard (Dickinson Wright). Byl will send a reminder to section members after the Labor Day holiday. Topp will send a reminder to the speakers to bring sufficient copies of handouts or to send PowerPoint presentations to Brauer. Brauer will supply the a/v equipment if same is not provided by the venue.
2. **Fall Program/November 9, 2006:** The Fall Program will commence at 2:00 p.m. and will be the celebration of the 25<sup>th</sup> anniversary of the Environmental Law Section. Joe Sax, Frank Kelly and William Milliken will speak on a broad range of topics. Steve Chester will also be invited to speak on timely topics, such as what the future holds for the MDEQ, environmental protection and the agency's enforcement climate. After their presentations, the speakers will be honored by the Section. Hors d'oeuvres will be served. Holmes will call Steve Chester and extend an invitation, as well as forward a written invitation. Jim Olsen will introduce Mr. Sax. Byl will contact Bill Rustem to introduce Milliken. Topp will follow up with Chris Bzdok to confirm the location, time and food. The cost of the event will be \$25 per person, with an open bar.
3. **Winter Program/TBD 2006:** The time and location of the Winter Program is yet to be determined. The committee has recommended another "boot camp" style event, although the topics will likely be different. Brauer will poll the subject matter committees for topics and report back at the next committee meeting.
4. **Next Committee Meeting:** The next meeting of the Program Committee will be on September 20, 2006, 5:30 p.m.

## ENVIRONMENTAL LAW SECTION COUNCIL MEETINGS

### MEETING MINUTES – June 18, 2006

Present:

In Person: Peter Holmes, John Byl, Susan Topp, Grant Trigger, Matt Eugster, Chris Bzdok and S. Lee Johnson.

By Phone: Chris Dunsky, Tom Phillips, Chuck Barbieri, Charlie Denton, Dennis Donohue, Scott Hubbard, Michael Caldwell and Kurt Brauer.

Meeting called to order at 10:05 a.m.

1. **Minutes:** The minutes of the February 4, 2006 meeting were approved.
2. **Secretary-Treasurer's Report:** Topp presented the Secretary-Treasurer's Report. She reported that there is a balance in the Section's account of \$52,448.17 as of May 31, 2006. A discussion ensued on the growing fund balance. Motion by Grant Trigger that the three environmental law section officers be authorized to approve up to \$2,000 in expenditures for program committees to host seminar/receptions for this calendar year. Motion seconded by Bzdok. Motion was approved
3. **Standing Committee Reports:**
  - A. **Membership.** Report by Chris Bzdok. Written report submitted by Dustin Ordway summarizing: (1) membership committee's efforts on the annual preparation and dissemination of the Environmental Law Section Directory, (2) communication with and encouragement for young lawyers and law students to participate in the section, (3) development of a speakers list, (4) listserv updates, and (5) updating the Section survey in preparation of electronic dissemination of the same. A written Membership Committee Report has been attached to the minutes.
  - B. **Program Committee.** Susan Topp reported on the success of the Environmental Law Bootcamp held at Crystal Mountain in February and the April program held at the Michigan State Bar Building in Lansing. The program held on June 16, 2006 at Higgins Lake had a turn out of approximately 20 attendees despite the fact that over 30 had registered.

Regardless of the relatively small turnout, the program still offered a good opportunity for dialog and discussion with the Department of Environmental Quality and others.

Topp also reported that the program for the annual meeting on September 14, 2006, to be held in Ypsilanti is going to focus on wetland issues. The title of the program will be "Wetlands Regulations; Is the Government All Wet?" The program will include a discussion of the Rappanos and Carabell cases by Malcolm Hopper and Paul Bernard. Malcolm Hopper is with the Pacific Legal Foundation in Sacramento, California. Motion by Trigger, second by Byl to have the Section pay for Hopper's travel and lodging expenses in order to be a guest speaker at the annual meeting. Motion carried. The wetland program scheduled for the annual meeting will also include having Saulius Mikalonis speak on the new feasible and prudent analysis. Further discussion on the annual program pertained to the fact that it was the Section's 25<sup>th</sup> anniversary. It was suggested that we invite Mr. Joseph Sax to come from Berkley, California, and former Governor Milliken. Both guests to speak during a reception which would be held immediately after the program from 4:30 to 6:30 p.m., prior to the section dinner. It was also suggested that Jim Olson be asked to introduce these speakers. Mr. Sax and Governor Milliken would each be given a section print. Chris Bzdok volunteered to make arrangements for a room to hold the reception. It was also suggested that we invite Howard Tanner, Steve Chester, and other dignitaries. A committee was appointed consisting of Chris Bzdok, Kurt Brauer, Michael Caldwell and Grant Trigger as chair to organize this special 25<sup>th</sup> anniversary event.

Lastly, a discussion was held concerning the moot court competition and inviting the Michigan competitors to put on their program during a combined Environmental Law Section/U of M Environmental Law Society Program in the fall. Topp to appoint a committee to further explore these issues.

- C. **Michigan Environmental Law Journal.** Report by Peter Holmes. Bob Schroder will be turning over the Journal to S. Lee Johnson. They hope to publish a "State of the Law" format covering the calendar year for 2006 in 2007.
- D. **Technology.** Report by Charlie Denton.
- E. **Desk Book.** No report.

#### **Subject Matter Committee Reports:**

- F. **Air.** Report by S. Lee Johnson. Johnson reported on the MDEQ ambient air monitoring program in the Detroit area. The committee is considering holding a program on this issue.

- G. **Environmental Litigation and Administrative Practice.** No report.
- H. **Hazardous Substances.** Report by Charlie Denton. They are preparing a program on sediment contamination.
- I. **Natural Resources.** No report.
- J. **Water.** Report by Dennis Donohue. The committee had a program on implementation on the water withdrawal legislation which was very successful. It was suggested that the new water withdrawal legislation would make an excellent topic for a future program, possibly in the fall, as there should be implementation guidance from the MDEQ by that time. This suggestion will be discussed at the next program committee meeting.

#### **Liaison Reports.**

- A. **Board of Commissioners.** Report by Peter Holmes. Board of Commissioners passed a resolution opposing the current Michigan civil rights initiative to be placed on the November 2006 ballot. It also adopted a policy prohibiting officers of any State Bar Sections from receiving compensation for their duties as officers.
- B. **Real Estate Section.** Report by Peter Holmes. Real Estate Section is in need of articles for the next few issues of the Real Property Review on environmental topics.
- C. **Administrative Law Section.** No report.

#### **Chairperson's Report.** Report by Peter Holmes.

- K. **Bylaw Change.** A proposed amendment to the Bylaws of the section was presented to reduce the number of Council members from 22 to 21 voting members in the 2006/2007 term and 19 voting members in subsequent terms. Additionally, recommend to change the Bylaws to make the appointment of two additional members to the Council from the Real Property and Administrative Law sections optional rather than mandatory. Also, committee chairs and vice chairs shall serve a two-year term with one two-year renewal. Motion to adopt the Bylaw changes as amended, motion carried.
- L. **Nominating Committee Recommendation.** The nominating committee was comprised of John Byl, Susan Topp, Peter Holmes and Chris Bzdok. There are three Council members whose first terms are expiring as follows: Tim Lozen, Chris Dunsky and Scott Hubbard. Nominating committee recommends that Tim Lozen, Chris Dusky and Scott Hubbard all be nominated for a second term. There are three Council members whose second terms are expiring: Tom Phillips, S. Lee Johnson and

Chuck Barbieri. With the Bylaw amendment having been approved to reduce the number of Council members, only two of these positions need to be replaced. Nominating committee recommends Ernest Chiodo and Jim O'Brien. Ernest Chiodo has been active on the Environmental Litigation and Administrative Practice committee and brings the perspective of the plaintiff's bar. Jim O'Brien has been active on the Program Committee. A new Secretary/Treasurer also needs to be nominated as the present Secretary/Treasurer, Susan Topp, will move up to Chair Elect. The nominating committee recommends Chuck Barbieri for Secretary/Treasurer. Mr. Barbieri has been very active on the Hazardous Substances Committee and on the Council. Motion by Trigger to adopt the slate, second by Bzdok, slate approved.

- M. **Attorney Client Privilege.** The ELS should pass a resolution to support the State Bar and the ABA Task Force on this issue. Peter Holmes will draft a letter to this effect.
- N. **Section Dues/Finances.** The issue of the finances was discussed during the treasurer's report. Proposed not to change the dues at this time but to expand activities instead for the next year.
- O. **Section's 25<sup>th</sup> Anniversary.** This issue was discussed during the Program Committee report.

**Vice-Chair's Report.** None.

**New Business.** Suggested that we have a second and third place award for the writing competition beginning next year. Suggest giving an award of \$1,000 for second place and \$500 for third place. Also suggested that the winners be invited to attend the annual meeting. There was also a brief discussion on the Part 201 program that was held at Higgins the day before and the decreased participation in this annual Higgins Lake event by Council members. It was hoped that more Council members would attend the traditional overnight program at Higgins Lake next year as the opportunity is very beneficial to the Council members as it allows an extended opportunity for interaction.

**Old Business.** No report.

Meeting adjourned at 11:55 a.m.

Submitted by:

Susan Hlywa Topp, Secretary

## PROPOSED BYLAWS AMENDMENTS

By Peter Holmes  
Chairperson

Proposed Bylaws amendments were submitted by the Section Chairperson to the Council during the Council meeting on June 17, 2006. The Council considered and modified the proposed amendments and voted to recommend that they be adopted by the members of the Section at the September 14, 2006 Annual Meeting of the Section. To facilitate your review, a blacklined version of the proposed amendments to the current Bylaws, as recommended by the Council, is published below. Briefly, the proposed changes are as follows:

1. Article III, Section 3 would reduce the size of the Council in two stages from 22 voting members to 21 voting member in 2006-2007 and to 19 voting members thereafter. This change would reflect recent reductions in Section membership and bring the Section more into line with the size of the Councils of other Sections. In addition, the Chairperson's appointment of two non-voting members of the Council as liaisons to the Real Property Law and Administrative Law Sections would become discretionary rather than mandatory. This would allow voting members of the Council to serve as the liaisons when appropriate.
2. Article IV, Section 5 would be amended to reduce the size of a quorum from 9 voting members to 8 voting members. This reduction would reflect the reduction in Council size proposed above.
3. Article VII, Section 3 would be amended to allow Chairpersons of subject matter Committees to serve a second consecutive two-year term. This change is intended to allow greater continuity in Committee leadership.

Section members are encouraged to attend the Section's Annual Meeting at the Eagle Crest Hotel in Ypsilanti on Thursday afternoon, September 14, 2006. Watch for further meeting details in the State Bar Journal and on the State Bar and the Section websites.

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

### ARTICLE I Name and Purposes

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

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

### ARTICLE II Membership

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

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

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

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

### ARTICLE III Officers and Council Members

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

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

Section 3. There shall be a Section Council consisting of ~~twenty-one (21)~~ voting members ~~in the 2006-2007 term and nineteen (19) voting members in subsequent terms~~, including the Chairperson, Chairperson-Elect and Secretary-Treasurer, all of whom shall be members of the Section, together with ~~eighteen (18)~~ other members ~~in the 2006-2007 term and sixteen (16) other members in subsequent terms~~, ~~all but one~~ of whom shall be elected by the Section as hereinafter provided. A retiring Chairperson shall remain a voting ex-officio member of the Council for one (1) year and a non-voting ex-officio member for the next four (4) years immediately following the expiration of his or her term as Chairperson. This additional five-year term shall not be considered a second consecutive term for the purposes of Section 4 of this Article. ~~At the Council's request, two~~ (2) additional members of the Council ~~may~~ be appointed (one each) from the Real Property Law Section and the Administrative Law Section of the State Bar of Michigan by the Chairperson of each of those respective entities. These two (2) appointed Council members shall serve no more than three (3) consecutive one-year terms unless otherwise approved by Council, and they shall be non-voting members and shall not be eligible to serve as officers of the Section or Council. [amended 9/17/87, 9/13/90; renumbered 9/26/91; amended 9/21/95]

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Section 4. The Chairperson-Elect and Secretary-Treasurer shall be elected at each annual meeting of the Section to hold office for a term beginning at the close of the annual meeting at which they shall have been elected and ending at the close of the next succeeding annual meeting of the Section (and until their successors shall have been elected and qualified). At the end of his or her term in office, the Chairperson-Elect, provided he or she is still in office and still a member of the Council, shall automatically succeed to the position of Chairperson for a term of one (1) year. [amended 9/17/87, 9/13/90; renumbered 9/26/91]

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

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

#### ARTICLE IV Nomination and Election of Officers

Section 1. Nomination No later than two (2) months prior to the Council meeting before the annual meeting of each year, the Chairperson, with the advice of the Chairperson-Elect, shall appoint a Nominating Committee consisting of at least three (3) members of the Section. The Nominating Committee shall make and report nominations to the Section for the offices of Chairperson-Elect, Secretary-Treasurer and members of the

Council, to succeed those whose terms will expire at the close of the next annual meeting and to fill vacancies then existing for unexpired terms. The Nominating Committee shall solicit suggestions from the members of the Section for nominations for officers and Council members in the Michigan Environmental Law Journal and/or the Section listserv or similar electronic message system. The Nominating Committee shall publish a written report of its proceedings, including without limitation the names, qualifications and addresses of all nominees selected by the Committee, in the issue of the Michigan Environmental Law Journal published immediately prior to the annual meeting and/or via the Section listserv or similar electronic message system at least four (4) weeks prior to the annual meeting. Other nominations for the same offices may be made from the floor at the annual meeting. A statement of the qualifications of the Nominating Committee's selections for nominees shall be presented at the annual meeting. With respect to nominations made from the floor at the annual meeting, nominees, or those making the nominations, shall present a statement of the nominee's qualifications. [amended 9/17/87, 9/13/90, 9/21/95]

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

- (a) To be eligible for election to the Section Council, the member shall have served for no less than two years as an active member of a Section committee.
- (b) To be eligible for election as an officer of the Section, a member shall have served not less than four full years as a voting member of the Section Council. [added 9/26/91; amended 9/21/95; amended 9/18/97]

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

## **ARTICLE V Duties of Officers**

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

Section 2. Chairperson-Elect. The Chairperson-Elect shall assist the Chairperson in the performance of his or her duties as the Chairperson may request. Upon the death, resignation or disability of the Chairperson, or upon his or her refusal to act, the

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

Section 3. Secretary-Treasurer.

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

(b) The Secretary-Treasurer shall keep a true record of all monies received and disbursed and shall report thereon to the Council whenever requested. Annually he or she shall submit a financial report for presentation to the membership of the Section. Consistent with the Bylaws of the State Bar of Michigan, he or she shall be responsible for forwarding all monies of the Section which come into his or her hands to the bookkeeping department at State Bar Headquarters in Lansing for deposit

and credit to the account of the Section. Further, unless waived on a meeting-by-meeting basis by vote of the Council, the Secretary-Treasurer shall present a current financial report at each meeting of the Council. [amended 9/17/87, 9/13/90]

**ARTICLE VI Duties and Powers of the Council**

Section 1. The Council shall have general supervision and control of the affairs of the Section, subject to the provisions of the Bylaws of the Section and the Bylaws of the State Bar of Michigan. It shall specifically authorize all commitments or contracts which shall entail the payment of money, and shall authorize the expenditure of all monies appropriated for the use benefit of the Section. It shall not, however, without prior approval of the State Bar Board of Commissioners, authorize commitments or contracts which shall entail the payment of more money during any fiscal year than the total of: (a) the amount received in Section dues for such fiscal year; and (b) any unexpended funds remaining in the Section treasury from prior years.

Section 2. The Council, during the interim between annual meetings of the Section, may fill vacancies in its own membership (other than the members appointed by the Real Property Law Section and the Administrative Law Section) or in the office of Secretary-Treasurer, or--in the event of a vacancy in both the office of Chairperson and

Chairperson-Elect--then in the office of Chairperson. Members of the Council and officers so appointed shall serve until the close of the next annual meeting of the Section; at that meeting the vacancies shall be filled for the remainder of their respective terms by a special election conducted concurrently with the regular elections as provided in Article IV herein. Vacancies in any of the three (3) appointed committee or Section seats on the Council shall be filled by the respective appointing entities. [amended 9/17/87; renumbered 9/13/90]

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

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

Section 5. ~~Eight (8)~~ voting members of the Council present in person or via a real time electronic or video conferencing method shall constitute a quorum at both regular and special meetings of the Council. [renumbered 9/13/90]

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Section 6. The Council shall act pursuant to a majority of those present in person or via a real time electronic or video conferencing method at regular and special meetings of the Council; or pursuant to the provisions of Section 7 of this Article. [amended and renumbered 9/13/90]

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

## **ARTICLE VII Committees**

Section 1. Standing Committees. The standing committees of the Section shall be the Journal Committee, Program Committee, Technology Committee and Membership Committee. The Council may authorize the creation of additional standing committees. Each standing committee shall consist of a Committee Chairperson, Vice Chairperson and such Section members as are appointed in accordance with this section and shall perform such duties and exercise such powers as the Council may direct, subject to the limitations of these Bylaws and the Bylaws of the State Bar of Michigan. The Chairperson shall appoint the members of each standing committee and shall appoint a

Chairperson and Vice Chairperson of each standing committee. The Chairperson may remove, and upon direction from the Council shall remove, the Chairperson or Vice Chairperson of any standing committee. The Chairperson shall have the authority to appoint a Section member to fill any vacancy occurring on a standing committee. When appointing the Standing Committees, the Chairperson shall consider the need to increase the number of women and racial/ethnic minorities serving on such committees and as chairpersons of such committees. At the time of appointment of the Standing Committees (Journal, Program, Technology, Membership), the Chairperson shall request that the Committee members review the Report of the Supreme Court Task Force on Racial/Ethnic and Gender Issues that is available on the State Bar web site and ask each committee to conduct its business consistent with the Task Force recommendations. [added 9/13/90; amended 9/21/95; amended 9/18/97]

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

- (a) Reviewing the Section's long-term plan for implementation of the Supreme Court Task Force Report on Racial/Ethnic and Gender Issues referenced in Article VII, Section 1 above, monitoring the Section's compliance with the plan, and making recommendations for updating or revising the plan.
- (b) Gathering information concerning women and racial/ethnic minorities practicing environmental law from organizations such as the State Bar, Wolverine Bar Association, Women Lawyer's Association of Michigan and other appropriate sources.
- (c) Providing information identifying women and racial/ethnic minorities practicing environmental law to the Chairperson, the Council and the Nominating and Program Committees for consideration as candidates for Section officers, Council members, Committees and program speakers.
- (d) Investigating potential new approaches to increase women and racial/ethnic minority representation in the Section.
- (e) Compiling and presenting to the Council statistical information regarding the gender and racial/ethnic composition of the Section, and of the State Bar. [added 9/26/91; amended 9/18/97]

Section 3. Subject Matter Committees.

(a) The Committee Chairperson shall have the authority to create subject matter committees, such as air, water, natural resources, etc., for such purposes as the Chairperson may determine appropriate, subject to the authority and control of the Council. The officers of a subject matter committee shall consist of a Committee Chairperson and a Vice Chairperson appointed by the Section Chairperson. Committee members shall be solicited and a list maintained by the Committee Chairperson. Committee Chairpersons and Vice Chairpersons shall serve a two year term and may serve ~~a second consecutive~~ two year term. At the end of his or her term, the Committee Vice Chairperson shall, provided he or she is still in office, automatically succeed to the position of Committee Chairperson. In appointing subject matter committee officers, the Chairperson shall consider only those Section members who have actively participated in Section Committee activities for at least one (1) year.

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

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

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

## **ARTICLE VIII Section Meetings**

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

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

Section 3. Fifteen (15) members of the Section present in person or via a real time electronic or video conferencing method at any Section meeting shall constitute a quorum for the transaction of business.

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

## ARTICLE IX Miscellaneous Provisions

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

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

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

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

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

## ARTICLE X Amendments

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

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

**ANNOUNCING THE STATE BAR'S NEWLY-LAUNCHED PRACTICE MANAGEMENT  
RESOURCE CENTER – BY THOMAS W. CRANMER**

As President of the State Bar of Michigan, I am proud to introduce a new membership benefit: the Practice Management Resource Center (PMRC). This new program will assist members in effectively and efficiently managing the business component of practicing law. It is designed to help attorneys manage everything from outfitting an office with the latest software that integrates time accounting, billing, and account management, to effectively marketing one's practice.

The PMRC is accessible through the State Bar's website at <http://www.michbar.org/pmrc/content.cfm>.

The PMRC contains different sections of information. The Resources section provides electronic access to articles, features, and forms on a variety of topics, such as business development, financial management, and calendaring and docket control. The Legal Software Directory contains links to dozens of vendors offering software applications to assist members in the day-to-day management of a law practice. And in the near future, a lending library will be available for members to search law practice management publications, tapes, CDs, and other resources. Those resources can then be requested online or at the State Bar of Michigan Building in Lansing.

The PMRC also includes a Helpline, which is accessible by phone at 1.800.341.9715 or via email at [pmrcHelpline@mail.michbar.org](mailto:pmrcHelpline@mail.michbar.org). The PMRC Helpline is a confidential, informal service designed to quickly assist SBM members with practice management issues. Those accessing the Helpline can get practical guidance, suggestions, referrals, and information about a variety of practice management topics from a practice-management advisor.

In addition to the website, the PMRC has an onsite Educational Center located in the State Bar of Michigan's headquarters at 306 Townsend in Lansing. The Educational Center offers programs on a variety of topics, including "hands-on" software demonstrations on an informal, individual basis. For example, members and their staff can test drive legal software in areas such as case management, time accounting, billing, and calendaring functions. We have made efforts to ensure that members statewide can avail themselves of this new service by taking the programs on the road in both Grand Rapids and Marquette. Bar associations interested in scheduling a program in their area should contact the PMRC Helpline.

The State Bar strives to be responsive to its members' needs. The PMRC was established in direct response to lawyers asking for help in keeping up with changes in technology, streamlining the way they practice, and enhancing the service they provide their clients. Many members in larger firm settings are simply trying to keep abreast of what tools are available. Others have undertaken career moves as a result of market changes or quality of life choices, placing many in the position of beginning solo and small firms midway through their legal careers. The PMRC is designed with both sets of needs in mind, providing practical guidance and useful resources.

I invite you to visit our website, and call or send an email to let us know what you think.