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| Susan Hlywa Topp, Chairperson Topp Law PLC 213 East Main P.O. Box 1977 Gaylord, Michigan 49734 (989) 731-4014 | 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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The Great Lakes Compact in Michigan: A New Approach to Regulating Water Withdrawals in the State

By Sara R. Gosman*

After two years of negotiations among environmentalists, industry, agricultural interests, and governmental officials, the Michigan Legislature has ratified the Great Lakes-St. Lawrence River Basin Water Resources Compact and significantly reworked the state's existing water withdrawal law to implement the Compact. Public Acts 179-190 were signed into law by the Governor on July 9, 2008. Under the new law, property owners will use a unique, internet-based assessment process to determine whether a proposed withdrawal may cause an adverse resource impact to river systems. Permits are required for withdrawals with severe impacts on fish populations, as well as very large withdrawals.

Background on the Compact

The Compact is a proposed agreement among the eight Great Lakes States to manage the region's water resources.¹ The Compact prohibits new or increased diversions of water out of the Great Lakes Basin—with strictly limited exceptions for public water supplies to near-basin communities—and directs each state to create a regulatory program for in-basin withdrawals using measures consistent with a minimum conservation standard.²

In December 2005, the Great Lakes Governors signed the Compact and a non-binding companion agreement, the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, with the Premiers of Ontario and Quebec.³ During the next three-and-a-half years, the Compact made its way through all eight state legislatures. Michigan was the final state to ratify the Compact, in part because the state also chose to create a comprehensive regulatory program at the same time.

For the Compact to become effective, Congress must give its consent.⁴ On August 1, 2008, the U.S. Senate passed a resolution consenting to the Compact. A similar bill is pending in the House of Representatives. President Bush has issued a statement supporting the Compact and urging rapid approval by Congress. Michigan's water withdrawal law is not tied, however, to the fate of the Compact in Congress.

Assessment of Water Withdrawals

The centerpiece of the new law is a water withdrawal assessment process that determines the impact of a specific withdrawal on river systems by calculating the effect of the stream flow reduction on fish populations.⁵ The process was developed by the Michigan Groundwater Conservation Advisory Council in response to a legislative mandate.⁶ For each type of affected stream or river, withdrawals are divided into four zones: Zone A, B, C, or D.⁷ Withdrawals in Zone A have minor effects on the density or abundance of fish populations, while withdrawals in the latter zones have increasingly severe effects.⁸ The table below shows how the zones are defined for each river system.

| | Zone A | Zone B | Zone C | Zone D‡ |
|---------------------------------------|---|---------------|---|--|
| Cold Stream | < 1%† | None | 1% < 3% | ≥ 3% |
| Cold Small River | < 50% of withdrawal that would result in Zone D | None | ≥ 50% of withdrawal that would result in Zone D; but < 1% | ≥ 1% |
| Cold-Transitional River System | None | < 5% | None | ≥ 5% |
| Cool Stream | < 10% | 10% < 20% | ≥ 20%; but < 10% reduction in characteristic fish populations†† | ≥ 10% reduction in characteristic fish populations |
| Cool Small River | < 5% | 5% < 10% | 10% < 15% | ≥ 15% |
| Cool Large River | < 8% | 8% < 10% | 10% < 12% | ≥ 12% |
| Warm Stream | < 10% | 10% < 15% | ≥ 15%; but < 5% reduction in characteristic fish populations | ≥ 5% reduction in characteristic fish populations |
| Warm Small and Large Rivers | < 10% | 10% < 20% | ≥ 20%; but < 10% reduction in characteristic fish populations | ≥ 10% reduction in characteristic fish populations |

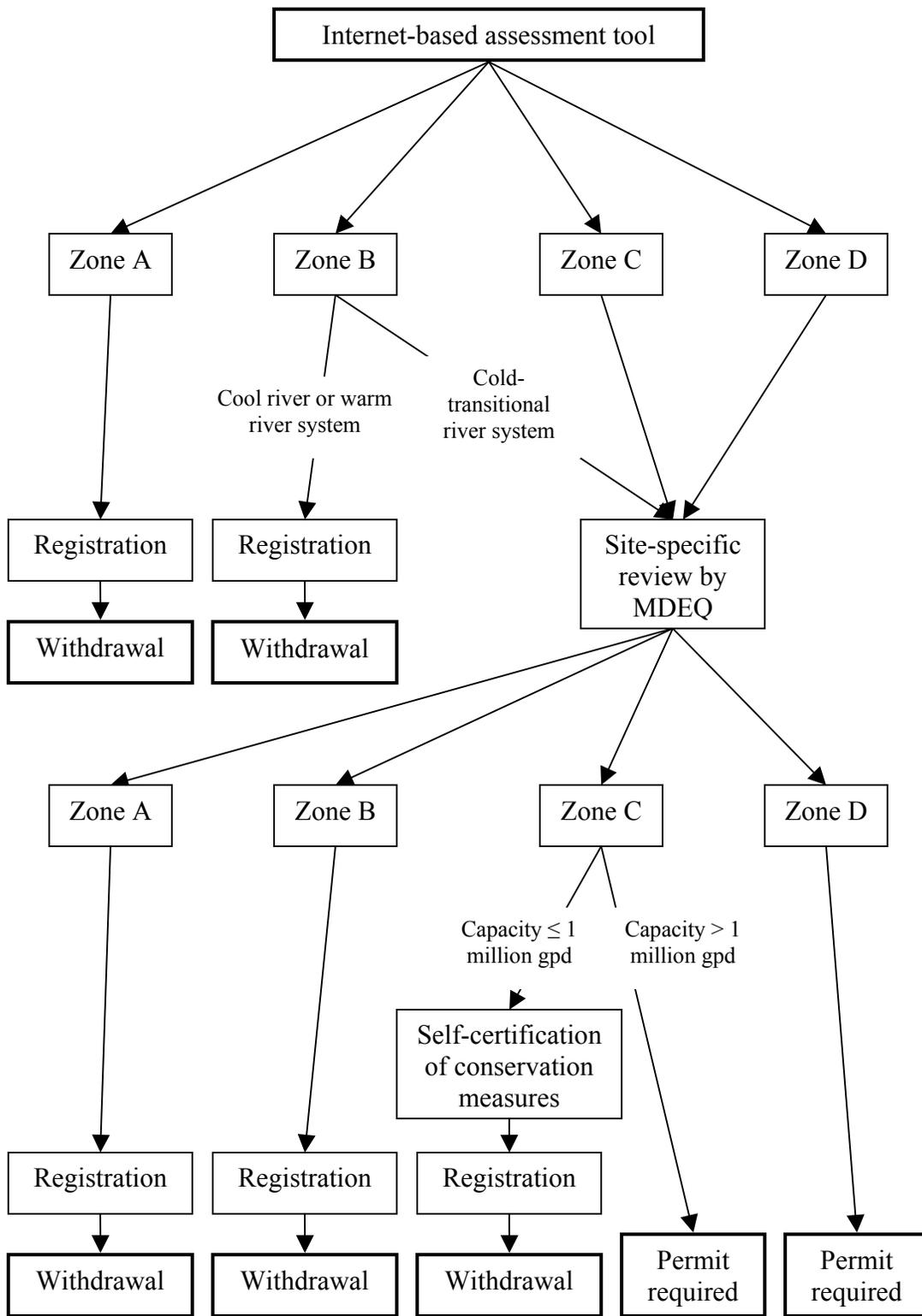
† Percentages in the chart are the percentage reduction in density of thriving fish populations, unless otherwise noted. Thriving fish populations are very sensitive to reductions in stream flow.⁹

†† Characteristic fish populations include a broader range of species and are less sensitive to reductions in flow than thriving fish populations alone.¹⁰

‡ A withdrawal is also placed in Zone D if it decreases the flow of a stream or river by more than 25% of its index flow.¹¹

The assessment process helps potential users and the state ascertain whether a new or increased "large quantity withdrawal" from a stream, river, or groundwater is prohibited because it causes an adverse resource impact.¹² A "large quantity withdrawal" is defined as "1 or more cumulative total withdrawals of over 100,000 gallons of water per day average in any consecutive 30-day period that supply a common distribution system."¹³ Withdrawals in Zone D have such severe effects that they are likely to cause a prohibited impact.¹⁴ On the flip side, withdrawals in Zones A and B are afforded the rebuttable presumption that they are not likely to cause a prohibited impact.¹⁵

The steps of the assessment process are shown in the flowchart below:



Beginning a year after the effective date of the legislation, property owners that develop the capacity to make a new or increased large quantity withdrawal from a stream, river, or groundwater must use an assessment model that will be available on the internet to determine the zone of the withdrawal.¹⁶ Once the owner enters data on the withdrawal—such as the capacity of the equipment, the location of the withdrawal, and the amount and rate of water to be withdrawn—the tool provides an immediate determination.¹⁷ If the withdrawal is in Zone A, or in a cool or warm river system and in Zone B, the owner may proceed after registering with the Michigan Department of Environmental Quality (MDEQ).¹⁸

Withdrawals in Zone B that affect the thermally sensitive cold-transitional river system, as well as withdrawals in Zone C or Zone D, must undergo a site-specific review by the MDEQ.¹⁹ This second level of assessment allows the MDEQ to consider additional information about the withdrawal and the river system that could alter the outcome of the model.²⁰ The review is to be completed within ten working days.²¹

If the site-specific review results in a withdrawal in Zone A or Zone B, the owner may proceed after registration.²² Withdrawals with a capacity of 1 million gpd or less that fall in Zone C may also proceed after registration if the owner self-certifies that she is implementing water conservation measures posted by the MDEQ on its website that the owner considers to be reasonable.²³ The remaining withdrawals—those in Zone C with a capacity greater than 1 million gpd and those in Zone D—may not occur unless the owner obtains a water withdrawal permit.²⁴

The assessment tool developed by the Michigan Groundwater Conservation Advisory Council does not apply to withdrawals from lakes or ponds. Thus, an owner who develops capacity to make a new or increased large quantity withdrawal from these water bodies is only required to register the withdrawal before proceeding.²⁵ But such withdrawals are not left unregulated. They are still prohibited if they cause an adverse resource impact—lowering the level of the lake or pond with a surface area greater than 5 acres so as to "impair or destroy the lake or pond or the uses made" or "functionally impair the ability of the lake or pond to support characteristic fish populations."²⁶

Improved Permitting and Public Involvement

The new law strengthens the existing permitting scheme by reducing the threshold for withdrawals from the Great Lakes and revising the permitting standard. In addition, MDEQ must provide public notification of permit applications and hold a public comment period of not less than 45 days before making its determination.²⁷

Under the previous water withdrawal law, any person that developed capacity to make a new or increased withdrawal of over 5 million gpd from the Great Lakes or over 2 million gpd from other sources was required to obtain a permit.²⁸ Withdrawals from the Great Lakes were subject to requirements similar to the minimum conservation standard in the Compact. Withdrawals from other sources, however, were only required to satisfy the prohibition on adverse resource impacts.²⁹

The new law removes the distinction between the Great Lakes and inland waters; a permit is now required for development of new or increased withdrawal capacity of more than 2 million gpd from all waters of the state.³⁰ As noted above, withdrawals with a

capacity greater than 1 million gpd that MDEQ determines to be in Zone C after a site-specific review also require a permit.³¹

These withdrawals must meet the following requirements, which are nearly identical to the Compact conservation standard:³²

- All water withdrawn, less any consumptive use, is returned, either naturally or after use, to the source watershed.
- The withdrawal will be implemented so as to ensure that the proposal will result in no individual or cumulative adverse resource impacts.
- The withdrawal will be implemented so as to ensure that it is in compliance with all applicable local, state, and federal laws as well as all legally binding regional interstate and international agreements, including the Boundary Waters Treaty of 1909.
- The proposed use is reasonable under common law principles of water law in Michigan.
- The applicant has self-certified that he or she is in compliance with environmentally sound and economically feasible water conservation measures.
- The proposed withdrawal will not violate public or private rights and limitations imposed by Michigan water law or other Michigan common law duties.

The MDEQ is also required to consider whether a "preventative measure" proposed by an owner will mitigate the effects of a withdrawal so as to prevent the withdrawal from causing an adverse resource impact.³³ Thus, a withdrawal that MDEQ determines to be in Zone D could be permitted if accompanied by a "preventative measure." If the MDEQ issues a permit based in part on the effect of such a measure, there must be a legally enforceable implementation schedule.³⁴

One contentious issue during the negotiations was whether the legislation should explicitly extend the public trust doctrine to non-navigable waters and groundwater. The final law maintains the status quo by providing that it shall not be construed to affect, alter, or interfere with "common law water rights or property rights or the applicability of other laws providing for the protection of natural resources or the environment or limit, waive, cede, or grant any rights or interest that the state possesses as sovereign for the people of the state in the waters or natural resources of the state."³⁵

Finally, the new legislation makes minor changes to the permitting requirements for bottled water producers and community water suppliers. The permit threshold for producers of bottled water has been ratcheted down from a new or increased withdrawal of more than 250,000 gpd to that of more than 200,000 gpd.³⁶ Community water suppliers may continue to develop new or increased water withdrawal capacity without meeting the permitting standard if the suppliers have no feasible and prudent alternative and conditions are attached to ensure that the environmental impact of the withdrawal is balanced by the public benefit.³⁷ But the new law limits this exception to those systems owned by a political subdivision.³⁸ In addition, a public comment period for these applications must be at least 45 days.³⁹

Conclusions and Implications

By ratifying the Compact, Michigan joined the Great Lakes Region in managing its own withdrawals and protecting itself from diversions. The implementing legislation significantly improves oversight of surface and groundwater withdrawals in the state—and provides users with a fast, simple process to assess the impact of most large quantity withdrawals. But lakes and ponds remain at risk of resource degradation because the assessment model does not yet apply to withdrawals from these sources. And the state may have to revisit the level of acceptable resource impact to ensure that it adequately protects Michigan's waters in the long term. To its credit, the legislature realized that the law is a work in progress and charged a new advisory council with evaluating the assessment process and providing recommendations over the next three years.⁴⁰

* Sara R. Gosman is an attorney working for the National Wildlife Federation on the Compact. She is also a lecturer on environmental law at the University of Michigan Law School. From 2004 to 2007, she was an Assistant Attorney General in the Environment, Natural Resources, and Agriculture Division of the Michigan Department of Attorney General. She is a graduate of Harvard Law School.

¹ The Compact can be found in the newly created Part 342, Great Lakes-St. Lawrence River Basin Water Resources Compact, Natural Resources and Environmental Protection Act, MCL 324.34201 *et seq.*

² MCL 324.34201, Sections 4.8-4.11. Transfers between Great Lakes watersheds are also considered diversions, but the Compact provides for exceptions under certain conditions. MCL 324.34201, Sections 1.2, 4.9.

³ The Agreement can be found at <http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf> (accessed August 3, 2008).

⁴ US Const, art I, § 10.

⁵ Fish are often a good indicator of habitat health because they are high on the food web.

⁶ See Groundwater Conservation Advisory Council, Report to the Michigan Legislature (July 2007), <http://www.michigan.gov/documents/deq/Groundwater_report_206809_7.pdf> (accessed August 3, 2008).

⁷ MCL 324.32701(1)(tt)-(ww).

⁸ *Id.*

⁹ Groundwater Conservation Advisory Council, n 6 *supra*, at p 12. The law defines a "thriving fish population" as "fish species that are expected to flourish at very high densities in [specific] stream reaches." MCL 324.32701(1)(oo).

¹⁰ Groundwater Conservation Advisory Council, n 6 *supra*, at p 12. The law defines a "characteristic fish population" as "fish species, including thriving fish, typically found at relatively high densities in [specific] stream reaches." MCL 324.32701(1)(f).

¹¹ MCL 324.32701(1)(a)(vi).

¹² See MCL 324.32721(1).

¹³ MCL 324.32701(1)(aa).

¹⁴ MCL 324.32701(1)(a), (ww).

¹⁵ MCL 324.32722(2)-(3).

¹⁶ MCL 324.32706b(1). Some withdrawals—notably those by owners of non-commercial wells on single-family or small multi-family residential property—are exempted. See MCL 324.32727(1).

¹⁷ MCL 324.32706a(3)-(4). New or increased "large quantity withdrawals" by community water suppliers subject to the Safe Drinking Water Act must also be evaluated through the assessment tool. MCL 325.1004(2).

¹⁸ MCL 324.32706b(3).

¹⁹ MCL 324.32706b(4); MCL 324.32706c(1). Owners are not limited to one proposal; they may play with the parameters of the withdrawal to see if the internet-based tool provides a different determination.

²⁰ See MCL 324.32706c(1)-(2).

²¹ MCL 324.32706c(3).

²² MCL 324.32706c(3).

²³ MCL 324.32706c(4); MCL 324.32708a.

²⁴ MCL 324.32706c(5)-(6).

²⁵ MCL 324.32705(1); MCL 324.32706b(1).

²⁶ MCL 324.32701(1)(a)(vii); MCL 324.32721(1).

²⁷ MCL 324.32723(4).

²⁸ See 2006 PA 33 (former MCL 324.32723(1)).

²⁹ See 2006 PA 33 (former MCL 324.32723(5)-(6)). Under the previous law, an adverse resource impact was defined as decreasing the flow of a stream or surface water body such that its ability to support characteristic fish populations is functionally impaired. 2006 PA 33 (former MCL 324.32701(a)).

³⁰ MCL 324.32723(1)(a)-(b).

³¹ MCL 324.32723(1)(c). In addition, the new law provides that transfers of more than 100,000 gpd between Great Lakes watersheds are subject to permitting under the standard provided in the Compact. MCL 324.32723(1)(d), (7).

³² MCL 324.32723(6); MCL 324.34201, Section 4.11.

³³ MCL 324.32723(2), (8).

³⁴ MCL 324.32723(8).

³⁵ MCL 324.32728(1).

³⁶ MCL 325.1017(3); 2006 PA 37 (former MCL 325.1017(3)).

³⁷ MCL 325.1004(4).

³⁸ MCL 325.1004(4).

³⁹ MCL 325.1004(4); MCL 325.1017(6).

⁴⁰ See MCL 324.32803.

Empowering the Environment: an Analysis of the Environmental Mandate Utilized by the European Bank for Reconstruction and Development

By Justin M. Waggoner*

INTRODUCTION

The collapse of communism in Central and Eastern Europe revealed disturbing environmental degradation. Old, poorly maintained lead smelters exposed nearby residents to harmful emissions.¹ The reliance on inefficient and highly pollutant brown coal as an energy source had caused massive air pollution.² Furthermore, a large portion of the region's surface water was unfit for human consumption.³ These were just a smattering of the environmental ills prevalent in Central and Eastern Europe when the Iron Curtain lifted. Due to lax, unenforced, and absent environmental standards, the region had become dangerously polluted.

The international community reached a swift consensus that both economic restructuring and environmental reform were necessary. The European Bank for Reconstruction and Development (EBRD or Bank) was envisioned as a cutting-edge multilateral development bank (MDB) that would influence the region's progress in both realms.⁴ Accordingly, the Agreement Establishing the EBRD contained an explicit "environmental mandate" requiring the Bank to consider the environmental impact of any disbursement of its funds.⁵

This paper analyzes the EBRD's environmental mandate, while evaluating its effectiveness throughout the Bank's first 17 years of operations. Part II includes background information on the Bank.⁶ Part III offers a detailed explanation of its environmental operations. Criticisms and recommendations of the EBRD's environmental actions are addressed in Part IV.

II. FORMATION AND HISTORY OF THE EBRD

A. *Formation of the EBRD*

In a 1989 address to the European Parliament, French President François Mitterrand encouraged the establishment of a "Bank for Europe" to assist Central and Eastern Europe in the transition out of communism.⁷ The idea to establish the Bank came from President Mitterrand's creative advisor Jacques Attali, who would later become the EBRD's first president.⁸ Mitterrand's address was the catalyst for the formation of the EBRD, as the European Council and other founding members quickly warmed to its creation.⁹ The Bank began its operations on May 28, 1991.¹⁰ Within a period just 20 months, the EBRD evolved from an initiative to an operational MDB, an incredibly short amount of time for such a complex organization.¹¹

B. *The Three Mandates of the EBRD*

The EBRD was a pioneer due to its three mandates—political, economic, and environmental—which no other international financial institution (IFI) had established.¹² These mandates were assigned to the EBRD because democratic political development, open-market growth, and environmental improvement were considered key ingredients

to the progress of Central and Eastern Europe.¹³ Due in part to these three mandates, the Bank had lofty expectations placed upon it.¹⁴ Mitterrand said the EBRD was a step towards the development of a “great Europe.”¹⁵ Attali claimed the Bank and act as a “door-opener” for many.¹⁶

In order to understand properly the role of the EBRD, it is imperative to ascertain the differing aims and authorities of the three mandates. The political mandate requires the Bank’s countries of operation to maintain multiparty democracy and pluralism.¹⁷ The EBRD utilizes its political mandate as a reactionary measure that prevents the Bank from funding non-complying state governments (although it may continue to fund private sector projects in the state).¹⁸

The EBRD’s economic mandate calls for “fostering the transition of Central and Eastern European countries towards open market-oriented economies and the promotion of private and entrepreneurial initiative” by assisting recipient countries with “demonopolization, decentralization, and privatization to help their economies become fully integrated into the international economy.”¹⁹ Much like environmental measures, the economy in the region required challenging and radical transition.²⁰

The Bank’s role as a merchant bank and a development bank was a highly debated issue prior to its establishment.²¹ The U.S. and the United Kingdom requested all EBRD funds be provided for private use because of the belief that any emphasis on the public sector would have equated to the subsidization of socialism.²² These countries favored an exclusively merchant bank approach. The continental European countries argued that such an approach was flawed because the Bank would need to finance infrastructure and some state-owned enterprises.²³ Thus, the continental European countries favored a system in which the EBRD could function as both a merchant and a development bank.²⁴ Ultimately, a compromise was reached in which no more than 40 percent of the EBRD’s funds could be directed toward the public sector.²⁵

Through its environmental mandate, the EBRD commits itself to promote “environmentally sound and sustainable development” in “the full range of its activities.”²⁶ This was the first instance in which the charter of an IFI formally required an institution to consider environmental issues in its activities.²⁷ The Bank interprets the term “environment” broadly such that it encompasses a wide range of possible effects resulting from its projects.²⁸ “Sustainable development” signifies economic growth that meets the needs of the present without compromising the well-being of future generations.²⁹ If a project fails to address environmental matters the EBRD deems essential, the Bank will not fund the project.³⁰ Therefore, the EBRD exercises conditionality over borrowers through its environmental mandate on every project.

The EBRD cannot participate in policy-based lending.³¹ As a result, the Bank is a demand-driven institution, meaning the EBRD does not take a very active role in shaping policy changes within member countries.³² The Bank’s inability to use policy-based lending paired with its private sector, demand-driven focus have restricted the incentive for its bankers to produce stand-alone environmental projects.³³ Consequently, the EBRD has not been nearly as active on environmental matters as many had hoped it would be.³⁴

C. *Development of the EBRD and its Operations*

During the Bank’s first few years, its primary struggle was to jumpstart operations.³⁵ This was not an easy task since the EBRD was seeking to fund private sector projects in countries where no private sectors existed.³⁶ Furthermore, the

EBRD's cap on public financing reduced its ability to act as a development bank and fund necessary infrastructure projects.³⁷

The EBRD was sharply criticized for its lavish spending³⁸ and President Jacques Attali's overbearing management style.³⁹ Additionally, the EBRD suffered early on from the lack of a unified vision and conflicting provisions in its founding agreement.⁴⁰ Many observers felt the EBRD had formed too quickly and that its establishment was loaded with shaky compromises to ensure its quick formation.⁴¹ The Bank encountered several internal problems during its early operations. The Bank's poor initial performance led some to claim it was doomed to fail.⁴²

Attali resigned in 1993 and the EBRD altered its spendthrift ways.⁴³ In 1994, the EBRD undertook a reorganization that merged the separate divisions for merchant and development banking.⁴⁴ This allowed the EBRD to maintain a more unified approach, rather than perpetuating the ideological rivalry between the divisions. Meanwhile, the Bank gradually had an easier time discovering projects to fund as the entrepreneurial spirit developed and economic growth occurred.⁴⁵ Over time, the EBRD has developed into a financially healthy MDB.

A noteworthy aspect of the EBRD's development concerns its countries of operation. The Bank began operations in Central and Eastern Europe, but with the collapse of the Soviet Union in the early 1990s it expanded eastward to Central Asia.⁴⁶ Meanwhile, the European Union (EU) has also expanded to the east with accessions by a total of ten Central and Eastern European countries in 2004 and 2007.⁴⁷ EU membership is a major step forward for a country, because it signifies the country's economic growth, stability, and prowess.⁴⁸ Since the ten EU accession countries have sufficiently addressed their reconstruction and development needs, they will "graduate" from (cease to be recipient members of) the EBRD by 2010.⁴⁹

The EBRD has shifted its focus increasingly further to the south and the east (including primarily the Balkans, extreme Eastern Europe, and the Asian countries of operations)⁵⁰ in order to help the early transition countries (ETCs) that are in need of more substantial reform and assistance.⁵¹ Investment in ETCs is often too risky or otherwise unattractive to private actors. Therefore, EBRD investment is important for economic progress in these countries

III. ENVIRONMENTAL APPROACH

A. *Environmental Reform in Central and Eastern Europe*

Years of ecological destruction and neglect marred the landscape in many of the EBRD's countries of operations.⁵² Several communist governments paid lip service to enacting strict environmental standards. However, the Chernobyl nuclear power plant disaster in 1986 opened the public's eyes to the deficiency in their environmental protection efforts.⁵³ The public realized strong anti-pollution laws existed only on paper because enforcement was ineffective since "regulator and regulated tended to be one and the same thing."⁵⁴ Fines were low and the major polluters often escaped paying fines altogether.⁵⁵

In the years leading up to the collapse of communist regimes, improving the environment was a high priority in many Central and Eastern European countries.⁵⁶ However, after the transition out of communism, environmental protection turned out to be a complex and demanding task.⁵⁷ Strengthening economies and other political issues took precedence.⁵⁸ A negative sentiment developed against environmental reform because of its perceived hindrance on economic development.⁵⁹

The environment received more consideration in the late 1990s because countries in Central and Eastern Europe sought admittance into the EU.⁶⁰ In order to join the EU, a candidate country must adopt the *acquis communautaire* (*acquis*), the common body of EU legislation that includes an environmental *acquis*.⁶¹ The environmental *acquis* is one of the most difficult aspects of the overall *acquis* for candidate countries to satisfy.⁶² Adoption of the EU's standards requires three distinct actions: transposition, implementation, and enforcement.⁶³ As a result, EU membership has acted as a carrot for these countries to complete environmental reform.

B. *Environmental Reform Within the EBRD*

During its first year of operations, the EBRD developed a policy instrument titled *Environmental Management*, in which the EBRD demonstrated its efforts for sustainable economic growth and listed priorities to allow it to play "a leadership role in the environmental recovery of the region."⁶⁴ *Environmental Management* provided very general guiding principles and failed to provide any overarching environmental policy or criteria to guide its project lending.⁶⁵ The Bank was criticized for its policy procedures for public participation and information disclosure.⁶⁶ Additionally, the EBRD received criticism from environmentalists disappointed with the Bank's efforts, especially since it was the first MDB with the goal of sustainable development built into its charter.⁶⁷

In 1996, the EBRD released *Environmental Policy*, a revised version of *Environmental Management*.⁶⁸ At the time, several shareholding countries hoped to strengthen the Bank's use of specific environmental standards in its operations, such as EU environmental standards.⁶⁹ Some EBRD member countries believed the use of specific standards would be unrealistic and burdensome.⁷⁰ The resulting middle ground was a policy under which the Bank would meet national and EU environmental standards, provided such standards were appropriate for a specific project.⁷¹ If the national or EU standards were not appropriate, the EBRD could utilize World Bank standards or "other sources of good international practice."⁷²

In 2003, the EBRD once again revised *Environmental Policy*. The 2003 revisions expanded the scope of environmental protection to include a social dimension concerning prohibitions on forced labor, harmful child labor, and discriminatory practices in the workplace.⁷³ The Bank also made significant strides in its public consultation and disclosure of environmental information.⁷⁴

On May 12, 2008, the Bank approved a revision to *Environmental Policy* entitled *Environmental and Social Policy*, which will take effect on November 12, 2008.⁷⁵ *Environmental and Social Policy* is an impressive step forward in numerous ways. First, as the title indicates, the EBRD has placed more emphasis on social elements within its environmental operations. Secondly, *Environmental and Social Policy* provides Performance Requirements (PRs), specific requirements that all EBRD-financed projects are required to meet in regard to key areas of environmental and social impacts.⁷⁶ Third, the 2008 revision much more clearly elucidates when the Environmental and Social Action Plan (ESAP) will be utilized by the Bank. Finally, *Environmental and Social Policy* promotes not only EU environmental standards, but also the European Principles for the Environment⁷⁷, to which the Bank is a signatory.⁷⁸

C. *Environmental Implementation Process*

The EBRD implements its environmental mandate on a project-by-project basis.⁷⁹ Before the EBRD approves financing, every project must pass through an environmental and social appraisal process.⁸⁰ The appraisal involves a comprehensive

consideration of: (i) environmental and social impacts implicated by a particular proposed project, (ii) the capacity and commitment of the borrower to meet the PRs, and (iii) the role any third parties may play in the project achieving compliance.⁸¹ If the proposed project does not satisfactorily address environmental and social issues within the PRs, or if it is an activity specifically negated by the Bank's *Environmental and Social Policy*⁸², the EBRD may decide not to finance the project.⁸³

Once a project is approved, it is categorized. Categorization involves a determination of whether the project is a direct investment of EBRD funds or a financial intermediary (FI) project in which EBRD funds are distributed by the FI to specific projects.⁸⁴ If the EBRD invests directly in a project, the investment will be classified under one of three categories: A, B, or C, depending on the perceived environmental and social impacts of the project.⁸⁵ Projects classified under Category A could result in significant adverse future environmental and/or social impacts.⁸⁶ Consequently, a Category A project's impact is significant enough to require the introduction of an independent third party to carry out the environmental assessment process.⁸⁷ *Environmental and Social Policy* provides examples of Category A projects, including the construction of crude oil refineries, thermal power stations, and major highways.⁸⁸

Category B projects are those which may result in future environmental and/or social impacts that are site-specific or can readily be addressed through mitigation measures applied in accordance with the PRs.⁸⁹ Finally, Category C projects are likely to result in minimal or no adverse future environmental or social impacts.⁹⁰ Thus, Category C projects do not require any additional environmental appraisal.⁹¹

FI projects do not fit within the A, B, and C classification system. Before providing funds to an FI, the EBRD conducts environmental due diligence on the FI and its portfolio to assess the FI's environmental policies and procedures.⁹² The FI must meet the Bank's Performance Requirement 9 (PR9, specifically for FIs), which includes environmental requirements and prohibited activities.⁹³

For proposed projects that do not meet the PRs at the time of approval, the Bank may still approve the project and develop an ESAP to document key environmental issues and opportunities, the required actions to address the issues, an implementation schedule, and an estimate of the associated costs.⁹⁴ The ESAP normally outlines a long-term or phased approach that considers likely future environmental regulations.⁹⁵ ESAPs agreed to between the EBRD and the project sponsor become part of a legal agreement between the parties.⁹⁶

The EBRD also completes extensive environmental monitoring and review. Monitoring serves two key purposes. First, it ensures that the applicable environmental standards are complied with by the Bank's client.⁹⁷ Secondly, it provides the Bank with a feedback mechanism to gauge the environmental impacts associated with ongoing projects.⁹⁸ The extent of the monitoring is meant to be commensurate with the potential risks and adverse impacts of the project.⁹⁹ Monitoring is carried out by both the EBRD and the client.¹⁰⁰

D. *EBRD Staff Primarily Involved With Environmental Matters*

The EBRD divides environmental issues amongst three discrete units: the environmental appraisal unit (EAU), the municipal and environmental infrastructure team, and the energy efficiency unit (EEU).¹⁰¹ The EAU acts as an internal watchdog on the Bank's environmental behavior.¹⁰² The municipal and environmental infrastructure team and the EEU are operational units, meaning their members seek to identify and design loans.¹⁰³ The EBRD also has an environmental advisory council (ENVAC), an

independent body of environmental specialists who meet twice a year to advise the Bank on environmental policy issues.¹⁰⁴

Examples of projects the municipal and environmental infrastructure team finances include water supply, sewage and wastewater treatment, and district heating.¹⁰⁵ This team decentralizes municipal services and infrastructure activity through bankable projects that also have a positive environmental impact.¹⁰⁶ There is a high demand for the municipal and environmental infrastructure team's services because "every town in Central and Eastern Europe needs investment in wastewater, solid waste, and district heating."¹⁰⁷ The municipal environmental and infrastructure team develops municipal guarantees and credit facilities, while also assisting municipalities with privatization efforts in order to improve performance and develop the capacity to self-finance.¹⁰⁸

The EBRD focuses a sizeable portion of its environmental efforts on energy efficiency.¹⁰⁹ Energy efficiency has been an ideal area for the Bank to focus its efforts because all Central and Eastern European countries previously maintained particularly unsustainable approaches to energy due to communist economies in which light, heat, and power were treated as virtually free goods.¹¹⁰ Energy efficiency remains an important environmental concern in the region because it is between two to seven times more energy intensive than most Western European countries.¹¹¹ Thus, the Energy Efficiency Unit (EEU) is a key actor in the EBRD's environmental behavior. It was established in 1995 to finance small energy efficiency projects.¹¹² The EBRD is the only IFI with a specialized energy efficiency team.¹¹³

Three primary benefits are garnered from enhanced energy efficiency: (1) increased energy supply; (2) reduced pollution; and (3) the preservation of resources.¹¹⁴ The EBRD has fully recognized these benefits and has specialized in providing assistance on energy efficiency matters. Funding energy efficiency through projects such as ESCOs is extraordinarily beneficial because of the overlap of economic and environmental gains.

E. *Environmental Law Reform in EBRD Countries of Operation*

After the fall of communism, several of the former Soviet Bloc countries began to express interest in joining the EU, referring to such a move as a "Return to Europe."¹¹⁵ The EU subsequently agreed to eastward enlargement.¹¹⁶ Due in part to the EU's commitment to enlarge, the EBRD elected to use the EU environmental framework as the benchmark for its own environmental behavior.¹¹⁷ The region's use of EU standards was sensible due to proximity, the EU's advanced environmental standards, and the goal of EU accession by many Central and Eastern European countries. Moreover, the EU was eager to export its environmental standards to the region in order to reduce the harmful consequences of transboundary pollution.¹¹⁸

The transposition of EU environmental standards into the region has been an arduous task.¹¹⁹ Many barriers to the effective utilization of EU environmental policy exist because of "merging the existing legal cultures, expectations and practices of EU law" with the governments of Central and Eastern European countries.¹²⁰ Falling into compliance with the EU environmental *acquis* is one of the most difficult barriers for candidate countries to overcome in their accession efforts.¹²¹

The implementation of EU environmental law in Central and Eastern Europe has several flaws. The first flaw is that the EU's environmental standards are designed for Western Europe, which has had 60 years to recover from World War II and develop some of the world's most progressive environmental standards.¹²² Meanwhile, Central and Eastern European countries experienced a 40-year breach of legal continuity and governmental development.¹²³ At a time when the West was moving into services and

high technology manufacturing, the planned economies of Central and Eastern Europe retained classical heavy industry.¹²⁴ As a result, Central and Eastern European states are attempting to play “catch-up” by adopting foreign environmental policy that did not develop through natural progression within the region.¹²⁵

A second flaw is that EU environmental law is composed of legal norms that are consistently changing even while Central and Eastern European states attempt to instill them.¹²⁶ Thus, the EU has created a moving target. Understandably, this is a result of the dynamic nature of environmental policy.¹²⁷

A third flaw in the transposition of EU environmental standards into Central and Eastern Europe is the lack of sufficient institutional capacity.¹²⁸ One of the major impediments to developing strong environmental units has been the excessive centralization within many Central and Eastern European countries.¹²⁹ Typically, environmental matters are handled most effectively by independent self-governing systems, as opposed to central governments.¹³⁰ Another institutional barrier to environmental reform is the relatively weak position that government environmental members hold in comparison to other sectoral institutions.¹³¹

IV. CRITICISM AND RECOMMENDATIONS

A. *Difficulty Squaring Environmental and Economic Mandates*

To be sure, economic development is the principal objective of the EBRD. However, economic development often places pressure on the environment, especially when the development involves land clearing and increasing the use of energy resources.¹³² As a result, the EBRD’s economic and environmental mandates are bound to clash in certain instances.

There are structural deficiencies within the Bank that can reduce its attention afforded to environmental concerns. Bankers within the EBRD are encouraged to find “bankable” projects and to get them out as quickly as possible.¹³³ Many environmental projects are not very bankable because they fail to generate short-term financial returns.¹³⁴ Environmental projects are particularly time-consuming. Consequently, there is a disincentive for bankers to pursue environmental projects. The EBRD should incorporate a stronger form of environmental assessment in the performance reviews of its bankers to counterbalance the bankers’ motivation to gain rapid approval for projects that may not be environmentally sustainable.

Although environmental projects often have limited short-term financial returns, they can result in significant long-term economic benefits.¹³⁵ Broadly stated, a healthy environment can result in significant savings over an unsustainable approach that will require extensive clean-up and restorative efforts. Moreover, the interests of economic development and environmental protection are sometimes directly aligned.¹³⁶ For example, increased energy efficiency provides immediate financial savings, while also reducing pollution and preserving resources.¹³⁷ However, despite the economic gains realized through environmental protection, negative environmental implications accompany most instances of economic development.¹³⁸

The EBRD should implement a quality control unit for its loan activities. The World Bank established the Quality Assurance Group (QAG) in 1996.¹³⁹ The QAG’s express purpose is to improve “the quality of Bank output within the broad context of alleviating poverty and achieving development impacts.”¹⁴⁰ The EBRD should use the QAG as a model for designing its own system.¹⁴¹ Such a system would guard against the descent in quality of EBRD loans by making bankers and other staff members accountable for the overall quality of their projects.¹⁴² Furthermore, it could serve as a

feedback mechanism to provide staff members with knowledge on methods to improve quality in future projects.¹⁴³ A quality control system could evaluate projects based on their furtherance of objectives enumerated in *Environmental and Social Policy*.

The EBRD should informally stretch the boundaries of its restriction on policy-based lending. All other MDBs have taken an expansive or “teleological” view in interpreting the boundaries of provisions within their founding charters.¹⁴⁴ After having been in existence for 17 years, the EBRD seems ready to follow the trend set by other MDBs. If the EBRD increased its flexibility to participate in policy-based lending, it could fund key environmental improvement projects that would provide significant long-term economic benefits.

B. *Ambiguous Environmental Structure*

The EBRD does not specifically define its environmental behavior and instead provides examples of the types of operations it funds.¹⁴⁵ The Center for International Environmental Law severely criticized the Bank in its early years for lacking an “overarching policy or criteria to guide its project lending.”¹⁴⁶ Although the EBRD’s introduction of *Environmental Policy* and its 2003 revisions considerably lessened the ambiguity, the document was still nondescript in providing direction on precisely how the EBRD should utilize its environmental mandate. For example, *Environmental Policy* did not demonstrate when an Environmental Action Plan, the legally binding environmental details of a project, should be issued.¹⁴⁷

The EBRD has strongly mitigated its problem of excessive ambiguity.¹⁴⁸ *Environmental and Social Policy* provides more specific guidance on the EBRD’s environmental behavior. For example, it has specifically indicated when an ESAP is required. Moreover, the introduction of the PRs provides further clarification.

C. *Use of EU Standards Is Inappropriate*

The EBRD has been criticized for using EU environmental standards. Critics argue that it is unrealistic to expect proper usage of EU environmental standards in many of the EBRD’s countries of operation. In fact, prior to the 1996 revisions, even some EBRD staff members claimed that the idea of using EU standards was “silly.”¹⁴⁹ There is also a risk that borrowers may shun the EBRD because of expensive EU environmental compliance requirements in favor of private sources of capital that will not attach environmental conditionality. Thus, the Bank’s strict adherence to EU environmental standards could indirectly lead to unsustainable projects.

Some environmentalists argue that EU environmental standards, even if properly enforced, do not provide for sustainable development.¹⁵⁰ These environmentalists claim that in areas such as nuclear power, nuclear waste disposal, traffic emissions, and urban sprawl, the EU has adopted policies that are not sustainable.¹⁵¹ Moreover, the EU environmental policy has been criticized for its conflicting priorities, which often cause the environmental *acquis* to be undermined by consumerist concerns.¹⁵² Surprisingly, there are instances in which the environmental standards in Central and Eastern European countries are more stringent than the EU’s standards.¹⁵³ Consequently, the EBRD’s adherence to EU standards could result in unfortunate downward harmonization on a few of its projects.¹⁵⁴

Arguably, the EBRD’s decision to use EU environmental standards was a logical solution to the often disorganized and conflicting national environmental standards plaguing many of its countries of operation. The use of EU environmental standards was prudent because if the EBRD had failed to enforce EU standards in its projects,

redundancy and inefficiency would have resulted from projects constructed below EU environmental standards that would have required future alterations to conform with the environmental *acquis* as countries joined the EU. Additionally, the Bank's use of EU standards allows its environmental experts and bankers alike to be extensively familiar with one set of environmental standards, rather than needing to learn and apply the intricacies of individual countries' environmental policies.

The EBRD's flexibility to use "applicable national law" or "other good international practice" is appropriate.¹⁵⁵ Under exceptional circumstances or when EU standards might not be ideal (for projects far removed from Europe, such as in Mongolia), the EBRD may look outside of the EU standards. Another valuable use of this flexibility is the restriction of downward harmonization in the event of any deficient EU environmental policies.¹⁵⁶

The EBRD has a duty to follow the mandate of its charter for sustainable development. Therefore, the Bank's usage of EU environmental standards is not unreasonable. Rather, it is appropriate for the EBRD to set high standards for its environmental operations as opposed to funding more achievable but also potentially unsustainable projects. If the EBRD had adopted the latter approach, it would have been a nod in the direction of shortsighted, convenient, and overly commercial-centric behavior by the Bank. As a result, the EBRD has most effectively met the terms in its charter by utilizing the environmental policies and practices of the EU. However, the use of EU environmental standards may not be the Bank's best long-term solution.

As the EBRD expands to the south and east, it should develop its own set of environmental standards. The significance of the EU standards will diminish as countries graduate from the EBRD and the percentage of projects in Asia and non-EU countries increases. Furthermore, the EBRD could benefit from the clarity of having its own environmental standards customized for its countries of operation. The EBRD appears to be considering a move in this direction. In its *Environmental Policy Discussion Paper*, describing the former *Environmental Policy* review and released on May 11, 2007, the EBRD proposed annexing even more specific project policy requirements than it ultimately added to the *Environmental and Social Policy*.¹⁵⁷

V. CONCLUDING OBSERVATIONS

Although the EBRD has not proven to be the environmental champion that some predicted, the EBRD's environmental mandate has certainly had a role in helping Central and Eastern Europe become more sustainable. Much like the Bank itself, the environmental mandate got off to a rocky start. However, with some restructuring and refocused prioritization, the EBRD has strengthened its use of environmental conditionality.

As the EBRD increasingly handles projects in the ETCs, it is vital that the Bank remains firm to its environmental mandate because it will inevitably be opposed by economic interests. The Bank, its operations, and international environmental standards are all very dynamic and constantly present challenges. If the EBRD aggressively continues to utilize its environmental mandate, maybe President Mitterrand's vision of a "great Europe" can come to fruition.

**From time to time the Michigan Environmental Law Journal will publish articles authored by law students which are considered by the Journal editors to be of interest to the membership. This article was written by Justin M. Waggoner, a law student at the University of Kansas School of Law, graduating in May 2008.*

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- ¹ Tamar L. Gutner, *Banking on the Environment: Multilateral Development Banks and Their Environmental Performance in Central and Eastern Europe* 133 (2002).
- ² Paul A. Menkveld, *Origin and Role of the European Bank for Reconstruction and Development* 14 (1991).
- ³ Gutner, *supra* note 1.
- ⁴ Chris A. Wold & Durwood Zaelke, *Promoting Sustainable Development and Democracy in Central and Eastern Europe: The Role of the European Bank for Reconstruction and Development*, 7 *Am. U. J. Int'l L. & Pol'y* 559, 566 (1992).
- ⁵ Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, Article 2:1(vii) [hereinafter Agreement Establishing the EBRD].
- ⁶ Although the operations of the EBRD extend from Central Europe to Central Asia, this paper focuses primarily on the countries in Central and Eastern Europe.
- ⁷ Adam Bronstone, *The European Bank for Reconstruction and Development: The Building of a Bank for East Central Europe* 22 (1999).
- ⁸ Menkveld, *supra* note 2, at 25.
- ⁹ *See id.*
- ¹⁰ EBRD Website, at <http://www.ebrd.org/pubs/insti/basics.htm>.
- ¹¹ Menkveld, *supra* note 2, at 7.
- ¹² The EBRD is labeled a new-age, third-generation IFI. *See* John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 16 *U. Kan. L. Rev.* 605, 606 (1993).
- ¹³ Menkveld, *supra* note 2, at 13-14.
- ¹⁴ Bronstone, *supra* note 7, at 28.
- ¹⁵ *Id.*, at 29.
- ¹⁶ *Id.*
- ¹⁷ Agreement Establishing the EBRD, *supra* note 5, at arts. 1, 2 & 8.
- ¹⁸ *See* John Linarelli, *The European Bank for Reconstruction and Development and the Post-Cold War Era*, 16 *U. Pa. J. Int'l Bus. L.* 373, 404 (1995).
- ¹⁹ Agreement Establishing the EBRD, *supra* note 5.
- ²⁰ *See* Menkveld, *supra* note 2, at 13-14.
- ²¹ Bronstone, *supra* note 7, at 32.
- ²² Bronstone, *supra* note 7, at 33.
- ²³ Menkveld, *supra* note 2, at 62-63.
- ²⁴ *See* Bronstone, *supra* note 7, at 33.
- ²⁵ Agreement Establishing the EBRD, *supra* note 5, at art. 11:3.
- ²⁶ *Id.*
- ²⁷ Wold, *supra* note 4.
- ²⁸ EBRD *Environmental and Social Policy*, April 29, 2003, art. 2 [hereinafter *Environmental and Social Policy*].
- ²⁹ David Turnock, *East Central Europe and the Former Soviet Union: Environment and Society*, 167 (2001).
- ³⁰ *Environmental and Social Policy*, *supra* note 28, at art. 4.
- ³¹ Agreement Establishing the EBRD, *supra* note 5, at art. 13:2 and accompanying explanatory notes at para. 3.
- ³² In contrast, the World Bank often utilizes policy-based lending. Gutner, *supra* note 1, at 114.
- ³³ *Id.* at 66.
- ³⁴ *See* The Center for International Environmental Law, *EBRD's Environmental Promise: A Bounced Check?*, at <http://www.ciel.org/Publications/issue3.html> (1995) [hereinafter CIEL Report]; and *see* Bankwatch's EBRD Environmental Policy Review, at <http://www.bankwatch.org/project/EP> [hereinafter Bankwatch Website].
- ³⁵ Gutner, *supra* note 1, at 61.
- ³⁶ *Id.*
- ³⁷ However, the EBRD was flexible in its use of the 40% cap. Head, *supra* note 12, at 648.
- ³⁸ Robert Peston, *Spending at the European Bank: the Bank Likes to Say Yes - to Itself*, *Fin. Times*, April 13, 1993, at 6.

- ³⁹ Gutner, *supra* note 1, at 61.
- ⁴⁰ See Bronstone, *supra* note 7, at 48.
- ⁴¹ *Id.* at 47.
- ⁴² See Patrick Donovan, *Attali and His Bank Fail to Match Up to Expectations*, *The Guardian*, August 27, 1991.
- ⁴³ Kevin Done, *Bank Casts Off Its Profligate Image*, *Fin. Times*, Mar. 7, 1996, at 2.
- ⁴⁴ The EBRD is now organized into three country groups (Central Europe, Russia and Central Asia, and Southern and Eastern Europe and the Caucasus) and three sector groups (financial institutions, infrastructure, and industry and commerce). See Gutner, *supra* note 1, at 107.
- ⁴⁵ Bronstone, *supra* note 7, at 80-81.
- ⁴⁶ Countries such as Mongolia, Kazakhstan, the Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan were eastern EBRD countries that joined the Bank after its original formation. EBRD Website, at <http://www.ebrd.org/about/basics/members.htm>.
- ⁴⁷ Countries that joined the EU in 2004 were the Czech Republic, Poland, Estonia, Latvia, Slovenia, Lithuania, the Slovak Republic, and Hungary. Countries that joined the EU in 2007 were Romania and Bulgaria.
- ⁴⁸ See EU Website, at http://europa.eu/pol/enlarg/overview_en.htm.
- ⁴⁹ *Law in Transition Online 2006: Focus on Central Europe*, from the EBRD Website, at <http://www.ebrd.org/pubs/legal/lit062.pdf>, at 3.
- ⁵⁰ See *Annual Report 2005: Annual Review and Financial Report*, from the EBRD Website, at <http://www.ebrd.org/pubs/general/ar05.pdf>, at 4.
- ⁵¹ ETCs include: Armenia, Azerbaijan, Georgia, the Kyrgyz Republic, Moldova, Mongolia, Tajikistan, and Uzbekistan. The EBRD has created the ETC Initiative in which the Bank "aims to stimulate market activity in these countries" by pledging to finance more projects and accept higher risk in its loans to its poorest countries of operations. EBRD Website, at <http://www.ebrd.org/pubs/factsh/themes/etc.pdf>.
- ⁵² EBRD Website, at <http://www.ebrd.org/enviro/policy/standard.htm>.
- ⁵³ See Turnock, *supra* note 29, at 165.
- ⁵⁴ *Id.*
- ⁵⁵ EBRD Website, at <http://www.ebrd.org/enviro/policy/standard.htm>.
- ⁵⁶ The Environmental Challenge for Central European Economies in Transition 11 (Jürg Klarer & Bedřich Moldan eds. 1997) [hereinafter *The Environmental Challenge*].
- ⁵⁷ *Id.*
- ⁵⁸ See CIEL Report, *supra* note 34.
- ⁵⁹ The Environmental Challenge, *supra* note 56.
- ⁶⁰ See John O'Brennan, *The Eastern Enlargement of the European Union* 149 (2006).
- ⁶¹ John M. Kramer: *EU Enlargement and the Environment: Six Challenges*, in *EU Enlargement and the Environment* 290 (JoAnn Carmin & Stacy D. VanDeveer eds., 2005).
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ *Environmental Management: The Bank's Policy Approach Document*.
- ⁶⁵ CIEL Report, *supra* note 34.
- ⁶⁶ *Id.*
- ⁶⁷ *Id.*
- ⁶⁸ Gutner, *supra* note 1, at 64.
- ⁶⁹ *Id.*, at 65.
- ⁷⁰ See *id.*
- ⁷¹ *Id.*
- ⁷² *Id.*
- ⁷³ *Environmental Report 2003*, EBRD Website, at <http://www.ebrd.org/pubs/enviro/envirorep.pdf>, at 7.
- ⁷⁴ According to Gutner, access to EBRD staff and documents has improved as the Bank has aged. Gutner, *supra* note 1, at 65.
- ⁷⁵ EBRD Website, at <http://www.ebrd.org/enviro/policy/index.htm>.
- ⁷⁶ *Id.* at art. 3.

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- ⁷⁷ The European Principles for the Environment are based largely upon EU environmental measures and for the purposes of this paper will be grouped together with such measures.
- ⁷⁸ *Environmental and Social Policy*, at art. 3.
- ⁷⁹ Linarelli, *supra* note 20, at 383
- ⁸⁰ *Environmental and Social Policy*, *supra* note 28, at art. 14.
- ⁸¹ *Id.* at art. 15.
- ⁸² A list of such activities can be found in Appendix 2 of *EBRD Environmental and Social Policy*.
- ⁸³ *Environmental and Social Policy*, *supra* note 28, at art. 16.
- ⁸⁴ *Id.* at arts. 19 & 24.
- ⁸⁵ *Id.* at Article 19.
- ⁸⁶ *Id.*
- ⁸⁷ *Id.*
- ⁸⁸ *Id.* at Appendix 1.
- ⁸⁹ *Id.* at art. 21.
- ⁹⁰ *Id.* at art. 22.
- ⁹¹ *Id.*
- ⁹² *Id.*, at art. 24.
- ⁹³ *Id.*
- ⁹⁴ *Id.* at art. 8 and PR1, para. 14.
- ⁹⁵ *Id.* at PR 1, art. 20
- ⁹⁶ *Id.*
- ⁹⁷ *Id.* at art. 35.
- ⁹⁸ *Id.*
- ⁹⁹ *Id.* at PR1, art. 20.
- ¹⁰⁰ *Id.* at art. 35.
- ¹⁰¹ Gutner, *supra* note 1, at 107, 109.
- ¹⁰² *Id.*
- ¹⁰³ *Id.*
- ¹⁰⁴ *Id.* at 109.
- ¹⁰⁵ *Id.*
- ¹⁰⁶ *Id.*
- ¹⁰⁷ This has been gleaned from interviews that Gutner conducted with an EBRD staff members. *Id.*, at 110.
- ¹⁰⁸ *Id.*
- ¹⁰⁹ *Id.* at 4.
- ¹¹⁰ *Sustainability Report 2005*, EBRD Website, at <http://www.ebrd.org/pubs/general/sus05.pdf>, at 2.
- ¹¹¹ *Id.*
- ¹¹² Gutner, *supra* note 1, at 110.
- ¹¹³ EBRD Website, at <http://www.ebrd.com/enviro/invest/selected.htm>.
- ¹¹⁴ *Sustainability Report 2005*, *supra* note 110.
- ¹¹⁵ O'Brennan, *supra* note 60, at 14.
- ¹¹⁶ *Id.*
- ¹¹⁷ See EBRD Website, at <http://www.ebrd.org/enviro/policy/standard.htm>.
- ¹¹⁸ O'Brennan, *supra* note 60, at 148.
- ¹¹⁹ See generally Eva Kružíková, *EU Accession and Legal Change: Accomplishments and Challenges in the Czech Case*, in *EU Enlargement and the Environment* 99 (JoAnn Carmin & Stacy D. VanDeveer eds., 2005).
- ¹²⁰ *Id.*
- ¹²¹ *Id.*
- ¹²² *Id.* at 104.
- ¹²³ *Id.*
- ¹²⁴ Turnock, *supra* note 34, 29 165.
- ¹²⁵ See Kružíková, *supra* note 119, at 104.
- ¹²⁶ *Id.*

¹²⁷ *Id.* at 105.

¹²⁸ Kramer, *supra* note 61, at 297-299.

¹²⁹ The Environmental Challenge, *supra* note 56, at 12.

¹³⁰ *Id.*

¹³¹ *Id.*, at 19.

¹³² Gutner, *supra* note 1, at 11.

¹³³ Gutner, *supra* note 1, at 108.

¹³⁴ *Id.*

¹³⁵ See <http://www.epa.gov/efinpage/efc.htm#intro>.

¹³⁶ Gutner, *supra* note 1, at 10.

¹³⁷ See *Sustainability Report 2005*, *supra* note 110.

¹³⁸ See Gutner, *supra* note 1, at 11.

¹³⁹ <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/QAG/0,,pagePK:109619~theSitePK:109609,00.html>.

¹⁴⁰ *Id.*

¹⁴¹ The QAG does not deny or approve projects. Rather, it evaluates a sample of projects after their completion to determine the World Bank's quality rating. See <http://siteresources.worldbank.org/QAG/Resources/QEA7SynthesisReportandAnnexes.pdf>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Head, *supra* note 12, at 650.

¹⁴⁵ Gutner, *supra* note 1, at 23.

¹⁴⁶ CIEL Report, *supra* note 34.

¹⁴⁷ See *Environmental Policy*, *supra* note 28, at art. 17.

¹⁴⁸ The CIEL has not offered any further criticisms of the EBRD's environmental actions since 1995. Presumably, this means that the CIEL believes the EBRD's subsequent actions in *Environmental Policy* were at least adequate.

¹⁴⁹ Gutner, *supra* note 1, at 65.

¹⁵⁰ Stacy D. VanDeveer & JoAnn Carmin, *Assessing Conventional Wisdom: Environmental Challenges and Opportunities Beyond Eastern Accession*, in *EU Enlargement and the Environment* 315, 318 (JoAnn Carmin & Stacy D. VanDeveer eds., 2005).

¹⁵¹ There are also many observers who are concerned that the eastward expansion of the EU will mark the end of progressive EU environmental policy. *Id.*

¹⁵² *Id.* at 317-318.

¹⁵³ Petr Jehlička & Andrew Tickle, *Environmental Implications of Eastern Enlargement: The End of Progressive EU Environmental Policy*, in *EU Enlargement and the Environment* 77, 83 (JoAnn Carmin & Stacy D. VanDeveer eds., 2005).

¹⁵⁴ *Id.*

¹⁵⁵ *Environmental and Social Policy*, *supra* note 28, at art. 5 and 7.

¹⁵⁶ Another concern could be extremely polluted areas of Central and Eastern Europe that warrant environmental protection beyond the EU standards (and possibly any existing environmental standards).

¹⁵⁷ EBRD Website, at <http://www.ebrd.org/about/policies/enviro/policy/review/issues.pdf> [hereinafter Discussion Paper], at 4.

ENVIRONMENTAL LAW ESSAY CONTEST 2008 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.

The 2008 winning environmental law essay, published below, was written by Linus Y. Chen, a law student of the Emory University School of Law, graduating in May 2008.

Entrusting Endangered Species Recovery in a (Public-)Private Trust

By Linus Y. Chen

INTRODUCTION

The Endangered Species Act¹ (ESA) is one of the United State's flagship environmental laws. The ESA is well known for its absolute mandates as interpreted by the Supreme Court.² Many have criticized that the ESA's strict mandates and command-and-control structure lead to inefficient outcomes and creates perverse incentives that further harm species listed as endangered or threatened.³

However, the recent innovations of using Habitat Conservation Plans (HCPs) and Safe Harbor programs under Section 10 of the Act provide an opportunity to create positive incentives to recover endangered species in the form of endangered species mitigation banks ("Conservation Banks").³ These innovations harness market forces to create incentives to recover endangered species, rather than command-and-control regulations that create disincentives for private land owners to recover endangered species. But with any market, especially a market with limited parties that trade on very specialized commodities, there are market failures- namely speculation on poor information, thin markets, and the disincentive not to recover an endangered species because of the newly created value related to endangered species and their habitat.

To counter these market obstacles, this essay's main recommendation is to establish a private (or public-private) "trust" to facilitate endangered species habitat trading, to remove incentives against recovering these species, and to actively assist this market by providing "insurance" to landowners who participate in endangered species habitat trading. This trust⁴ benefits the general public, and serves as a charitable trust (or public trust) to implement the public welfare of endangered species recovery and conservation. Thus a trust established to facilitate trades in endangered species habitat would help ensure that a market based trading system remains viable.

I. GENERAL BACKGROUND OF THE ENDANGERED SPECIES ACT AND ITS IMPLEMENTATION BY THE FEDERAL GOVERNMENT

The U.S. Fish & Wildlife Service and the National Oceanographic and Atmospheric Administration (NOAA) Fisheries (formerly National Marine Fisheries Services), collectively the “Services,”⁵ have the responsibility to implement the ESA and protect federally listed species. Once the Services list a species as either endangered or threatened⁶ under the ESA, § 9 of the Act prohibits “take” of a species, which can include direct killing, or indirect harm such as destroying a species’ habitat.⁸ “Takings” violations incur substantial penalties under the ESA.⁹

However, the highly politicized nature of the ESA and strong property rights sentiments create a disincentive for the federal government to enforce § 9 take.¹⁰ If a species occurs on private land, a land owner has ESA § 9 restrictions imposed on his or her land. Landowners complain that these burdens are a regulatory “taking” under the Constitution’s Fifth Amendment and that the landowner should be compensated for endangered species related restrictions.¹¹ Without a means to compensate private landowners who have endangered species on their lands, these regulatory burdens have created the incentive for private landowners to discourage federally listed species from ~~recovering~~ recovering on their property.¹² Landowners can actively and preemptively prevent species from occurring on their property by degrading the habitat so that species do not settle on their land- cutting down trees, clearing underbrush, etc.¹³ Also, if the landowner discovers an endangered species on the land before the federal government, the landowner can act illegally - commonly known as “shoot, shovel, and shut-up.”¹⁴

If a federally listed species already occurs on the land, private property owners can also allow for the passive degradation of the habitat⁷ since there is no requirement for a private landowner to proactively help an endangered species.⁸ For example, the Kirtland’s warbler, which only nests in young jack pine forests in Michigan, have become endangered because fire suppression have allowed these tree to mature into old jack pines that are unsuitable for nesting; viable conditions would be maintained by periodic natural fires created by lightning strikes.⁹ There is no ESA requirement for a landowner to periodically burn their land or mechanically replicate conditions for young jack pines. Similarly, if an exotic invasive species, e.g. purple loosestrife overgrows the land and makes the habitat unsuitable for an endangered species, there is no requirement for the landowner to control or remove the threat. Thus the ESA originally only created burdens for private landowners who had endangered species on their land, and provided no incentive to private property owners to help recover federally listed species.

II. ESA SECTION 10’S REGULATORY RELIEF TO PRIVATE LANDOWNERS: THE FOUNDATIONS FOR A MARKET MECHANISM

To relieve the regulatory burdens created by the Act, Congress amended the ESA in 1983 to provide an exception to § 9 “take” of species. Section 10 of the ESA permits private actors to “take” federally listed species. An actor, after receiving “permission” under § 10 by the Services, can indirectly “take” a species by harming the species’ habitat, or perhaps accidentally harming an individual so long as the actor took all reasonable and prudent precautions.¹⁰ This indirect “take” is often referred to “incidental take.”¹¹ Knowingly and directly killing a federally listed species is still not allowed.¹²

There are two parts under ESA § 10 that permit “takings” of endangered species on private land: Habitat Conservation Plans under ESA § 10(a)(1)(B), and Safe Harbor

Agreements under ESA § 10(a)(1)(A). Either of these options can later be converted to a Conservation Bank. Both of these statutorily created options are briefly discussed below.

A. *“Taking” Species on Private Land Under ESA § 10: Habitat Conservation Plans (and Conservation Banks)*

Under ESA § 10(a)(2) a private landowner can enter into a “Habitat Conservation Plan” (HCP), allowing “incidental take” of an endangered species during land development.¹³ Under an HCP, developers would agree to set aside some land as preserves, and perhaps restore habitat elsewhere, in exchange for some habitat to be destroyed when the land was developed. These HCPs must show that there will be adequate funding for the plan so that the supposed conservation activities that the landowner anticipates to conduct will occur.¹⁴ When Congress initially amended the ESA to include the HCP provision, relatively few HCPs existed (there were only 39 HCP plans between 1985 and 1994).¹⁵ However after the government announced the “No Surprises” policy, more HCPs were developed (in 1995 alone, 86 HCPs were approved, and at the end of 1999, 294 HCPs had been approved).¹⁶ Under No Surprises, the government provides assurances to private landowners who enter into HCPs that these landowners need not worry about future additional regulatory requirements if the status of the species worsened and the individuals of the species that occurred on the HCP land became more important.¹⁷

HCPs later developed where an applicant was directly interested in “growing” species, a mechanism labeled by some as “conservation banking.”¹⁸ In some cases, a landowner wanted to grow species for “mitigation credits” to incidentally take species elsewhere (“internal credits”). Some HCP applicants were interested in “growing” species so that another landowner could pay the HCP applicant for the mitigation credit (“external credits” for third parties). In other words, the HCP applicant was creating a “mitigation bank” where other landowners could purchase mitigation credits, rather than conduct their own mitigation activity. Such a system would supposedly be efficient since it would permit a landowner to purchase a credit from the mitigation bank if the cost of the credit was less than the cost for the landowner to conduct his or her own mitigation activity. Conservation banks have been considered superior because of their “proactive” aspects, rather than traditional “reactive” HCPs.¹⁹ As a result, conservation banks allow the presence of an endangered species to provide for “an opportunity to generate income from what may have previously been considered a liability.”²⁰

However there have been several criticisms of the HCP and Conservation Bank system.²⁹ There is no assurance that the mitigation bank will successfully grow the anticipated species: a landowner may plant some trees for an endangered species, however it may turn out that the habitat lacks some other important aspect for the species, perhaps food, so that the species never establishes itself in this area. Though there may be an “incentive to carefully monitor the status of the endangered species on [a conservation bank] property,”²¹ and report when more endangered species are present for additional credits, there is not necessarily an incentive to report that the status of a species is doing poorly and where credits may become limited.²² Any information provided by the HCP or Conservation Bank may be suspect unless there is verification by independent scientists.²³ Critics also object to the long 50 to 100 year agreements for these HCPs that provide little opportunity for the Services to step in if drastic action is needed for a species,²⁴ or for adaptive management to address changed circumstances.²⁵

Another major criticism is that HCPs lead to an inefficient amount of land that is preserved for species - too much land, or not enough land, may be preserved under a

piecemeal HCP approach.³⁵ Though virtually all HCPs are under the jurisdiction of the Fish and Wildlife Service, the Service has not yet formally considered all these HCPs in total to determine its impact on the species as a whole.²⁶ Furthermore, an analysis of HCPs found that for at least 80% of the HCPs examined basic biological information, such as average life span and rates of change in population size, was unknown.²⁷ Once all these HCPs are considered in total, critics suggests that supposedly an efficient level of habitat conservation could be determined.²⁸ However, the Service would also have to consider other habitat not under HCP protection, a likely costly and difficult undertaking. Lastly, if the requirements to obtain an incidental take permit are too costly, landowners will have little incentive to enter into an HCP.²⁹

B. Safe Harbor Agreements: Another Innovation under ESA §10 to Help Recover Endangered Species and Private Landowners

The Services developed a second option under § 10 of the ESA to relieve private landowners from the Act's regulatory burdens know as Safe Harbor.³⁰ If a landowner has an endangered species on his or her land and takes action that, or by taking no action, ~~that~~ improves that species' habitat so that more species occur on the land (e.g. not cutting down trees for birds), the landowner has the flexibility to return that habitat to its initial condition (baseline) of when the landowner entered the program. This baseline condition is set prior to entering the Safe Harbor Agreement. Generally it is the number of species that occurred on the land when the private property owner entered the program.³¹ Furthermore a landowner could enter into the program without any individuals of a species occurring on the land, and if some endangered species take up residence on the property after entering the program, the landowner could return to the baseline condition of zero individuals of the species.³²

Though the Safe Harbor program does not create a positive incentive for federally listed species, it at least removes some of ESA's regulatory burdens and some of its regulatory property takings criticism. Another advantage is that the program provides options to landowners who want minimal government intrusion on their private property, rather than entering into a more involved HCP agreement with the government as discussed earlier. Also areas included in the Safe Harbor program are generally valuable for species and the Service would not have to worry if the landowner is unsuccessful in raising species. If individuals of the species occur on these lands, a landowner could choose to give up the option of returning the land to baseline conditions in exchange for money. In other words, the landowner could later upgrade the Safe Harbor agreement into a "conservation bank."³³

III. HABITAT TRADING VIA ENDANGERED SPECIES CONSERVATION BANKS: PROMISES AND PROBLEMS

Regulatory mechanisms that incorporate market concepts are more efficient than the traditional command and control ESA prohibitions. Through a trading scheme, the optimal level of environmental protection can be attained at the lowest possible cost. The actor who can attain greater environmental protection has the incentive to conduct actions greater than the minimum amount in order to create credits that can be purchased by actors who have higher compliance costs.³⁴ Trading also allows for the efficient allocation of scarce resources. Land with higher valued use could be used by paying the landowner of the lower valued property to conserve for the endangered species. Of course the quality of the endangered species habitat would be considered as part of the value of the developed land, so development on high quality habitat would

require greater mitigation.³⁵ Nonetheless, use of market trading would be more efficient and respond to economic conditions more readily than government command and control regulations.

The most commonly discussed market mechanism for endangered species recovery is a habitat trading scheme.³⁶ Habitat trading create credits that are equivalent between the harm to the species' habitat and traded for credits that mitigate that harm. Though credits are generally acres of habitat, other credit units have been considered or used.³⁷ Either the Services will determine the value of a credit or will let the traders determine the value of the credit, but the Services will then verify if the credit values are appropriate.³⁸ Current scholarship discusses how to determine the value of these credits³⁹ and other considerations such as if the habitat occurs in the same subregion or not.⁴⁰

There are disadvantages inherent in an endangered species habitat trading scheme. First, there are substantial administrative and transaction costs associated with the habitat transaction method.⁵¹ Second, trading units will be subdivided either by species and/or subregions (either for the species or for the area). As areas are subdivided, fewer potential participants are available in the market, leading to the problem of "thin markets" that possibly lead to the collapse of trading.⁵² Also, many of these endangered species occur in very local areas, restricting the number of parties that may choose to participate in the market. An unintended consequence is that environmental groups could purchase credits that drive up the cost of credits, which would dissuade developers from participating in the process and perhaps lead developers to "shoot, shovel, and shut-up" rather than purchasing credits.⁵³ Third, several endangered species may occur on the land, confounding the credit determination for each species and the land itself; conversely, landowners may have to purchase multiple credits from different areas which further increase transaction costs.⁵⁴ Some scholars have proffered various proposals to address the shortcomings of endangered species habitat trading.⁵⁵ The author here does not suggest recommendations for all of these shortcomings, but offers that a "trust" entity could help mitigate some of these problems, as discussed next.

IV. A "TRUST" WOULD FACILITATE HABITAT TRADING AND MAINTAIN THE VALUE OF AN ENDANGERED SPECIES CONSERVATION BANK.

Many scholars criticize the inefficiencies related to the HCP process and the current system to facilitate habitat trades. In addition to commenting on the trading system itself, this section also recommends that a trust and database maintained by a private third party, which could later become a public-private partner with the federal government, could help facilitate the endangered species trading system.

Generally, a private trust is set up for the benefit of an individual beneficiary, while a public trust, also termed "charitable trusts" is one in which the beneficiary is a governmental entity or the public welfare.⁵⁶ For the remainder of this article "public" will be to describe governmental involvement in a charitable trust. Also here, "private trust" will be used to describe an environmental organization acting as a "charitable trust," not where a private individual is the sole beneficiary of the trust.

A. The Organizational Advantages of Establishing a Trust for Endangered Species Recovery

Some criticism with the current HCP process may be because the government is in charge of the system and must be integrally involved in approving and monitoring

these HCPs. Since all habitat trades must be approved by the Services and the Services is responsible for enforcing the ESA, it may be a “natural monopoly”⁵⁷ that justifies the Service being the primary organization to collect information related to habitat trades.⁵⁸ However as long as the Services continue to be under-funded for activities related to the HCP program and consulting on habitat trade actions,⁵⁹ a private organization that supplements the Services’ responsibilities may increase the overall efficiency of habitat trading and realize cost savings such as a streamlined HCP and Conservation Bank process.⁶⁰ This private organization⁶¹ could duplicate some of the Services’ responsibilities, such as collecting and synthesizing information on HCPs, refuges, parks, etc., to determine the overall species’ status. Ultimately, a private-public partnership may be the most efficient option for considering and approving habitat trades and HCPs.

Specifically with HCPs, critics charge that the HCP process has been conducted piecemeal and not comprehensively. A systematic and coordinated framework assessing HCP management would allow for greater “adaptive management” to improve the HCP process.⁶² The Services would be the best place to manage such a centralized program, since they must approve all HCPs and Conservation Bank habitat trades. A first step would be to collect and organize all existing information on various conservation activities for endangered species and to make that information publicly available, and doing so would not be technologically difficult or expensive.⁶³ The Services did develop a preliminary database known as the Environmental Conservation Online System (ECOS)⁶⁴ that contains this information, but only on some HCPs.⁶⁵ However this database has been criticized to contain only “the most rudimentary data, such as plan location, size, application status, permit-issuance date, species covered, and duration for individual HCPs.”⁶⁶ The database also fails to compile information on HCPs to comprehensively consider the impacts of these HCPs on endangered species.⁶⁷ Thus, the ECOS database is of “marginal value.”⁶⁸ Furthermore, providing more resources to improve ECOS was politically unpopular because of past Congressional hostility to the ESA.⁶⁹

Because of the political hostility to the ESA, a private body that collects information for a centralized HCP database would be a better alternative. Of course this private organization, likely an environmental organization, would not have the regulatory authority of the Service, but could help to supplement many of the Service’s responsibilities. As mentioned earlier, a public-private partnership may ultimately be most efficient in coordinating endangered species habitat trades. A future presidential administration may be more amenable to endangered species protection, making greater government involvement in this centralized HCP database more likely.

Some private environmental organizations have attempted to compensate for the Services’ failure and have developed a private database on HCPs “to enable independent scientific expertise to be brought into HCP negotiations on behalf of conservation interests and local communities.”⁷⁰ Unfortunately, as one scholar notes, the “initiative to create an ‘HCP Resource Center’ never became operational, though seed money had been gathered and some Services field staff expressed support for such a center.”⁷¹ Thus, there is currently no centralized repository, either government or private, for a private land owner interested in creating an HCP or Conservation Bank to consult for assistance and benefit from efficiency savings.⁷² An advantage of having a centralized body available to assist in HCP development is that this body may have connections to interested stakeholders who could serve as a steering committee, and also access to independent scientists to review any biological information.⁷³ By incorporating additional parties the likelihood that an HCP or Conservation Bank is improved increases, and similarly any endangered species recovery.⁷⁴ Though private

landowners may prefer the traditional process of working just with the Service to minimize upfront transaction costs, hoping that Services' requirements will be lax, improving the process would allow for greater certainty for this and other HCP or Conservation Bank that cover the species.⁷⁵ Thus a trust, as a database, would serve to facilitate the creation and efficacy of any HCP or Conservation Bank to recover endangered species.

*B. The Economic Advantages of Using a Trust to Facilitate Endangered Species Mitigation Conservation Banking*⁷⁶

A private environmental organization for centralized HCP and Conservation Bank information also has the additional advantage of acting as a "trust" to ensure the marketability of future habitat trades, provided that the organization could raise money to fund the trust. The trust, besides funding additional work needed for HCP planning, implementation, and monitoring, would serve two important functions. First, the trust would remove the perverse incentive not to recover a species. The HCP and Conservation Banking property where federally listed species occurs has economic value so long as these species remain listed. Once these species are delisted, excess endangered species habitat credits no longer have any additional value. In other words, there is a perverse incentive with Conservation Banks not to recover a species. To address this problem, the trust could choose to purchase these extra credits for the delisted species, so long as the trust could determine that the HCPs and Conservation Banks sincerely created credits for a viable market⁷⁷ rather than to obtain greater value for their land.⁷⁸

Thus, the trust could act to provide "insurance," the second advantage of having a private centralized organization for HCPs, Conservation Banks and Safe Harbor Agreements. A Conservation Bank could create habitat credits for a certain species, but if no other developers need credits for the same species this scenario would make the conservation bank worthless.⁷⁹ Because of the uncertainty of demand for credits, private landowners may not set up Conservation Banks to develop credits. By guaranteeing to purchase credits for species that do not have a market or have a very limited market due to the limited range of some species, this trust would help to increase both supply and demand for endangered species habitat credits and help to "thicken" a thin or non-existent market.⁸⁰ Also, if there is not a market for these species, private individuals or environmental organizations could purchase these credits without fear of driving up the price of credits, due to lowered supply, and creating a disincentive for landowners to participate in the trading system, as mentioned above in Section III.⁸¹

The insurance aspect of this trust would also help to mitigate the criticism of HCPs' No Surprises rule. To accommodate for No Surprises, scholars have advocated for incentives of direct federal loans,⁸² grants,⁸³ or tax credits⁸⁴ to permittees who provide information and engage in adaptive management.⁸⁵ Rather this trust, having a private component, could provide grants in addition to non-monetary expert assistance in setting up an HCP, Conservation Bank or Safe Harbor Agreement.⁴¹ As a quasi-insurance entity, the trust could also provide insurance payouts for changed circumstances for endangered species recovery.⁴² To spread out the risk to landowners of new requirements such as changes to habitat management on HCPs and Conservation Banks, the insurance payments from the trust would pay for these unforeseeable changes.⁴³ As one author suggests, this insurance program, in trust form, could be "subsidized in a manner similar to the federal crop insurance program."⁴⁴ But rather than having "Conservation bank owners [] pay premiums to purchase such insurance, as in a more typical insurance plan,"⁴⁵ a disincentive for creating

Conservation Banks, the trust (funded by a private environmental organization) would pay for these premiums contingent that private landowners provide adequate information and allow for inspection of the land.⁴⁶

A limitation the trust would have to consider is whether it would have sufficient funds to pay for all credits that it “insures.” But landowners who provide information on endangered species to the trust, and agree to modify the HCP or Conservation Bank to accommodate for adaptive management,⁴⁷ would have insurance preference. These preferred landowners could be guaranteed 80 to 100% of the value of the credit, while those “non-preferred” could be guaranteed lesser amounts. Insurance preference would then create “incentives for the generation and disclosure of information.”⁴⁸

V. CONCLUSION

The use of free market trading of credits for federally listed species helps to mitigate the ESA’s regulatory burden by creating value for the presence of endangered species on private land. Trading endangered species credits, usually in the unit of habitat, allows for higher valued land uses to continue in exchange that other endangered species habitat is restored or preserved. The market for endangered species habitat trading is still in its infancy due to the recent ESA § 10 innovations during the mid to late 1990s: the “No Surprises” rule for HCPs, Conservation Banking and Safe Harbor Agreements. However there are still many market failures with endangered species habitat trading.

The author here believes that the establishment of a trust executed by either a private environmental organization, or jointly run by a private environmental organization and the U.S. Fish & Wildlife Service can help facilitate the market of endangered species habitat trading. This trust can improve the efficiency of endangered species recovery by providing information assistance for the landowner to set up a Conservation Bank and similarly improve the quality of information about the endangered species on that private land. A trust can also provide economic assistance for Conservation Banks, bestowing insurance for the private landowner that any recovery activities will be in some way compensated. Thus this trust can help address some of the market failures of the disincentive to recover species and the thin markets associated with endangered species habitat trading.

Though many market failures remain with habitat trading, Conservation Banks should continue to be developed and encouraged. First, as long as there are regulatory burdens imposed on private landowners, these landowners have no incentive to help recover endangered species and every incentive to surreptitiously violate the ESA and lobby to gut the Act. Second, in some cases, ultimate recovery of an imperiled species will require immediate action to prevent further endangerment in the species’ status; establishing a Conservation Bank may ensure that key habitat for an endangered species will be preserved for its future. Lastly, to entrust endangered species recovery in just command-and-control regulations would be foolhardy and naïve, and to ignore tradable mitigation credits would remove a valuable tool in the recovery of endangered species.

¹ Endangered Species Act of 1973, 16 U.S.C. 1531-1544.

² See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); but see *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

³ E.g., Erik Stokstad, *What's Wrong With the Endangered Species Act?* SCIENCE. 30 September 2005:

Vol. 309, no. 5744, pp. 2150-52 at 2151; and Stephen Quarles, *The Pit Bull Goes To School: The Endangered Species Act at 25: What Works?*, 15 THE ENVIRONMENTAL FORUM 55, Environmental Law Institute (1998).

³ HCPs in particular have been touted as one of the most prominent and significant advances in environmental law by transforming the “command and control model into a contractual model.” Jean O. Melious & Robert D. Thornton, *Contractual Ecosystem Management Under the Endangered Species Act: Can Federal Agencies Make Enforceable Commitments?*, 26 ECOLOGY L.Q. 489, 490 (1999). Similarly, the Safe Harbor program has been embraced by both Democrat and Republican Interior Secretaries for its regulatory innovation to mitigate the regulatory burden of having endangered species on private property. J.B. Ruhl, *Endangered Species Act Innovations in the Post-Babbitonian Era- Are There Any?* 14 DUKE ENVTL. L. & POL'Y F. 419, 434 (2004).

⁴ A trust is a fiduciary relationship regarding property and charging the person or organization with title to the property with equitable duties to deal with it for another's benefit; in this case the beneficiary is the general public. Black's Law Dictionary (8th ed. 2004).

⁵ Under the ESA, the U.S. Fish & Wildlife Service generally implements the ESA for terrestrial and fresh water species, and NOAA Fisheries generally implements the ESA for marine species. In this article, Service will generally refer to the Fish & Wildlife Service since the terrestrial species that impact land owners will be under their authority.

⁶ Generally throughout the remainder of this writing, “endangered species” will mean ~~both endangered or both endangered and~~ threatened species (which are “federally listed species”). An endangered species “means any species which is in danger of extinction throughout all or a significant portion of its range...” ESA § 3(6). A threatened species “means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” ESA § 3(19). Threatened species technically do not receive the ESA's “take” protection of § 9; however the Services by regulation have granted threatened species the same level of protection as endangered species under ESA § 4(d).

⁸ “Take” is defined under Section 3(18) as “to harass, harm, pursue, hunt, shoot, wound, kill, trap capture, or collect, or to attempt to engage in any such conduct.” The Services broadly defined “harm” under take to include habitat modification, which was upheld by the Supreme Court in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 515 U.S. 687, (1995). Though the broad interpretation of harm extends to all species, it is generally limited only to animals. § 9(a)(2) limits take of plants on federal land, transport or sale, unless a state's “ESA” law provides additional protection.

⁹ A knowing violation against an endangered species can be punished by imprisonment for a year and a fine of up to \$50,000; violations for threatened species carry punishments of imprisonment for six months and a fine of up to \$25,000. 16 U.S.C. § 1540(b)(1).

¹⁰ Eugene H. Buck et al., *The Endangered Species Act in the 109th Congress: Conflicting Values and Difficult Choices* 3, 13 (2006).

¹¹ *Id.* at 12.

¹² Private landowners are important in the recovery of many endangered and threatened species. In 1996,

more than half of the U.S. endangered or threatened species had at least 81 percent of their habitat on non-federal land, and between a third and a half of the protected species do not occur at all on federal land. David S. Wilcove, Michael J. Bean, Robert Bonnie, & Margaret McMillan, *Rebuilding the Ark: Toward a More Effective Endangered Species Act for Private Land*. December 5, 1996. http://www.edf.org/documents/483_Rebuilding%20the%20Ark.htm

¹³ Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. LAW & ECON, 27 (2000).

¹⁴ In addition to being an illegal violation of the ESA, such action is also economically inefficient because the investment in time and effort in evading the law will produce “deadweight losses.” John. D Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L., 1, 20 (2005).

⁷ *Id.*

⁸ David S. Wilcove & Linus Y. Chen, *Management Costs for Endangered Species*, 12 CONSERVATION BIOLOGY 1405, 1405 (1998).

⁹ Michael J. Bean, *The Endangered Species Act: Success or Failure*, 2 (May 2005), http://www.edf.org/documents/4465_ESA_Success%20or%20Failure.pdf

¹⁰ ESA § 10(a)(2)(B)(i) and (ii).

For example, if an endangered bird nested in a hollow of a tree, and the actor made every reasonable effort to make sure that no birds would be harmed, if the actor was granted a Section 10 permit, the actor could cut down the tree without incurring any Section 9 liability by destroying the bird's habitat or accidentally killing the bird, if it remained in the tree while the tree was being cut down.

¹¹ ESA § 10(a)(2)(B)(i). Permits issued under section 10 of the ESA are "Incidental Take Permits."

¹² Of course self-defense exceptions still apply. ESA § 11(a) and (b).

¹³ HCPs became more prevalent during the Clinton administration when the ESA was under attack by a hostile Congress after the 1994 Republican takeover of Congress. John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A preliminary View*, 31 ENVTL. L. 199, 213-241 (2001); A. Dan Tarlock, *Slouching Toward Eden: The Eco-Pragmatic Challenges of Ecosystem Revival*, 87 MINN. L. REV. 1173, 1199 (2003).

¹⁴ ESA § 10(a)(2)(B)(iii).

¹⁵ Environmental Defense, *Progress on the Back Forty, An Analysis of Three Incentive-based Approaches to Endangered Species Conservation on Private Land*, 17 (Jan. 2000), http://www.edf.org/documents/150_BackForty.pdf.

¹⁶ *Id.*

¹⁷ See U.S. Fish & Wildlife Service, Habitat Conservation Plan Assurances: "No Surprises" Questions and Answers, <http://www.fws.gov/endangered/hcp/NOSURPR.HTM>. The federal government issued the draft "No Surprises" policy in 1994, and finalized the policy in 1998. 63 Fed. Reg. 8859.

Many scholars have been very critical to the "No Surprises" policy. See Alejandro E. Camacho, *Can Regulation Evolve? Lessons From a Study in Maladaptive Management*, 55 UCLA L. REV. 293, 355 (2007) (Arguing that the No Surprises rule creates "significant incentives for applicants to thwart monitoring and adaptive implementation). See also Christopher S. Mills, *Note: Incentives and the ESA: Can Conservation Banking Live Up to Potential?*, 14 DUKE ENVTL. L. & POL'Y F. 523, 532-533 (2004) (Mills argues that the No Surprises rule creates the perverse incentive for HCP landowners not to report unforeseen circumstances to the Services; also Mills argues that the Services are "unable to make changes itself, even if it is aware that changes are needed, as a result of chronic under-funding.").

¹⁸ Mills, *supra* note 25.

¹⁹ *Id.* at 530-531.

²⁰ Memorandum from Matt Hogan, Acting Director of the U.S. Fish and Wildlife Service, to the Regional Directors, Region 1-7, Manager, California Nevada Operations Office (May 3, 2003), available at <http://endangered.fws.gov/policies/conservation-banking.pdf>. Notice of availability at 68 Fed. Reg. 24753 (May 8, 2003). For example in California, as of 1996, 39 conservation banks had been or were in the process of being established at a land value of at least \$40 million. A Report of The California Resources Agency and the Department of Fish and Game, *A Catalogue of Conservation Banks in California: Innovative Tools for Natural Resource Management*, June 1996, at 1.

²⁹ For general criticism on the HCP process itself, see Camacho, *supra* note 25, arguing the HCPs are inadequate because they do not involve more and earlier public involvement, and that this particularly precludes the consideration of sufficient science in the plans. Also the process creates a the disincentive to include other parties because of the additional short-term transaction costs borne by the Services and HCP landowners along with increasing complexity with additional parties; but including additional parties would improve the long-term value of the HCP, *Id.* at 319-320, and the costs of developing future HCPs would decrease with experience, *Id.* at 348. Camacho also argues that HCPs are ineffective because the Service relies on information

from the landowner, and thus there is no incentive for the landowner to be honest and question the credibility of the information without independent scientists to verify the landowner's claims. *Id.* at 320.

²¹ Mills, *supra* note 25, at 538.

²² By locating key monitoring functions with the applicant, the Services have made the temptation for an applicant to conceal unfavorable data incredibly strong. Camacho, *supra* note 25, at 328.

²³ *Id.* at 320.

²⁴ Frances James, *Lessons Learned from a Study of Habitat Conservation Planning*, 49 *BIOSCIENCE* 871, 873 (1999).

²⁵ See George F. Wilhere, *Adaptive Management in Habitat Conservation Plans*, 16 *CONSERVATION BIOLOGY* 20 (2002).

³⁵ See Jonathan Remy Nash, *Trading Species: A New Direction for Habitat Trading Programs*, 32 *COLUM. J. ENVTL. L.* 1, 18 (2007).

²⁶ Craig W. Thomas, *Habitat Conservation Planning* at 159, 164, in Archon Fung & Erik Olin Wright, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (2003). The Services' failure to include affected HCP neighbors late in the process led to distrust, polarization, and ultimately many fragmented HCPs rather than a more cost-effective and comprehensive regional HCP.

²⁷ Carol Kaesuk Yoon, *Many Habitat Conservation Plans Found to Lack Key Data*, *N.Y. TIMES*, Dec. 23, 1997, at F3.

²⁸ Nash, *supra* note 35, at 25-26.

²⁹ James Salzman & J.B. Ruhl, *Apples for Oranges: The Role of Currencies in Environmental Trading Markets*, 31 *ENVTL. L. REP.* 11438, 11448 (Dec. 2001).

³⁰ § 10(a)(1)(A), 64 FR 32717. Landowners who enroll in the Safe Harbor program receive "enhancement of survival" permits under this subsection that allow "incidental take" for activities that return to "baseline" the number of individuals of a species on the property.

³¹ However the baseline number of individuals may be set higher than the number of individuals currently extant. *Id.*

³² However, the Services would have the opportunity to come on to the property before any action to "return to baseline" to remove and relocate the species elsewhere. *Id.* at 32719.

³³ However, these landowners may be limited by the requirement that a conservation bank section "must be large enough to be ecologically self-sustaining." Hogan, *supra* note 28, at 1.

³⁴ Nash, *supra* note 35, at 13.

³⁵ *Id.*

³⁶ For a discussion of another proposed market mechanism for endangered species, see Nash *supra* note 35 (Nash argues for using a "constrained ambient emissions trading" approach for endangered species. Under Nash's constrained approach, rather than trading habitat, Nash argues for trading based on units of environmental degradation. *Id.* at 32.).

³⁷ At a smaller scale, individual elderberry bushes are used as a credit unit for the threatened valley elderberry longhorn beetle. On the other side of the scale, colonies of the endangered red-cockaded woodpecker have been considered as a unit, rather than acres of the woodpecker's pine forests.

³⁸ Nash, *supra* note 35, at 13.

³⁹ *Id.*, at 19-29, evaluating Todd G. Olson, Dennis D. Murphy & Robert D. Thornton, *The Habitat Transaction Method: A proposal for Creating Tradable Credits in Endangered Species Habitat*, in *Building Economic Incentives into the Endangered Species Act: A Special Report from Defenders of Wildlife* (Hank Fischer & Wendy E. Hudson eds., 1994), and David Sohn & Madeline Cohen, *Note, From Smokestacks to Species: Extending the Tradable Permit Approach from Air Pollution to Habitat Conservation*, 15 *STAN. ENVTL. L.J.* 405 (1996).

⁴⁰ Jon H. Goldstein & H. Theodore Heintz, Jr., *Incentives for Private Conservation of Species and Habitat: An Economic Perspective*, in *Building Economic Incentives into the Endangered Species Act: A Special Report from Defenders of Wildlife* (Hank Fischer & Wendy E. Hudson eds., 1994) at 55.

⁵¹ Nash, *supra* note 35, at 28. Similarly, Camacho, *supra* note 25, at 341 notes that the chief criticism of HCPs from applicants is the administrative cost of the approval process.

⁵² Nash, *supra* note 35, at 29-30. Mills, *supra* note 25, at 555-560 suggests that a requirement that developers obtain a federal permit to survey for endangered species would obtain information and allow for the “thickening” of the market. As developers see a demand for credits, some of the developers will elect to use their land as conservation bank, leading to an increase in supply. However Mills recognizes this federal permit requirement is politically unfeasible considering property rights: government intrusion on private land and government intrusion on traditionally local concerns.

⁵³ Mills, *supra* note 25, at 540 and 549. Mills (at 540) argues that Conservation Banks are advantageous because they provide “non-developers to take a proactive approach to species protection without creating conflict between economic and environmental interests,” however Mills does not consider the conflict of driving developers out of the trading system if credits become too expensive.

⁵⁴ Nash, *supra* note 35, at 38.

⁵⁵ See *Id.* at 32. Nash argues for trading based on units of environmental degradation, rather than based on acres of endangered species habitat. See also Michael J. Bean & Lynn E. Dwyer, *Mitigation Banking as an Endangered Species Conservation Tool*, 30 ENVTL. L. REP. 10537, 10548 (July 2000), that another credit system based on “survival probability of the species for some given period of time” would be an ideal metric. However Bean and Dwyer recognize that “our ability to quantify precisely current survival probabilities and the impacts of helpful or harmful actions is rudimentary to nonexistent.” *Id.*

⁵⁶ Laura Dietz, J. D., et al., *American Jurisprudence*, Second Edition (2008).

⁵⁷ Albeit a natural monopoly created by ESA regulations.

⁵⁸ A further advantage as a natural monopoly is that the Services could learn from current HCPs to improve future HCPs and conservation programs to reduce costs and increase the efficiency of conservation measures. Camacho, *supra* note 25, at fn 321, citing Habitat Conservation Plans: Hearings Before the Subcomm. on Fisheries, Wildlife, and Drinking Water of the S. Comm. on Env't and Pub. Works, 106th Cong. 150, 97 (1999) (statement of Donald J. Barry, Assistant Secretary for Fish and Wildlife and Parks) (“[We should] be able to develop more of a template HCP that could be utilized readily, pulled off the shelf in a particular area for certain species, and use that as a way of streamlining the cost and the process.”); *id.* at 10 (statement of Peter Kareiva, NMFS) (“If we did produce data bases, if we put energy into that, subsequent efforts would go much faster Any data that you put in a computer data base for any of those HCPs will inform future conservation plans that touch on those same species.”).

⁵⁹ Camacho, *supra* note 25, at 333-34 and 348-349. Insufficient resources are spent on HCP implementation activities because of limited public funding, a fact that the U.S. Government Accountability Office (GAO), changed in 2004 from the General Accounting Office, reported that the Services were allocated \$ 2 million in fiscal year 2001 for all HCP monitoring and implementation (a small sum considering the more than 450 HCPs nationwide), and that field staff spend only 2 percent of their time on monitoring activities. See U.S. Gen. Accounting Office, *Endangered Species Program: Information on How Funds Are Allocated and What Activities Are Emphasized* 12, 17 (2002), <http://www.gao.gov/new.items/d02581.pdf>.

⁶⁰ See *supra* note 58.

⁶¹ A private organization to serve this role would likely be an environmental organization such as Environmental Defense Fund (EDF), The Nature Conservancy, or Defenders of Wildlife, which have market incentive programs for habitat conservation. EDF already has a “Center for Conservation Incentives” that could provide many of the organizational and economic assistance described in this writing. See <http://www.edf.org/page.cfm?tagID=117> (last visited June 16, 2008). Other environmental-wildlife organizations that could set up this program could also be the World Wildlife Fund or National Wildlife Federation.

⁶² Camacho, *supra* note 25, at 337, and Wilhere, *supra* note 34.

⁶³ *Id.* at 337-338.

⁶⁴ See U.S. Fish & Wildlife Serv., Environmental Conservation Online System, http://ecos.fws.gov/ecos_public/index.do (last visited June 16, 2008).

⁶⁵ Camacho, *supra* note 25, at 339.

⁶⁶ *Id.* at 338.

⁶⁷ *Id.* at 339.

⁶⁸ *Id.* at 339.

⁶⁹ See, e.g., The Endangered Species Reform Act of 2007, S. 658; Threatened & Endangered Species Recovery Act of 2005, H.R. 3824.

⁷⁰ Natural Heritage Inst., *Where Property Rights and Biodiversity Converge: Lessons From Experience in Habitat Conservation Planning* 23.

⁷¹ Camacho, *supra* note 25, at 339, citing a Telephone Interview with Greg Thomas, President, Natural Heritage Institute (June 27, 2006).

⁷² As Camacho, *supra* note 25, notes The Nature Conservancy has created NatureServe.org, a publicly available electronic database that serves as a repository of scientific data about endangered and threatened species. However, no data on HCPs is included in the database. See *supra* note 58.

⁷³ Camacho, *supra* note 25, at 350.

⁷⁴ See *supra* note 29.

⁷⁵ *Id.*

⁷⁶ To the author's knowledge, no articles have proposed the advantages of having an organization serve as a trust to assist the market. Rather, as described *infra*, other authors have proposed a private insurance scheme that does not involve an environmental organization to ensure for the marketability of habitat trades. The author surmises that environmental groups have not considered entering the market to facilitate habitat trades because of the focus for the past several years on climate change advocacy.

⁷⁷ The trust would then work in a manner similar to the Bill and Melinda Gates Foundation with regard to vaccines. To spur development of a vaccine for a developing world illness, which generally is not profitable, the Foundation guarantees to purchase a certain quantity of vaccines, creating an incentive to create the vaccine, even if an illegal cheaper form of the vaccine is developed soon after.

<http://www.gatesfoundation.org/MediaCenter/Speeches/Co-ChairSpeeches/BillgSpeeches/BGSpeechWEF-080124.htm> (last visited June 16, 2008).

⁷⁸ The trust would also create an organizational advantage for an environmental group that sponsored the trust. The trust would be a marketing tool for the environmental group to solicit donors. The trust money would be kept by the environmental group to be used in case excess credits would have to be purchased. In the meantime, the interest from the money collected for the trust could be used by the environmental group to run the centralized HCP database and program.

⁷⁹ Mills, *supra* note 25, at 555.

⁸⁰ Again, this trust would work like the Gates Foundation-vaccine example in *supra* note 77, guaranteeing a market.

⁸¹ Of course if the landowner was trying to trade impaired habitat or excess endangered species habitat, the trust could choose not to purchase the credit, or only pay for a small percentage of the credit.

⁸² Camacho, *supra* note 25, at 357, citing Endangered Species Recovery Act of 1997, S. 1180, 105th Cong. § 5(h) (1997) (proposing the Habitat Conservation Planning Loan Program, which would have provided no-interest loans to states and municipalities to assist in plan development).

⁸³ *Id.* at § 5(m) (proposing grants to HCP parties to perform additional mitigation measures to address unforeseen circumstances).

⁸⁴ Camacho, *supra* note 25, at 357 citing Endangered Species Recovery Act of 2007, S. 700, 110th Cong. (2007) (introduced Feb. 28, 2007) (proposing tax credits and deductions for landowners who engage in habitat conservation efforts on their property).

⁸⁵ Wilhere, *supra* note 34.

⁴¹ In contrast to the private trust concept, Camacho, *supra* note 25, at 357 suggests that the federal government could help to regulate the habitat trading market. The Services could levy penalties on permittees for noncompliance, which help fund the incentive program. *Id.* citing Endangered Species Act: Incentives to Encourage Conservation by Private Landowners: Hearing Before the Subcomm. on Environment and Natural Resources of the H. Comm. on Merchant Marine and Fisheries, 103d Cong. 81 (1993) (statement of Larry McKinney, Texas Parks and

Wildlife Department) (describing an unadopted proposal for a "federal tax penalty, or severance tax ... levied on lands converted to uses not compatible with the support of endangered, threatened and candidate species, or significant biodiversity habitat... . Moneys from the tax penalty would help fund the various incentive programs"). Camacho also suggests that "Congress could develop a credit program that allows permittees to reduce their costs for mitigation in exchange for generating and disseminating reliable data that benefit regional or national conservation efforts." *Id.* citing Nash, *supra* note 35. Another benefit would be a streamlined administrative review process and more deferential judicial review for cooperative landowners. *Id.*

⁴² Mills, *supra* note 25, at 553.

⁴³ *Id.*, citing Meryl Eschen, *A Market Based Alternative to Current Policy Under the Endangered Species Act: A No Surprises Insurance Program* (2004) (unpublished masters project on file with Mills) (describing the basis for a No Surprises Insurance program).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Wilhere, *supra* note 34.

⁴⁷ *Id.*

⁴⁸ Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L.J. 50, 71-72 (2001); ("Providing appropriate incentives for the generation and disclosure of information ... is critical to the effective protection of endangered species on private land.").

ENVIRONMENTAL LAW SECTION COUNCIL MEETINGS

MEETING MINUTES – November 10, 2007

Present: Susan Topp, John Byl, John Tatum, Scott Hubbard, Chuck Barbieri, Chris Dunsky, Jeffrey Haynes, Bob Schroder, Grant Trigger, Charles Toy

By phone: Craig Hupp, Mike Caldwell, Anna Maiuri, Matt Eugster

Susan Topp called the meeting to order at 10:10 a.m.

1. MINUTES:

John Tatum moved, with support by John Byl, to approve the minutes of the September 27, 2007 meeting. The motion passed unanimously.

2. SECRETARY-TREASURER'S REPORT:

Chuck Barbieri presented the Secretary-Treasurer's Report and advised that the Section's account had a balance of \$45,368.70 based on State Bar records. John Tatum moved to accept the Treasurer's Report and John Byl seconded. The motion passed unanimously.

Grant Trigger recommended that the Officers and Council plan a budget for revenues and expenditures for the upcoming year.

3. STANDING COMMITTEE REPORTS:

A. Membership Committee.

Susan Topp reported on behalf of Committee Chair Dustin Ordway that there was no Committee Report.

B. Program Committee.

Susan Topp reported that the Section will co-sponsor a seminar on November 28, 2007, along with the East and West Michigan Chapters of the Air and Waste Management Association ("AWMA"). She also reported that Steve Chester, Director of the Michigan Department of Environmental Quality ("MDEQ"), had sent her an e-mail expressing his surprise that the program for the seminar did not include any presenter from MDEQ. Craig Hupp noted that Vince Helming of MDEQ is a member of the Board of the East Michigan AWMA, and presumably could have obtained an appropriate MDEQ presenter for the program. John

Tatum proposed that Susan Topp respond to Mr. Chester's e-mail and urge MDEQ and the Department of Attorney General ("MDAG") to participate more actively in Environmental Law Section activities. Chris Dunsky suggested that a telephone call might receive more attention than an e-mail response. The matter was concluded when Susan Topp requested John Tatum to call Mr. Chester to invite an MDEQ presenter to participate in the November 28, 2007 seminar and to welcome greater participation by MDEQ and MDAG in Environmental Law Section matters.

Finally, Susan Topp noted that the Program Committee also plans to hold a "nuts and bolts" winter program at a ski resort or other location in northern Michigan, perhaps Otsego or Boyne, in late February or early March, 2008.

C. Environmental Law Journal.

John Byl noted that Lee Johnson, the current Journal editor, has material from several sources ready for publication, but has not published the Michigan Environmental Law Journal since Summer of 2006. Bob Schroder, former editor of the Journal, expressed concern that the Journal had not been published for a year and wondered whether Lee Johnson needs help. John Byl reported that he had discussed the status of the Journal with Lee Johnson, and that Johnson's busy work load may be a factor. Chris Dunsky volunteered to speak with Johnson on this issue and to suggest several alternatives for him to consider, including an offer by Bob Schroder either to provide assistance or to resume responsibility for the Journal.

D. Technology Committee.

John Tatum reported that the Family Law Section had begun a "wiki" site operated by the State Bar which enables members to create and revise articles of interest to that Section in a manner similar to the popular "wikipedia" online encyclopedia. Tatum suggested that the Environmental Law Section may want to establish a similar "wiki." There was much discussion concerning how such an online service would operate and who would control and/or edit the content of such a site. No action was taken.

John Tatum noted that Section Member Charles Toy will become President of the State Bar on October 1, 2009, and suggested that the Section should seek to have the October 2009 version of the State Bar Journal devoted to environmental law issues. John Byl and Anna Maiuri offered to see what can be done to achieve that result.

E. Deskbook Committee.

Jeff Haynes wants to publish a new Deskbook both in print and on the State Bar website where access would be free for State Bar Members. He suggested that the Deskbook could be published one chapter at a time, perhaps with preliminary versions given to Council members for review. The online version could contain links to reported cases and statutes, and possibly include links to a "wiki" where readers could be allowed to supplement the text of the chapter with comments. Haynes is working with Tatum on the "wiki" issue.

So far Haynes has received a chapter on water pollution from Tom Wilczak and has a draft chapter from Paul Bohn. Joe Quandt has nearly completed a draft chapter on takings. Haynes has received outlines of chapters from all other attorneys who have assignments.

Trigger suggested that the Section use its budget to provide more support for completing the Deskbook project. He also questioned whether allowing non-authors to publish comments in a "wiki" format would be appropriate for a scholarly project like the Deskbook. Haynes suggested that the Section sponsor a web log ("blog") as an alternative to including a "wiki" feature in the Deskbook. Bob Schroder suggested that sponsoring a blog could be a way to stimulate articles for publication in the Michigan Environmental Law Journal. Charles Toy stated that Ann Vrooman, an employee of the State Bar, is available to help Sections with "cutting edge" technological issues including blogs, and wikis, and offered to put Tatum and Haynes in touch with her.

4. SUBJECT MATTER COMMITTEE REPORTS

A. Air Committee.

No report.

B. Environmental Litigation Administrative Practice Committee.

No report.

C. Hazardous Substances and Brownfield Committee.

Craig Hupp reported that Charlie Denton has taken over as new Chair of the Committee and intends to plan a meeting to discuss a recent Sixth Circuit decision.

D. Natural Resources Committee.

No report.

E. Water Committee.

No report.

5. LIAISON REPORTS

A. Real Estate Section.

Pat Paruch submitted a report by e-mail on November 7, 2007. The reported noted that Melissa Papke of Varnum Riddering and Richard Sundquist of Clark Hill are Co-Chairs of the Environmental and Energy Law Committee of the Real Property Law Section, and that Pat will continue as the Committee Coordinator with the Environmental Law Section. She also noted that the Environmental and Energy Law Committee is looking for an author to produce an article for the spring 2008 Michigan Real Property Review.

6. CHAIRPERSON'S REPORT

Sue Topp reported that the Section is responsible for part of the costs for the AWMA seminar to be held in November at Lansing Community College. The total costs are about \$6,000. Chuck Barbieri stated that we should inform law schools about this event. John Byl noted that professors at law schools are our best contacts and offered to provide a list of our law school contacts.

Grant Trigger suggested that the Section should offer two scholarships (at a cost of \$40-\$50 each) for two law students to attend the AWMA program. Grant Trigger made a formal motion to this effect, supported by John Byl. The motion was passed unanimously.

John Tatum and Craig Hupp noted that they are working on a Clean Air Act mock negotiation session at one or more law schools.

Susan Topp reported that she had received a survey from the Computer Law Section asking what web-based tools the Section uses to serve our members. John Tatum had discussed this with the Computer Law Section. Topp delegated this issue to Tatum for further handling.

Peter Holmes noted that according to the Section's by-laws, recent Section Chairs should be listed as ex officio members of the Environmental Law Section Council, and requested that Section documents be corrected accordingly.

Sue Topp informed the Council that John Byl had recently been listed in Who's Who – International for Environmental Law, and expressed congratulations to him on behalf of the Council for that accomplishment.

Sue Topp directed a discussion of goals for the Section to achieve during the coming year as follows:

- Deskbook Committee: Have one chapter up on the web by the next Council Meeting, and several additional chapters done by the June Council Meeting.
- Michigan Environmental Law Journal: Publish three or four times during calendar year 2008.
- Continue to hold quarterly Council Meetings. The next Council Meeting will be on February 23, 2008 at Michigan State University Law School.
- Develop plans for revenues and expenditures.
- Propose a State legal milestone related to environmental law.

7. NEW BUSINESS

Sue Topp presented John Byl with a copy of Russ Cobane's print in recognition of his service as Council Chair for the past year.

8. OLD BUSINESS

Anna Maiuri offered the use of Miller Canfield's video conferencing facilities in Grand Rapids, Lansing and/or Detroit for Council purposes, possibly including Council meetings.

The meeting adjourned at noon.

MEETING MINUTES – June 16, 2008

Present At Ralph McMullen Center, Higgins Lake: Susan Topp, Chuck Barbieri,
Christopher Dunsky, John Tatum, Kurt Brauer, Timothy Lozen, Anna Maiuri, Craig Hupp,
James O'Brien, John Byl

Present by phone: Scott Hubbard, Dustin Ordway, Kurt Kissling, Matthew Eugster
and Michael Caldwell

Susan Topp called the meeting to order at 10:00 a.m.

9. MINUTES OF PRECEEDING MEETING:

Secretary-Treasurer Chris Dunsky distributed copies of the May 19, 2008 draft of the Council's February 23, 2008 meeting, which had previously been distributed for review by e-mail. Tim Lozen moved, with support by Anna Maiuri, to approve the minutes of the February 23, 2008 meeting. The motion passed unanimously.

10. SECRETARY-TREASURER'S REPORT:

Chris Dunsky distributed copies of the report from the State Bar for the Section's finances for the eight months ending May 31, 2008. The Section has a balance of \$62,603.32, much of which the Council authorized at its last meeting for use on the Deskbook. John Tatum noted that he and Jeff Haynes have just hired a law student to work for the Section on cite-checking chapters for the Deskbook. Susan Topp reported that Jeff Haynes has received first drafts of Deskbook chapters for water, takings, and wetlands, and expects to receive drafts of two more chapters soon. However, there are some chapters for which the authors have not yet submitted outlines. Haynes expects three chapters to be ready for publication in electronic form soon, and all chapters may be ready for electronic publishing by the State Bar annual meeting in September. Susan Topp suggested, and the Council agreed, that chapters should be published electronically when available rather than waiting for all chapters to be completed.

The Secretary-Treasurer's Report was accepted.

11. STANDING COMMITTEE REPORTS:

F. Membership Committee.

Dustin Ordway reported that a membership directory of Section members has been circulated, and that he received appreciative comments from many members.

Ordway also reported that 14 individuals have requested to be listed on the Section's web page as "certified mediators," and that he will confirm that each of them has some sort of certification before listing them. Discussion followed concerning various forms of certification available to mediators. Several Council Members were of the view that we should not insist on any particular form of certification as long as the individual to be listed has some formal training in the skills necessary to be an effective mediator. After discussion, Ordway moved to send the list to the Council for approval prior to posting. The posting will indicate what certification or qualification each mediator has, with an explanation that the Section makes no representations concerning the adequacy of any particular individual's training or qualifications to serve as a mediator. Craig Hupp seconded, and the motion was approved.

It was noted that the Section's Bylaws establish annual dues of \$2.00 for law students, although the Council has waived collection of those dues because the amount is too small to make it worthwhile to collect them. Craig Hupp moved that Council: (1) continue its current practice of waiving dues for students, pending possible change in the Section's Bylaws; and (2) direct the Chair to start the process of amending the Bylaws to waive dues for law student members of the Section permanently. The motion passed.

Chuck Barbieri moved that the Council waive dues for the 2008-2009 year for all employees of the State of Michigan. Dustin Ordway moved to amend the motion to provide for the waiver of dues for 2008-2009 for employees of all governments. Barbieri accepted the amendment. After discussion, the motion, as amended, was passed. It was suggested that the Membership Committee broadcast this information to the Michigan Municipal League and state agencies as soon as possible so that we can determine whether the waiver of dues substantially increases participation in Section activities by government employees.

G. Environmental Law Journal.

No report.

H. Technology Committee.

John Tatum reported that he is trying to post a video of the Council's February program on agency decision making on the Section's website, but the State Bar has difficulties making sufficient bandwidth available for a file of that size. Tatum said that he can provide copies of the program on DVD. He also noted that Mark Cooney of Cooley Law School has offered to let the Section use its facilities again for programs.

I. Program Committee.

Kurt Brauer distributed the attached one-page report on Program Committee activities dated June 12, 2008, with information concerning the program held on June 13, 2008 regarding the Grayling Stormwater Project, the MDEQ Environmental Bond Program, and updates to the Michigan brownfield program. His report also identifies three topics for discussion at the September annual meeting, and a proposed joint program in November, 2008 with the East and West Michigan Chapters of the Air and Waste Management Association.

Brief discussion followed on whether the Council should continue its tradition of having a program and meeting at Higgins Lake in June in 2009. Early June has been found to be a bad time because it conflicts with school graduations. This years meeting conflicted with the Bar Leadership Forum, the Upper Michigan Legal Institute, and the Chairs presentation of report to the Board of Commissions on Mackinac Island. The Council scheduled next year's meeting for June 19-20 and agreed that we need to do a better job promoting and marketing the program both for its educational value and as an opportunity for a family weekend.

J. Deskbook Committee.

Issues concerning the Deskbook were discussed above.

12. SUBJECT MATTER COMMITTEE REPORTS**F. Air Committee.**

Kurt Kissling reported that the Air Committee is working on a fall program to be held in conjunction with the Air and Waste Management Association. The program is expected to cover Maximum Achievable Control Technology and other air issues. The Air Committee is also considering a program for this Winter.

G. Environmental Litigation Administrative Practice Committee.

No report.

H. Hazardous Substances and Brownfield Committee.

Craig Hupp reported that Chair Charlie Denton postponed a program that the Committee had scheduled for the first weekend of June and expects to hold that program in the Fall.

I. Natural Resources Committee.

No report.

J. Water Committee.

No report.

13. LIAISON REPORTS**B. Real Estate Section.**

Pat Paruch was not present but distributed the attached report by e-mail to Council Members before the meeting.

C. Bar Liaison.

Charles Toy was not present.

14. CHAIRPERSON'S REPORT

Chair Susan Topp noted that she filed the attached Annual Report for the Section which will be published in the September Bar Journal.

Topp also noted that she needs a 75 word summary of Council activities for the next Bar Journal, and asked John Tatum to write a short statement concerning the work the Technology Committee has been doing, which she considers to be outstanding.

Concerning September's annual meeting, Topp noted that we need to select a place for dinner in or near Dearborn. She appointed a Committee of Craig Hupp and Chris Dunsky to suggest several appropriate restaurants that could be reserved for this event.

On the Legal Milestones Project, John Tatum noted that some State Bar employees are interested in an environmental legal milestone connected to the Great Lakes, rather than the Ray Township or Pigeon River cases that have been discussed previously. One possibility is the Supreme Court decision regarding access to Great Lakes shorelines. The Council took no specific action on this issue.

Topp noted that the American Arbitration Association would like to make a presentation concerning the availability of its services, and referred this issue to the Program Committee for consideration.

Topp reported that a Nominating Committee consisting of her, Chair-Elect Barbieri, Secretary-Treasurer Dunsky, and Council Member Anna Maiuri was not able to propose a slate of new Council Members because it had incomplete information concerning how many current Council Members must be replaced. The Nominating Committee will complete the discussions it has started after it obtains the necessary information from the State Bar and will propose a slate to Council by e-mail for its approval.

15. NEW BUSINESS

Susan Topp presented comments from Jim Olson about a new EPA final rule that would eliminate the necessity for NPDES permits for certain transfers of water from one water body to another. Brief discussion followed.

16. OLD BUSINESS

Chair Topp reported that Grant Trigger had offered to investigate an offer to sponsor a joint program with the American Bar Association's State and Regional Environmental Cooperation Committee (SRECC), but that she had heard no report from him. Mike Caldwell and Jim O'Brien both offered to contact Trigger and the SRECC to offer to help with this issue. Topp will e-mail both of them information that she received from the SRECC.

The next Council meeting will be September 18, 2008 in Dearborn at the State Bar Annual Committee.

The meeting adjourned at noon.

PROPOSED CHANGES TO THE ENVIRONMENTAL LAW SECTION BYLAWS

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 9117187]

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 9117187, 9113190]

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~~without payment of ~~annual~~any 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 9117187]

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 9126191]

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 nonvoting 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 9117187, 9113190; renumbered 9126191; amended 9121195]

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 9117187, 9113190; 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 9117187; amended and renumbered 9113190; renumbered 9126191]

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 9117/87; amended and renumbered 9113190; renumbered 9126191]

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 9117187, 9113190, 9121195]

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 9126191; amended 9121195; amended 9118197]

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 9113190; 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 9117187, 9113190]

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 9117187, 9113190]

ARTICLE VI Duties and Powers of the Council

Section 1. 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 9117187; renumbered 9113190]

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 9113190]

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 9113190]

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 9113190]

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 9113190]

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 9113190]

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 9113190; amended 9121195; amended 9118197]

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 9126191; amended 9118197]

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.

(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 9121195; amended and renumbered 9118197]

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 9113190; renumbered 9126191; amended 9121195; renumbered 9118197]

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 9113190; renumbered 9126191; amended 9121195; renumbered 9118197]

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 9113190]

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 9113190]

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 9/13190]

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 9121195]

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.