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## ***Tale of a Rule - MDEQ/MDNRE Can't Always Get What It Wants***

By Steven C. Kohl and Jane Kogan\*

On September 15, 2009, the Michigan Court of Appeals, in a published per curiam opinion, struck down Michigan Department of Environmental Quality (“MDEQ”) Air Quality Division’s Rule 1830, M.A.C. R 336.2830 (2008), which had expanded the means to challenge MDEQ decisions to approve or deny permit requests to install new sources of air emissions by adding a contested case proceeding to the process. See *Wolverine Power Supply Cooperative, Inc. v. Department of Environmental Quality*, 285 Mich. App. 548, 777 N.W.2d 1 (Mich. Ct. App. 2009). Under Rule 1830, individuals aggrieved by a decision to approve or deny certain permits to install under Part 55 of the Natural Resources and Environmental Protection Act (“NREPA”), M.C.L. Section 324.5501 *et seq.* (“Part 55”), were afforded the opportunity to initiate a potentially lengthy contested case proceeding which would ultimately delay reaching a final administrative decision on the permit.

In *Wolverine*, the Court of Appeals found that MDEQ had no authority to promulgate Rule 1830, which added the administrative contested case procedure to the process of reviewing *approvals* or denials of permits to install. The Court of Appeals further held that Rule 1830 directly conflicted with the review procedure established by Michigan’s principal air regulatory legislation, Part 55, which prescribed only one remedy to individuals aggrieved by a permit to install decision: appealing directly to the circuit court.

The decision squarely affirms that an administrative agency’s rulemaking authority is confined to the powers enumerated in the agency’s enabling legislation and that the rules cannot be allowed to vary a legislatively established standard or scheme.

### **I. The Back Story**

The Prevention of Significant Deterioration (“PSD”) provisions of the federal Clean Air Act (“CAA”) govern the permitting to construct or modify major sources of certain pollutants or contaminants as defined under the CAA. The CAA, like other federal environmental statutes, establishes a program of regulation jointly administered by federal and state authorities. The authority to issue a permit under the PSD provisions can lie with either the United States Environmental Protection Agency (“EPA”) or with an individual state’s air permitting authority, if state laws and rules incorporate the substantive provisions of the federal PSD implementing rules and that incorporation is approved by EPA into the state’s implementation plan (“SIP”). Permits issued by a state under a so-called SIP-approved state program, though they implement federal requirements, are nevertheless deemed to be state permits and displace federal permitting authority. Alternatively, EPA can delegate its authority to a state under a delegation agreement. While the permitting process is administered wholly by the state and a state permit results from the process, the state is deemed to be acting as an agent of EPA and the permit is considered to have dual status as both a state and federal permit.

From the outset of the federal PSD program, Michigan (like Illinois and a handful of other states) had operated as a delegatee of EPA. As a consequence, PSD permits issued by the former MDEQ were considered federal permits. Federal PSD permitting decisions are reviewable by EPA's Environmental Appeals Board ("EAB"), pursuant to 40 C.F.R. Part 124. In the early 2000's several PSD permits, including one allowing for construction of a significant new automobile assembly plant near Lansing, were delayed for an extended period. The delay in the construction of a new auto plant for over a year due to the EAB appeal process served as sufficient motivation for Michigan to seek to adopt rules that would allow MDEQ to be approved by EPA to issue PSD permits under its own authority as a state permit, thus removing EAB review jurisdiction.

MDEQ convened a series of stakeholder meetings for the purpose of necessary rule development under Part 55. While any set of rules needed to meet the minimum federal PSD requirements, the federal requirements were silent about the means by which administrative or judicial review of a state PSD permitting decision could be obtained. While other parts of NREPA expressly authorize contested case review under Michigan's Administrative Procedures Act of an administrative decision of MDEQ, Part 55 contained no such express provision. Nevertheless, MDEQ was persuaded in stakeholder meetings that PSD permits, governing sources with the potential to emit large amounts of air pollutants and contaminants, such as power plants or steel plants, should be subject to a contested case review process. The resultant rule package contained Rule 1830, affording a contested case review. Following Rule 1830's promulgation, proponents of several major projects subject to PSD permitting sought to challenge the validity of the rule through a declaratory judgment action.

## **II. The Court Decisions**

The controversy centered upon what authority MDEQ possessed to prescribe rules for review of its administrative decisions under Part 55 in light of M.C.L. Sections 324.5505(8) (West 2004) ("Subsection (8)") and 324.5505(14) (West 2004) ("Subsection (14)") which appeared to legislatively dictate when and to whom contested case review was available and when review was only via the generic judicial review afforded to administrative decisions under Michigan's Revised Judicature Act, M.C.L. Section 600.631 (West 2004) ("RJA"). The Missaukee County Circuit Court had no trouble concluding on summary disposition that Rule 1830 contravened the legislatively mandated scheme of review contained in Subsections (8) and (14). The decision of the Court of Appeals sustained this ruling in the face of an additional argument raised by MDEQ on appeal that Part 11 of NREPA, M.C.L. Section 324.1101 (West 2004) ("Part 11"), afforded it plenary authority to grant contested case review.

### **A. Statutory Construction of M.C.L. Sections 324.5505(8), 324.5505(14), and 324.5503**

#### ***i. The Parties' Arguments***

Plaintiffs contended that Rule 1830 was invalid because it conflicted with the statutory section governing review of permitting decisions, Subsection (8), specifying that the exclusive means of review is by filing a petition with the circuit court. *Wolverine*, 285 Mich. App. at 552-53. Additionally, Plaintiffs alleged that Rule 1830 was invalid because statutory construction rules required the Court of Appeals to apply the most specific

statute in a given area, and the most specific statute applicable to the validity of Rule 1830 provides for judicial review, not contested case hearings. *Id.* at 553-54.

In contrast, MDEQ contended that it had clear and broad authority to promulgate Rule 1830 under the auspices of its power to promulgate rules for hearings on air emission permitting decisions. *Id.* at 552. MDEQ further asserted that Rule 1830 was an appropriate exercise of its authority to “develop an evidentiary record on permitting issues before rendering a final agency decision.” *Id.*

### ***ii. The Court’s Analysis***

The Court of Appeals began its analysis by looking at MDEQ’s enabling statutes to ascertain whether the Legislature intended to give MDEQ powers to promulgate Rule 1830. First, the Court of Appeals validated MDEQ’s power to grant and deny permits to install and to promulgate rules for issuing permits under the general provisions of Part 55; thereafter, the Court of Appeals discerned MDEQ’s ability to provide contested case hearings under Subsection (8), governing appeals from permitting actions. See *generally Wolverine*, 285 Mich. App. at 557-71.

The Court of Appeals first evaluated language in Subsection (8) and found that “Subsection (8) does not directly delegate authority to the Department[, but] delineates the appeal process applicable to *permits to install*, providing that any person may seek judicial review of the issuance or denial of such a permit. . . .” *Id.* at 560.<sup>1</sup> The Court of Appeals concluded that even though the language of Subsection (8) is mandatory and limiting,<sup>2</sup> it merely provides that a petition for review would be the exclusive means to obtain *judicial* review, and does not establish judicial review to be the *exclusive* means of review. *Id.* at 561-62. Accordingly, the Court of Appeals concluded that, when read alone, Subsection (8) does not invalidate Rule 1830, as it arguably permits both administrative and judicial review of initial permit decisions. *Id.*

The Court of Appeals then compared the language in Subsection (8) to that of Subsection (14).<sup>3</sup> *Wolverine*, 285 Mich. App. at 562-65. In its review, the Court of Appeals observed that while the Legislature specifically enumerated two methods of review in Subsection (14) – a contested case hearing *and* judicial review, Subsection (8) only referenced one method of review – judicial review. *Id.* at 562-63. The Court of Appeals, agreeing with Plaintiffs’ argument, concluded that that omission was intentional. *Id.* at 564 (“the inclusion of the contested case procedure in subsection (14), concerning *operating permits*, but not in subsection (8), concerning *permits to install*, demonstrates the Legislature’s decision that contested case hearings are appropriate for denials of permits to operate, but are not appropriate for decisions on permits to install.”). Accordingly, the Court of Appeals concluded that contested case hearings were not an intended means of review of initial permitting decisions. See *id.* at 564-65.

Then, the Court of Appeals addressed MDEQ’s second argument that it had authority to promulgate Rule 1830 pursuant to its general authority to implement air quality regulations under M.C.L. Section 324.5503(b), (e), (u) (West 2004). *Wolverine*, 285 Mich. App. at 565-66. The Court of Appeals disagreed with MDEQ’s contention that M.C.L. Section 324.5503 bestowed such power on MDEQ for two reasons. First, the Court of Appeals stated that the provisions cited by MDEQ do not relate to promulgating rules for review of agency decisions, but permit MDEQ to “issue permits, to make findings of fact, and to do other things necessary to enforce clean air standards.” *Id.* at

566. The Court of Appeals reasoned that the issuance and enforcement of rules “does not necessarily include an administrative review procedure after issuance of a permit.” *Id.* Second, the Court of Appeals stated that, because the provisions of M.C.L. Section 324.5503 are general in nature,<sup>4</sup> but the provisions of M.C.L. Subsection (8) are specific in nature,<sup>5</sup> the specific provisions control MDEQ’s authority. *Id.* (citing *In re Appelt*, DEQ Administrative Order No. 990-90 (1996) (“When a statutory scheme provides both general and specific provisions, the more specific provisions control.”). Thus, the Court of Appeals concluded that MDEQ could not rely on the general provisions of M.C.L. Section 324.5503 as authority for promulgating Rule 1830. *Id.*

## **B. Statutory Construction of M.C.L. Section 324.1101**

### **i. The Parties’ Arguments**

In advancing its final argument to establish the validity of Rule 1830, MDEQ argued that M.C.L. Section 324.1101 (“Part 11”) “broadly authorize[d] [the Department] to review challenges to permitting decisions for both new and existing sources by conducting case hearings when the agency chooses to do so.” *Wolverine*, 285 Mich. App. at 569 (citing Appellant’s Br. on Appeal at 2). Consequently, MDEQ alleged that the lack of reference to contested cases in Subsection (8) was not fatal to the validity of Rule 1830, because the provisions of Part 55 must not be read in isolation. Rather, MDEQ contended that, because statutory construction requires NREPA to be read in its entirety, Rule 1830 must be read in the context of other provisions. Hence, MDEQ directed the Court of Appeals’ attention to Part 11 and argued that because it provides for review by both contested case hearings and judicial review, Rule 1830 was within the contemplation of the Legislature.

In response to these arguments, Plaintiffs contended that MDEQ could not rely on Part 11 to support the alleged validity of Rule 1830. Plaintiffs made the following arguments in support of their assertion: (1) the 1991 and 1995 Executive Orders did not transfer Part 11 powers to MDEQ, (2) MDEQ is judicially estopped from recharacterizing a position it took in a previous lawsuit, (3) MDEQ waived this grounds by not presenting it to the trial court, and finally, (4) Part 11 does not apply to permits issued under Part 55.

### **ii. The Court’s Analysis**

#### **1. MDEQ’s Authority Under the 1991 and 1995 Executive Orders**

Prior to determining MDEQ’s rights under Part 11, the Court of Appeals considered Plaintiffs’ argument that the administrative appeals provisions of NREPA are reserved for the Commission of Natural Resources, not MDEQ.

The Court of Appeals began this analysis with the 1991 Executive Order that merged several boards and commissions into the Department of Natural Resources (“DNR”). *Wolverine*, 285 Mich. App. at 567 (citing Executive Reorganization Order (ERO) 1991-31; *House Speaker v. Governor*, 443 Mich. 560, 564-65; 506 N.W.2d 190 (1993)). The Court of Appeals noted that even though the 1991 Executive Order transferred the authority initially vested in the Commission of Natural Resources (“Commission”) and other agencies to the Department of Natural Resources (“DNR”),<sup>6</sup> it retained the authority to review DNR’s final decisions relating to issuance of permits with the

Commission. *Id.* (citations omitted). In the 1995 Executive Order, however, MDEQ was created and granted all of the Air Quality Division's authority - "including, but not limited to . . . authority under [MCL] 324.5501 et seq." *Id.* (citing M.C.L. Section 324.99903(3)(a)). Accordingly, the Court of Appeals disagreed with Plaintiffs' argument and held that 1995 order transferred the Commission's authority to MDEQ.<sup>7</sup> *Id.*

## **2. MDEQ's Authority Under M.C.L. Section 324.1101**

Having concluded that MDEQ was not judicially estopped from relying on Part 11 to support the validity of Rule 1830, and did not waive this issue by not presenting it to the trial court, the Court of Appeals considered the merits of Plaintiffs' final contention that Part 11 does not apply to permits issued under Part 55. *Wolverine*, 285 Mich. App. at 566-67.

With regard to this issue, Plaintiffs asserted that Part 11 could not apply to review of decisions under Part 55 because pursuant to general statutory interpretation principles the specific review provisions of Part 55 control over the general provisions of Part 11. Particularly, Plaintiffs argued that, due to the fact that Part 55 specifically grants to an owner or operator of an *existing* source the right to a contested case when challenging an agency permitting decision, and provides only an RJA appeal for others, and Part 11 is a general provision that does not specify the permit challenges to which it applies, the specific provisions of Part 55 must control. Last, Plaintiffs argued that to read the language of Part 11 as conferring jurisdiction on MDEQ to provide a contested case for *any* challenge to Part 55 would violate rules of statutory construction because it would render the language in Subsection (14) wholly nugatory.

MDEQ, however, asserted that Section 1101 broadly authorizes MDEQ to review challenges to permitting decisions for both new and existing sources by conducting case hearings when the agency chooses to do so. MDEQ further argued that the Legislature intended to provide MDEQ with broad authority to "(1) promulgate rules as to how the agency will make its permitting decisions, and (2) include in the rules a method to challenge a permit to install for a new major source of air pollution by conducting a contested case hearing with an administrative law judge. Accordingly, MDEQ claimed that it lawfully promulgated Rule 1830 under its Part 11 authority as transferred under the prior Executive Orders.

The Court of Appeals took the parties' arguments into account, and ultimately concluded that Rule 1830 was invalid. The Court of Appeals initially agreed with Plaintiffs' argument that Part 11 was general in scope, "in that it applies to all permits and licenses that may issue under the NREPA, including, among many others, those for floodplain alteration, sewer systems, pesticide sales, soil erosion, and fur dealing." *Wolverine*, 285 Mich. App. at 570 (citing M.C.L. Section 324.1301(d)). However, the Court of Appeals found that MDEQ's PSD rules, which include Rule 1830, do not list Part 11 as an enabling authority. *Id.* (finding that the preface to the rules on prevention of significant deterioration of air quality state that they are "[b]y authority conferred on the director of the department of environmental quality by sections 5503, 5505(4), and 5512 of 1994 PA 451, MCL 324.5503, 324.5505(4), and 324.5512, and Executive Reorganization Order No. 1995-18, MCL 324.99903."). Applying the principle that a specific statutory provision controls over a related general provision, the Court of Appeals found that Part 11 cannot be deemed to grant MDEQ authority to provide a review process for *permits to install*, as it is not an enabling provision applicable to review of initial permitting

decisions. *Id.* (“[T]he Department’s reliance on the general structure of the NREPA and the general enabling statutes is unpersuasive. The Legislature designated a specific review procedure for decisions on *permits to install*, and the Department must adhere to that procedure unless and until the Legislature amends the specified review.”). Therefore, the Court of Appeals concluded that neither Part 11 nor Part 55 of NREPA could be read as authorizing the promulgation of Rule 1830.

MDEQ elected not to seek review by the Michigan Supreme Court and has now undertaken to amend its rules to delete Rule 1830.

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<sup>1</sup> The Court of Appeals acknowledged that the appeal process to which Subsection (8) refers is direct appeals to a circuit court under the RJA:

An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency . . . to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases.

*Wolverine*, 285 Mich. App. at 561 (citing M.C.L. Section 600.631).

<sup>2</sup> M.C.L. Section 324.5505(8) states, in pertinent part:

Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review.

*Id.*

<sup>3</sup> Subsection (14) states, in pertinent part:

This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Any person may appeal the issuance or denial of an operating permit in accordance with section 631 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.631 of the Michigan Compiled Laws. A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action.

M.C.L. Section 324.5506(14).

<sup>4</sup> “They are not tied to the Department’s administration of any particular type of permits or to its review procedures.” *Wolverine*, 285 Mich. App. 566.

<sup>5</sup> “[G]overning the Department’s administration of *permits to install*.” *Wolverine*, 285 Mich. App. 566.

<sup>6</sup> This order also created, among others, the Department of Natural Resources’ Air Quality Division. *Id.* (citations omitted).

<sup>7</sup> The court cited M.C.L. Section 324.99903(7):

All authority to make decisions regarding administrative appeals associated with the transfers referred to in paragraphs 3 [the air quality division], 5 and 6 above, which reside with the Commission of Natural Resources or the Michigan Department of Natural Resources, are transferred to the Director of the Michigan Department of Environmental Quality. In the event the Director is directly involved in an initial decision which is subsequently appealed through the Office of Administrative Hearings and to the Director for a decision, the Director shall appoint an individual within or outside the Michigan Department of Environmental Quality to decide the appeal.

*Wolverine*, 285 Mich. App. at 568.

## ***Toxicogenomics and Toxic Tort Litigation***

By Ernest P. Chiodo\*

Toxicogenomics is the area of research that combines evaluation of gene expression and toxicology to investigate the interaction between genes and environmental stressor as it relates to disease causation.<sup>1,2</sup> Toxicogenomics may play an increasing role in toxic tort litigation as the field advances. This paper will briefly describe the possible areas of impact of toxicogenomics upon toxic tort litigation.

### **THE GENOME**

A genome is the full complement of genes from an organism determined at the time of conception by the combination of maternal and paternal DNA. The human genome consists of approximately 3 billion base pairs of deoxyribonucleic acid. There is an approximately 0.1 percent variability in the DNA sequences between individuals. The identification of the variability of gene expression between individuals after exposure to various toxins serves as the basis of toxicogenomics.<sup>1</sup>

### **TOXICOGENOMIC TOOLS**

One tool used in toxicogenomics is the use of microarrays to determine which genes are activated (expressed) after exposure to various chemicals.<sup>3,4,5</sup> In this technology, thousands of gene copies can be placed on small glass chips to see if, after a subject is exposed to a substance, the products of gene expression from any of the tested genes are made. Patterns of gene expression can be compiled and compared in order to identify possible toxins.

Another toxicogenomic tool is the seeking of genetic abnormalities after toxin exposures as possible biomarkers demonstrating exposure to a specific toxin.<sup>6</sup>

The third tool of toxicogenomics is the linkage of genetic information with epidemiological techniques in the field of molecular epidemiology to seek genetic classes of increased susceptability.<sup>7</sup>

### **USES OF TOXICOGENOMICS IN LITIGATION**

#### **General and Specific Causation**

In toxic tort litigation, the plaintiff usually attempts to prove causation of a disease due to a toxin exposure while the defense counters by introducing evidence of alternative causes for the disease other than the alleged toxin exposure. The plaintiff must show both general and specific causation. General causation is a showing that exposure to the substance can cause the disease from which the plaintiff is suffering. After general causation has been proved, the plaintiff must prove specific causation by demonstrating that the particular exposure experienced by the plaintiff caused the plaintiff's disease. Currently the issue of general causation is elucidated by epidemiological studies

showing elevated rates of disease in exposed groups versus non-exposed groups. Proof of specific causation is usually made through expert testimony concerning the exposure and the likelihood that that exposure caused the disease rather than some other exposure or circumstance.

Attempts to establish general causation may be made by introducing microarray findings that certain gene expression patterns demonstrate that exposure to a particular substance can cause a particular disease. The toxic tort litigator must remember that gene expression does not necessarily indicate that the expressed gene or genes causes a particular disease.<sup>8</sup> However, the combination of toxicogenomics with molecular epidemiology may advance scientific consensus concerning general disease causation.

The presence of biomarkers may be introduced in an attempt to prove specific causation. Again, the presence of biomarkers alone without conventional methodologies used by qualified medical and exposure experts may not be sufficient to prove specific causation.<sup>9, 10</sup>

### **Establishment of Exposure**

Toxicogenomics may be used in an attempt to establish exposure to a particular substance. For example, DNA damage has been detected in workers exposed to benzene. However, the findings of the DNA damage measures have not found widespread acceptance as biomarkers of exposure or effect with benzene mediated disease.<sup>11</sup>

### **Increased Risk of Disease**

A hereditary difference within a single gene that occurs in more than one percent of the population is referred to as genetic polymorphism. These genetic variations can lead to increased risks of disease in exposure groups. For example, approximately 50 percent of the Caucasian population has a gene deletion for the enzyme glutathione S-transferase M1. This gene deletion causes an increased risk of lung cancer.<sup>12</sup> Toxicogenomics combined with molecular epidemiology studies may elucidate genetic types at increased risk of disease due to various substance exposures. The ability to identify persons at increased risk of disease after substance exposures due to their genetic makeup has implications in litigation involving claims concerning fear of cancer, medical monitoring, and failure to warn.<sup>13</sup>

## **CONCLUSION**

Toxicogenomics and the related discipline of molecular epidemiology hold great promise in identifying causes of disease in various exposure groups. These new tools may find increasing roles in toxic tort litigation. It is the responsibility of the toxic tort litigator to know when the right tool is being used for the right job.

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## **CARBON AND GREENHOUSE GASES – METHODS OF REGULATION**

By Rebecca Dukes\*

This article is not about the science of global warming. Irrespective of people's beliefs in the science and causation of global warming, one thing appears certain: greenhouse gases and carbon emissions will be regulated in some fashion over the long term. At the beginning of the Obama administration, with Democratic majorities in the House and Senate, comprehensive climate change legislation imposing a market-based approach to carbon reduction seemed imminent. However, the economic and banking crisis, the acrimonious debate over health care, the loss of a filibuster-proof majority in the Senate, and impending mid-term elections have cast significant doubt on a national legislative program. Despite this, regulatory and regional initiatives remain very active, and international pressure continues to drive voluntary carbon markets.

On January 28, 2010, the United States formally submitted a letter to the United Nations Framework Convention on Climate Change confirming its association with the Copenhagen Accord and outlining the U.S. commitment to an economy-wide emissions reduction target. While the Copenhagen Accord is not a ratified treaty, if the U.S. is going to honor this commitment, some form of regulation or mechanism will have to be implemented. Some industries and emissions are already being regulated on a state and regional level; however, the schemes under which they are controlled could ultimately be federally preempted. Politics have swirled around the creation and imposition of a mandatory system, and just when one method has appeared likely to be implemented, a new challenge has developed and delayed action. The four potential mechanisms for monitoring and controlling emissions in the U.S. are: (1) regulation by the United States Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA"), (2) new federal legislation implementing a carbon tax or a cap and trade program, (3) regional cap and trade programs, and (4) voluntary markets.

### **Environmental Protection Agency Regulation Under the Clean Air Act**

On April 2, 2007, the Supreme Court held that greenhouse gases could be considered air pollutants covered by the Clean Air Act in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Court held that the EPA must determine whether or not emissions of greenhouse gases cause or contribute to air pollution that could endanger public health and welfare, or whether the science is too uncertain to make a reasoned decision.

After issuing proposed findings and taking public comments, on December 15, 2009 the EPA published its final endangerment and cause or contribute findings, effective January 14, 2010.<sup>1</sup> The EPA found that current and projected concentrations of the six key greenhouse gases in the atmosphere threaten public health and welfare. (These six greenhouse gases are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, collectively referred to as "GHGs.") These findings themselves did not impose any requirements on industry or entities; but they are a prerequisite to EPA regulation of GHGs under the CAA.

On October 30, 2009, in conjunction with the endangerment finding, the EPA published its Final Mandatory Reporting of Greenhouse Gases Rule, effective December 29, 2009.

This inventory reporting rule requires large sources of GHGs to report their emissions. The rule requires approximately 10,000 facilities that emit about 85 percent of the nation's GHGs to collect and report emissions data. Suppliers of fossil fuels, motor vehicle and engine manufacturers, and other facilities that emit 25,000 metric tons or more of GHGs are subject to the requirements. According to EPA, most small businesses fall below the threshold and will not be required to report their emissions.

Additionally, the EPA issued its final "Tailoring Rule" on May 13, 2010, amending the CAA to include permitting and regulation for stationary sources of GHGs beginning January 2, 2011. The CAA currently requires permits for the emission of 100 or 250 tons per year for conventional pollutants such as lead and sulfur dioxides, depending on the source. The Tailoring Rule changes the applicability threshold from 100/250 tons per year to 75,000 tons per year for GHGs. Starting January 2, 2011, sources that already have New Source Review permit requirements for other pollutants will be required to include GHGs in their permits if they increase their GHG emissions by 75,000 or more tons per year. On July 1, 2011 Title V and New Source Review permitting requirements will extend to new sources that emit at least 100,000 tons of GHGs and existing sources that increase their GHG emissions by 75,000 or more tons per year, even if they do not exceed thresholds for other pollutants. New and upgraded sources that are subject to the permitting requirements will be required to install the "best available control technology" to control their GHG emissions. Sources that emit less than 50,000 tons of GHGs per year will not be subject to permitting requirements until at least April 30, 2016. By July 1, 2012 the EPA expects to finalize rules regarding whether permitting should be required for additional sources.

In addition to regulating stationary sources, the EPA has been active in promulgating regulations for mobile sources. On April 1, 2010 the EPA and the National Highway Traffic Safety Administration ("NHTSA"), on behalf of the U.S. Department of Transportation ("DOT"), released a joint Final Rule establishing a national program addressing GHG emissions and fuel economy standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles. The Final Rule, which takes effect January 2, 2011, mandates a 40% reduction in GHG emissions by 2016 and covers emissions from vehicle model years 2012 through 2016. These vehicles will be required to achieve 35.5 miles per gallon fuel economy, with compliance measured fleet-wide for each manufacturer. Electric vehicles will be classified as zero-emissions vehicles that can, within certain limits, be used as "credits" by auto makers for the compliance calculation. The EPA and NHTSA have indicated that they will issue a Notice of Intent by September 30, 2010 announcing plans for setting light-duty vehicle standards for model year 2017 and beyond.

The EPA and NHTSA have also begun the process of regulating GHG emissions and fuel economy for heavy-duty trucks and buses. In August 2010 they sent draft rules to the White House that would for the first time cut GHG emissions for heavy trucks and buses covering model years 2014-2018. The details of the rules are not publicly available yet.

EPA's attempt to cut carbon emissions has run into challenges from both sides of the aisle in the U.S. Senate and House of Representatives. On January 21, 2010, Senator Lisa Murkowski (R. Ak.) introduced a disapproval resolution seeking to veto retroactively the EPA's Endangerment Finding. This disapproval resolution had the support of six Democrats, but was ultimately defeated on June 10, 2010 by a 47-53 vote. Meanwhile,

Senator Majority Leader, Harry Reid (D. Nev.) has indicated that he plans to allow a vote in 2010 on a bill proposed by Senator Jay Rockefeller (D. W.V.) that would impose a two-year moratorium on any EPA regulation of GHGs. Senator Reid's decision to allow a vote on the Rockefeller bill was made to help dissuade senators from backing the Murkowski resolution. Senator Rockefeller's bill has seven Democratic co-sponsors, with most Republicans expected to support it if a floor vote takes place.

In the House of Representatives, Rep. Rick Boucher (D. Va.) and Rep Nick Rahall (D W.V.) introduced a companion to the Rockefeller bill that would force a two-year moratorium on EPA emissions rules. The House counterpart has 15 co-sponsors, including two Republicans.

Both measures are considered long shots; House Democratic leaders are unlikely to give floor time to their version, and President Obama indicated that he would have vetoed Senator Murkowski's resolution if it reached his desk. The White House has not commented publicly on the proposed two-year EPA delay.

The EPA's actions cannot be viewed in isolation; they are best considered in the broader context of other national, regional, and state activities also aimed at reducing GHG emissions. Additionally, the Obama administration has said repeatedly that it would prefer to address GHGs via legislation rather than regulation, and EPA's activities have been widely viewed as a spur to force Congress to act.

### **Federal Legislation**

National politics have commanded the spotlight over the past year with respect to whether, when, and in what form nationwide legislation may be enacted. This legislation could take two potential forms: (1) Carbon Tax, or (2) Cap and Trade. Under a Carbon Tax, regulated emitters would be required to pay a tax for every ton of pollution they emit. In a Cap and Trade program, the government places restrictions on GHG emissions (the "cap") and sells allowances that grant purchasers the right to emit a set amount. These allowances are tradable in the open market, so those who can reduce their emissions more cheaply are able to sell extra allowances to others who would otherwise have to pay more to comply (the "trade). The market could also include tradable offsets, which are created by unregulated entities who voluntarily reduce their emissions or find ways to capture or remove carbon from the environment. The open commodities market creates a monetary incentive to reduce emissions, and offers the possibility of achieving the overall cap at the lowest possible cost.

These are two distinct policies, each with its own supporters. Cap and Trade supporters say it is the only way to guarantee that an environmental objective will be achieved, has been shown to effectively protect the environment at lower-than-expected costs, and is politically more attractive. Carbon Tax supporters say a tax is better because it is more transparent, minimizes the involvement of government, and avoids the creation of new markets subject to manipulation.

Federal action to date has been to initiate the steps toward a Cap and Trade program, in combination with other energy policies.

The mechanisms by which a Cap and Trade program may be implemented are through the proposed federal American Clean Energy and Security Act ("ACES"), as passed by the U.S. House of Representatives in June 2009, and a U.S. Senate counterpart bill.

**ACES** – ACES was passed by the U.S. House of Representatives on June 26, 2009. ACES has five main components:

1. A clean energy section that promotes development of renewable sources of energy, carbon capture and sequestration technologies, clean electric vehicles, and smart grid and electricity transmission;
2. An energy efficiency section directed across many sectors of the economy, including buildings, appliances, transportation, and industry;
3. A global warming section that implements a cap and trade program that provides an initial allocation of allowances to various industries;
4. A consumer and industry-directed section that promotes education and green jobs during the transition to a clean energy economy; and
5. An agricultural and forestry offsets section that plays a role in the cap and trade program established in section three.

The U.S. Senate has not been nearly as decisive in its efforts to pass climate change legislation. On September 30, 2009 Senate Bill 1733 was introduced that would establish the Clean Energy Jobs and American Power Act (“CEJAP”). This bill quickly lost traction, though, in the midst of the health care debate. Senators John Kerry (D. Mass.), Lindsey Graham (R. S.C.), and Joe Lieberman (I. Conn.) then began working on extensively redrafting the bill to gain public support and the support of enough senators to pass the bill. After Senator Graham withdrew his support, Senators Kerry and Lieberman ultimately released the American Power Act, which was a comprehensive bill addressing the country’s environmental and energy issues. The trio of Senators faced much turmoil in drafting the bill and getting it to the Senate floor, and recently announced that comprehensive legislation is dead for the year. In the roller coaster of Senate actions over the past year, various possibilities were brought up, morphed, and abandoned, including a scaled-back version that addressed only the utility sector, an energy-only bill, an oil clean-up bill, and an offshore oil drilling reformation bill. Despite the acknowledgment that comprehensive legislation is dead for the year, the Obama administration has publicly voiced its optimism and commitment to advancing the legislation.

If a bill is ultimately passed by the Senate, the House and Senate bills will need to be reconciled and approved by the House and Senate again before being presented to the President. However, the future of the Senate bill is unknown, and recent suggestions have been made to remove the Cap and Trade portion of CEJAP in order to initially pass the clean energy portion. If this occurs, a federal Cap and Trade program could be delayed indefinitely.

### **Regional Initiatives**

A third potential avenue for regulation of GHGs is through state or regional cap and trade programs. While climate change legislation has garnered attention recently, over the past eight years there has been a lack of federal action regarding climate change. As a result, some states, along with some Canadian provinces and Mexican states, banded together to form various regional initiatives aimed at regulating GHG emissions and implementing cap and trade programs. Currently, 23 states either have or are developing cap and trade programs to regulate GHG emissions.

Under the regional initiatives, model rules are established, with the goal that each participating state or jurisdiction will then adopt legislation or regulations to implement those model rules within the jurisdiction. The three regional initiatives that exist or are being developed in the U.S. are the Regional Greenhouse Gas Initiative (“RGGI”), the Western Climate Initiative (“WCI”) and the Midwestern Governors Greenhouse Gas Reduction Accord (“Midwestern Accord”). RGGI began operation in 2009 and covers only large electric power generators. The WCI and Midwestern Accord will cover more emitters; both are progressing toward finalization with a start date of January 1, 2012.

While these regional initiatives are operating, or poised to begin operating, their regulations will likely be expressly or effectively preempted if a federal program is implemented. Along those lines, many of the states would prefer a national program and have indicated that the regional programs will only be implemented if federal efforts are unsuccessful.

### **Voluntary Markets**

Carbon and GHGs are also being regulated through voluntary means. Businesses are voluntarily reducing emissions in response to several recent court decisions that have opened the door for common law nuisance claims against entities emitting GHGs.<sup>2</sup> Additionally, in response to consumer demand and in an effort to market themselves as being “green,” many businesses are making voluntary commitments to reduce their emissions or participate in a voluntary market program. Many such programs exist both in the U.S. and elsewhere. Under a voluntary program businesses or consumers commit to reduce their emissions or carbon footprint by implementing reduction methods or purchasing credits to offset their emissions. Consumers are also participating in the programs to offset their overall carbon footprint or the carbon emitted during specific events. These programs create a market for the sale, purchase, and trade of “offsets,” which are created by innovators who find ways to capture or remove carbon from the environment.

Various methods exist for creating offsets including:

- agricultural methane capture and destruction;
- agricultural soil carbon capture and destruction;
- avoided emissions from organic waste disposal;
- coal mine methane capture and destruction;
- energy efficiency;
- forestry (forestation or avoided deforestation);
- fuel switching;
- landfill methane capture and destruction;
- renewable energy certificates (RECs); and
- wastewater treatment methane capture and destruction.

These projects must adhere to the standards set forth by the markets, or registries, in which the offsets are to be sold. Standards typically require that a project be real, independently-verified, and additional. The meaning of “real” in this context means that the carbon emissions being sequestered or reduced can be accurately measured and are calculable. Independent third-party verification is also required for obvious reasons.

The requirement of “additionality” carries different meanings in different markets, but typically means that a project is doing something above base-line, or in addition to what has been done historically is being done naturally. Several markets exist in the U.S.<sup>7</sup> and many exist internationally. Some of the most common markets and standards are:

- American Carbon Registry (ACR);
- Blue Registry;
- California Climate Action Registry (CCAR);
- Chicago Climate Exchange (CCX);
- Clean Development Mechanism (CDM);
- European Carbon Exchange (ECX);
- European Union Emission Trading Scheme (EU ETS);
- Globe Carbon Registry;
- Gold Standard;
- Voluntary Carbon Standard (VCS); and
- Voluntary Emissions Reduction (VER).

An offset project typically begins by following a protocol set forth within one of these markets, and then is verified, registered, and sold on that market. With potential cap and trade programs looming, which will likely allow offsets to play some role, these markets are all vying to establish themselves as the “standard.” If Cap and Trade legislation is enacted, these offsets could then be sold on a uniform market to either the regulated entities or the voluntary participants.

### **Contextual Implications**

Carbon regulation is a moving target at this point; when one method appears to gain traction, a new challenge appears. It is difficult to predict what type of regulation will ultimately occur, but some sort of regulation appears imminent. Regardless of the mechanism, opportunities and risks exist for businesses and consumers. Risks arising out the regulations take various forms. Noncompliance by regulated entities could result in significant penalties, and other businesses may be faced with disclosure requirements, audits, insurance considerations, and collateralization and lending issues. Opportunities exist within a “carbon-pricing” scheme for the creation of offsets and early reduction. Opportunities also abound in the investment and security sector by way of new financial products, market activity, commodities and derivative trading, insurance products, investments, and loans. Add in government incentives such as loan guarantees, tax credits, and other tax incentives, and nearly every sector of the economy can find a way to benefit from the GHG reduction schemes and carbon markets.

In this rapidly-changing environment, it is important for lawyers to stay aware of pending “green” legislation, administrative actions and regional and state-level initiatives in order to best advise clients on how to take full advantage of the potential opportunities and minimize possible risks attendant to increased regulation.

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<sup>1</sup> Federal Register, Vol. 74, No. 239, December 15, 2009.

<sup>2</sup> See *Connecticut v. American Electric Power Company Inc.*, 582 F.3d 309 (2<sup>nd</sup> Cir. 2009), *petition for cert filed August 2, 2010*, allowing plaintiffs to bring tort claims against emitters of GHGs that allegedly contribute to global warming. *But see California v. GMC*, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sep 17, 2007) and *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal 2009) in which courts have ruled that climate-based tort claims present non-justiciable political questions and dismissed nuisance claims. The *Kivalina* plaintiffs are seeking an appeal. In *Comer v. Murphy Oil USA*, 585 F.3d 855 (5<sup>th</sup> Cir. 2009), *vacated by Comer v. Murphy Oil USA*, 598 F.3d 208 (5<sup>th</sup> Cir. 2010), *appeal dismissed by Comer v. Murphy Oil USA*, 607 F.3d 1049 (5<sup>th</sup> Cir. 2010) a panel of the Fifth Circuit held that state law claims for damages allegedly caused by global warming based on nuisance, trespass, and negligence were justiciable and should be allowed to proceed. However, the panel decision was vacated when the Fifth Circuit granted en banc review. The Fifth Circuit issued no en banc opinion on the merits because it was not able to get a majority of judges without conflicts of interest to hear the en banc appeal.

## ENVIRONMENTAL LAW ESSAY CONTEST 2009 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 2009 winning environmental law essay, published below, was written by Eric Jamison, a law student at Wayne State University Law School, Detroit, Michigan.

### ***The Impact of Climate Change on Disclosure Requirements***

**By Eric Jamison**

The international conversation has changed from whether or not climate change is occurring to what to do about climate change.<sup>1</sup> As national and international conversations unfold about responses to climate change, publicly held companies need to examine their disclosure responsibility and their exposure to greenhouse gas regulation.<sup>2</sup> The market place is demanding carbon disclosure information as evidenced by the large participation in voluntary disclosure initiatives and public policy is shifting toward widespread regulation of greenhouse gases. While it may be apparent that energy intensive industries may be affected by disclosure of climate change risk, other industries that are dependent on the weather and located near coastlines may also be affected.

This essay looks at the evolution of greenhouse gas regulation on international and national levels and the potential carbon disclosure requirements under existing reporting standards.

#### **I. Greenhouse Gas Regulation**

Actions have been taken at international, national, regional and state levels to reduce and stabilize greenhouse gas (GHG) concentrations to prevent dangerous anthropogenic interference with the climate system.<sup>3</sup> The six major greenhouse gases are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.<sup>4</sup>

##### **a. International Actions**

The Kyoto Protocol adopted in 1997 by 182 nations set legally binding GHG emissions targets that took effect in 2005.<sup>5</sup> The Kyoto Protocol was seen as the first step towards global regulation of GHG. The first commitment period under the Protocol expires in 2012 and international focus has turned to the December 2009 meeting of the Intergovernmental Panel on Climate Change (IPCC) in Copenhagen.<sup>6</sup> Throughout 2009

participating nations have been planning the next steps of global GHG regulation with an eye on reaching an international agreement in Copenhagen.<sup>7</sup>

### **b. National and State Actions**

No federal action has been taken for climate change disclosure or regulation as of this writing, though the Waxman Markey bill is proposing a cap and trade system that would require GHG regulation and disclosure.<sup>8</sup> The Waxman-Markey bill, also known as the American Clean Energy and Security Act of 2009, passed the House in late June 2009 and is headed to the Senate for debate.<sup>9</sup> Numerous state and regional initiatives have emerged to require GHG regulation and disclosure. California and Florida have both passed state legislation to aggressively reduce their GHG emissions.<sup>10</sup> Three regional schemes have formed: the Western Climate Initiative,<sup>11</sup> the Midwestern Greenhouse Gas Reduction Accord (of which Michigan is a member)<sup>12</sup> and the Regional Greenhouse Gas Initiative.<sup>13</sup> Each regulatory scheme requires varying degrees of GHG reduction and regulation. International and national policy is shifting toward the regulation of GHG; climate change risk disclosure by publicly held companies is almost certain to follow.

The Environmental Protection Agency's issuance of its finding that GHG are "an endangerment to public health and welfare," may promote the idea that climate change risk is material information necessary for investors to make informed decisions and thus should be disclosed under regulation S-K.<sup>14</sup> Regulation S-K outlines the filing requirements of publicly held companies.<sup>15</sup>

## **II. Disclosure Requirements**

Many companies have voluntarily disclosed their carbon emissions according to the guidelines issued by the Carbon Disclosure Project and the Global Reporting Initiative, private organizations focused on environmental risks.<sup>16</sup> While voluntary disclosure initiatives have played a key role in educating the market about climate change related risk, they cannot be a replacement for compulsory reporting. The breadth and purpose of the various voluntary carbon disclosure standards do not allow for easy comparison of data. The voluntary disclosure has moved the market in the direction of transparency, but mandatory reporting must play a role to facilitate comparison of data to reflect actual risk exposure.

There are no current Securities and Exchange Commission (SEC) regulations specific to climate change risk disclosure; though regulation S-K requires publicly held companies to disclose material information.<sup>17</sup> As the regulatory schemes around the world develop and become compulsory, publicly held companies may need to disclose to investors their exposure to climate change related liabilities. The SEC may play a key role in developing and standardizing the transfer of carbon risk information to the market, making it accessible to all market participants.

### **a. Regulation S-K**

Material information is information necessary for investors to make informed decisions. The U.S. Supreme Court ruled that disclosure is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available" or if "there is a substantial likelihood that a reasonable shareholder would consider it

important in deciding how to vote.”<sup>18</sup> If an investor is considering a fund with substantial holdings located near coastlines that may be at risk due to severe weather, that investor may consider that information to be material. Alternatively, a publicly held company with substantial agricultural holdings in the Southwest United States, which may be affected by climate change related drought, may consider its potential risk material information necessary for investors to make informed decisions. Items 101, 102, 103 and 303 are the rules most likely to require disclosure of climate change related risk.

Item 101 pertains to the description of business. It requires publicly held companies to disclose information as to the “effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment... may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.”<sup>19</sup> Companies with operations in jurisdictions subject to the emerging regulatory schemes, *supra*, should be cognizant of their potential disclosure obligations under item 101. As carbon and GHG regulation evolve in the U.S. and become compulsory on a larger scale and the effects of climate change intensify, the necessity of climate change related risk disclosure will solidify. Some of the factors taken into consideration under Item 101 in determining what disclosure is material are: “both quantitative and qualitative factors such as the significance of the matter to the registrant..., the pervasiveness of the matter..., and the impact of the matter.”<sup>20</sup> Companies that have been proactive in taking aggressive measures to reduce their GHG emissions may find themselves in a favorable position in relation to their competitors who may have not taken measures to reduce their GHG risks.

Item 102 requires a description of property. “What is required is such information as reasonably will inform investors as to the suitability, adequacy, productive capacity and extent of utilization of the facilities by the registrant.”<sup>21</sup> Thus if a publicly held company has significant property holdings that may be adversely impacted by climate change, such as near coastlines or resorts dependent on snow fall or agricultural lands that may decline in productive capacity, they may be required to disclose their risk under item 102. Conversely, companies with property holdings in areas not likely to be affected by climate change may disclose their favorably positioned property holdings as a competitive advantage.

Item 103 involves legal proceedings. It requires the disclosure of material legal proceedings of the parent company and any of its subsidiaries.<sup>22</sup> Though there have been no successful climate change suits to date, with the increased level of GHG regulation and compulsory reduction mandates, climate change related litigation will almost certainly arise in the future. Several climate change suits have been brought and dismissed or are still pending.<sup>23</sup> The cases that have been brought to the courts have been dismissed on the grounds that they involve non-justiciable political questions. One notable case currently working its way through the courts is *The Native People of Kivalina v. Exxon Mobil*.<sup>24</sup> The people of Kivalina reside on an island off the coast of Alaska and are in the danger of losing their island as a result of climate change. Due to shorter winters, land-fast sea ice no longer protects the island from harsh fall and winter storms. Kivalina citizens brought suit in the U.S. District Court in California against the nation’s largest producers of GHG emissions, electric utilities, oil companies and coal companies claiming their GHG emissions contributed to climate change that is allegedly responsible for the loss of the island of Kivalina.

Item 303 includes management's discussion and analysis of financial conditions and results of operations. It includes disclosure impacting liquidity: "any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way."<sup>25</sup> GHG regulation for certain energy intensive industries, such as shipping or airlines, could be characterized as uncertainties likely to impact liquidity. In addition, disclosure from results of operation include "...any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."<sup>26</sup> Likewise, this requirement could have an impact on industries subject to high climate change risk.

### **b. Sarbanes-Oxley**

The Sarbanes-Oxley Act requires publicly traded companies to fairly represent their financial conditions and results of operations.<sup>27</sup> It mandates the disclosure of information necessary for investors to make financial decisions. Though there are no specific environmental disclosure rules, climate change risk disclosure reporting may improve as CEOs and CFOs are required under section 302 to personally certify specific information on reports being filed.

### **III. Conclusion**

As climate change risks and GHG regulations become more robust, publicly held companies must be cognizant of their responsibility to disclose their climate change risks and liabilities under the current SEC and Sarbanes-Oxley reporting requirements as well as likely expansion of the federal regulatory infrastructure in this area consistent with rapidly evolving public policy focused on climate change issues. Attorneys for public companies will be called upon to carefully examine their clients' disclosure requirements. The landscape of disclosure will change drastically in the coming years as regulatory schemes develop and take hold.

### Endnotes

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<sup>1</sup> Susan Fletcher, Congressional Research Service, *Global Climate Change: The Kyoto Protocol*, July 21, 2005. <<http://fpc.state.gov/documents/organization/50815.pdf>> (accessed June 23, 2009).

<sup>2</sup> U.S. Securities and Exchange Commission, <<http://www.sec.gov/about/laws.shtml#secact1933>> (accessed June 23, 2009).

<sup>3</sup> United Nations Framework Convention on Climate Change, <[http://unfccc.int/methods\\_and\\_science/mitigation/items/3681.php](http://unfccc.int/methods_and_science/mitigation/items/3681.php)> (accessed June 23, 2009).

<sup>4</sup> United Nations Framework Convention on Climate Change, <[http://unfccc.int/essential\\_background/glossary/items/3666.php#G](http://unfccc.int/essential_background/glossary/items/3666.php#G)> (accessed June 23, 2009).

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<sup>5</sup> United Nations Framework Convention on Climate Change, <[http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php)> (accessed June 23, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> Susan Fletcher, Congressional Research Service, *Global Climate Change: The Kyoto Protocol*, 2005. <<http://fpc.state.gov/documents/organization/50815.pdf>> (accessed June 23, 2009).

<sup>8</sup> HR 2454. <[http://energycommerce.house.gov/Press\\_111/20090515/hr2454.pdf](http://energycommerce.house.gov/Press_111/20090515/hr2454.pdf)> (accessed June 6, 2009).

<sup>9</sup> Greg Hitt and Stephen Power, *The Wall Street Journal*, June 28, 2009. <<http://online.wsj.com/article/SB124610499176664899.html>> (accessed June 29, 2009).

<sup>10</sup> Pew Center on Global Climate Change, <<http://www.pewclimate.org/node/6013>> (accessed June 8, 2009); California Environmental Protection Agency- Air Resources Board, <<http://www.arb.ca.gov/cc/ab32/ab32.htm>> (accessed June 10, 2009).

<sup>11</sup> Western Climate Initiative, <<http://www.westernclimateinitiative.org/>> (accessed June 5, 2009).

<sup>12</sup> Midwest Greenhouse Gas Reduction Accord, <<http://www.midwesternaccord.org/>> (accessed June 5, 2009).

<sup>13</sup> Midwest Greenhouse Gas Reduction Accord, <<http://www.midwesternaccord.org/>> (accessed June 5, 2009).

<sup>14</sup> United States Environmental Protection Agency, *Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under the Clean Air Act*, April 17, 2009. <<http://epa.gov/climatechange/endangerment.html>> (accessed June 23, 2009).

<sup>15</sup> 17 CFR § 229, adopted under the Securities Act of 1933, 15 USC 77a et seq., and the Securities Exchange Act of 1934, 15 USC 78a et seq.

<sup>16</sup> Global Reporting Initiative, *Sustainability Reporting Guidelines*, 2006 <<http://www.globalreporting.org/ReportingFramework/G3Guidelines/>>; Carbon Disclosure Project, *CDP5 Letter and Questionnaire*, February 1, 2007, <<http://www.cdproject.net/questionnaire.asp>> (accessed June 28, 2009).

<sup>17</sup> *Id.*

<sup>18</sup> *TSC Industries Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976).

<sup>19</sup> 17 CFR § 229.101 (c) (xii).

<sup>20</sup> 17 CFR § 229.101 Instructions to Item 101 (1).

<sup>21</sup> 17 CFR § 229.102 Instructions to item 102 (1).

<sup>22</sup> 17 CFR § 229.103

<sup>23</sup> *Connecticut v. American Electric Power Co., et al.* 406 F. Supp.2d at 272; *California v. General Motors, et al.* 2007 U.S. Dist. LEXIS 68547 at 22-23.

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<sup>24</sup> *Native Village of Kivalina v. ExxonMobil Corp., et al.*, CV 08-1138 (N.D. Cal., Filed Feb. 26, 2008).

<sup>25</sup> 17 CFR § 229.303 (a) (1).

<sup>26</sup> 17 CFR § 229.303 (a) (3) (ii).

<sup>27</sup> Sarbanes-Oxley Act of 2002, Pub L No 107-204, 116 Stat 745 (codified in various sections of 18 USC).

## ENVIRONMENTAL LAW SECTION COUNCIL MEETINGS

### MEETING MINUTES – November, 5, 2009

**Present at Lansing Lexington Hotel:** Lisa Babcock, Charles Barbieri, George Curran, Charlie Denton, Chris Dunsky, Steve Gobbo, Jeff Haynes, Craig Hupp, Lee Johnson, Kurt Kissling, Anna Maiuri, Jim O'Brien, Dustin Ordway, Patricia Paruch, John Tatum

Present via telephone conference: Kurt Brauer, Michael Caldwell, Ken Gold, Josh Gubkin

#### 1. INTRODUCTION

Chris Dunsky welcomed everyone to Lansing for the meeting.

#### 2. REVIEW AND APPROVAL OF MINUTES FROM SEPTEMBER 16, 2009 COUNCIL MEETING

Before the meeting, former Secretary-Treasurer, Charlie Denton, circulated draft Minutes of the Council's September 16, 2009 meeting. There was a motion by Jeff Haynes to correct on page 3 of the Minutes the word "gamer" to "garner." The motion was seconded by Craig Hupp. The motion passed unanimously.

Jeff Haynes also presented a Resolution to clarify the Environmental Law Council's Minutes of February 28, 2008. The Resolution stated that the Minutes of the February 23, 2008 meeting of the Environmental Law Section Council, Item 2, Secretary-Treasurer's Report, relating to the Michigan Environmental Law Deskbook state in part:

"He also requested approximately \$10,000 to hire a law student to perform cite checking and to proofread chapters for the Deskbook and proposed to pay an honorarium of \$1,000 to each author and editor for a total of \$11,000."

Jeff Haynes proposed that the minutes should say that the honorarium is \$500 to each author and \$500 to each editor.

The motion was seconded by Charles Barbieri. The resolution was adopted unanimously in favor of the change for the minutes to now say:

"He also requested approximately \$10,000 to hire a law student to perform cite checking and to proofread chapters for the Deskbook and proposed to pay an honorarium of \$500 to each author and \$500 to each editor for a total of \$11,000."

#### 3. SECRETARY/TREASURER'S REPORT (MAIURI)

A. **Current Status of the Accounts.**

The current status of accounts and review of financial reports from the State Bar of Michigan was presented. There were no corrections noted,

B. **Discussion of 2009/2010 Draft Budget.**

Ms. Maiuri presented the 2009-2010 draft budget. Lively discussion-ensued. The draft budget was presented with income at \$20,764.50, with total expenses planned at \$36,020.00. After considerable discussion, a few line items were changed. The Deskbook Committee suggested an increase in expenses from \$11,000 to \$22,000. A motion was made by Jeff Haynes and seconded by Craig Hupp to increase the budget item from \$11,000 to \$22,000 and was accepted unanimously.

The budget item for speakers and entertainment was originally listed at \$5,000. After considerable discussion, a motion was made by John Byl to decrease the amount to \$2,500. It was seconded by Josh Gubkin. The motion passed unanimously.

Dustin Ordway moved to approve the updated draft Fiscal Year 2010 Budget and Jeff Haynes seconded. The motion passed unanimously.

4. **CHAIRPERSON'S REPORT (DUNSKY)**

A. An introduction of Steve Gobbo, our liaison with the State Bar Board of Commissioners.

Mr. Dunskey introduced Mr. Gobbo as our liaison and the Council welcomed him to the meeting.

B. **Chairperson's 2009-2010 Goals**

Mr. Dunskey provided his goals for the upcoming fiscal year. These goals were:

1. Possible expansion of the Section to include energy issues.
2. Online publication of half of the Deskbook chapters.
3. Consideration of an administrative person for support for the Technical Committee.
4. Explore pursuing a periodic electronic newsletter for the Section.

C. **Status of Legal Milestone (Barbieri)**

Mr. Barbieri stated that there is a four member subcommittee of which Chuck is an ad hoc member to focus on legal milestones in environmental law. The subcommittee has approved the Pigeon River case (*WMEAC v. Natural Resources Commission*) as a legal milestone. Mr. Barbieri stated that he

expected a formal presentation to be held some time in June, and most likely in Otsego County. Mr. Barbieri said the committee is planning a June event and are hoping they can have former Governor Milliken and his wife as well as Prof. Joe Sax participate in the presentation in June.

**D. Possible Name Change to Environmental and Energy Law Section (Babcock)**

Ms. Lisa Babcock spoke to the group about starting an Energy Law Section to the State Bar. Ms. Babcock stated that she had obtained approximately two dozen signatures to set up a new section and she needed 50 but had missed the deadline to provide the signatures to provide to the State Bar. She then thought about alternatives to doing the stand alone section and entertained perhaps melding the energy issues into the Environmental Law Section of the State Bar. It was noted that the ABA Section of Environment has recently changed its name to the Section of Environment, Energy and Resources. Ms. Babcock stated that most lawyers who had worked in the Public Service Commission or in utility energy work had joined the Administrative Law Section of the Bar. However, with all the interest in alternative energy, the Administrative Law Section does not seem a good fit to tackle the issues that are emerging in the energy area. Mr. Dunsky suggested that we consider setting up another subject matter committee called the Energy Committee.

Mr. Barbieri brought a motion and it was seconded by Dustin Ordway for Chris Dunsky to create an up to 5 person ad hoc subcommittee to study whether an Energy Committee should be formed by the Environmental Law Section. John Tatum also suggested that any subcommittee take on the issues as to whether the section should be involved in the January 2011 proposed energy publication for the State Bar. Mr. Haynes suggested that the ad hoc committee also reach out to other sections to obtain their input. Mr. Haynes suggested the Administrative Law Section, the Real Estate Section and Business Section of the State Bar should be consulted. In addition, Mr. Barbieri suggested that the ad hoc subcommittee also consider a name change to the section to include environment and energy in the Environmental Law Section's name. Mr. Hupp also suggested that the motion include a charge to the ad hoc committee to determine whether a bylaw change needs to be made if a new committee is to be adopted or if there is a name change to the section.

The combined motion passed unanimously.

Mr. Gobbo stated that the process for name change needs to follow the section bylaws as well as the State Bar bylaws. The process would mean that there would be a change to the section bylaws and that would need to be presented at the annual meeting and then go to the Board of Commissioners for approval.

**E. January 2011 SBM Journal "Energy" Issue; May 2011 Water Law Issue.**

Mr. Tatum gave a report on these two issues to be included in 2011. Mr. Tatum also volunteered to edit the energy issue. Mr. Tatum stated that the water law issue is currently being put together by the Water Committee's, Mr. Steiner and Ms. Gosman.

**F. Committee Chairs for 2009-2010.**

It was noted that the Natural Resources Committee has not been active for quite some time. When Mr. Quandt and Mr. Zimmerman were asked about their chairmanship for that committee, they both denied they were the chairs for the committee. Therefore, it was suggested that we suspend operations on the Natural Resources Committee at this time. Mr. Josh Gubkin graciously volunteered to be the chair of the Hazardous Substances and Brownfield Committee and Charles Denton will serve as Vice-Chair until a new Vice-Chair is named. Mr. Craig Hupp has graciously accepted to be the Business Section liaison for the State Bar.

**G. Request on Comment for Proposal Regarding Confidentiality in Mediation Proceedings.**

Mr. Denton volunteered to circulate the Request for Comment on draft Proposal MCR 2.412 (Confidentiality and Disclosure of Mediation Communications) to the Section. Mr. Denton will collect the comments and provide them to the Office of Dispute Resolution and Mediation Confidentiality and Standards of Conduct Committee for the Michigan Supreme Court by February 1, 2010.

**5. STANDING COMMITTEE REPORTS**

**A. Deskbook Committee (Haynes)**

Mr. Haynes stated that the chapter on "Takings" has been completed and he encouraged everyone to provide feedback on the chapter that has been put on the State Bar website. A lively discussion ensued concerning whether the deskbook should be available only to State Bar section members, State Bar members or to the general public. Mr. Tatum explained that he was in favor of keeping this as a public service project. He said that all the links that are used can be used at no charge as long as the deskbook is available for the general public. Mr. Tatum proposed a motion that the deskbook be available for general public service use and available free of charge to the general public. The motion was seconded by Pat Paruch. The motion passed, however, there was one nay vote from Kurt Kissling.

Mr. Tatum stated that the Environmental Law Section has the copyright to the deskbook. Kurt Kissling suggested that Mr. Haynes should get copyright waivers from the authors of the different chapters. Mr. Haynes indicated that he would do so.

Mr. Tatum made a motion to authorize the Chair to replace ICLE with Lawriter. Mr. Tatum explained that Lawriter allows us to pick up Federal District Court cases. Mr. Tatum explained that the cost is \$500 per year and asked that the \$500 be included in the Deskbook budget. The motion was seconded by George Curran. The motion passed unanimously.

**B. Membership Committee (Ordway)**

Mr. Ordway suggested that the section extend for another year the dues membership waiver for public sector employees. The motion was seconded by George Curran and passed unanimously.

**C. Program Committee (Brauer) - Provided via email report (copied herein) to Mr. Chris Dunsky on 11-4-09.**

1. The Program Committee expects that the November 5 Program held in conjunction with the East and West Michigan Chapters of the Air and Waste Management Association was a resounding success. Registration was full as of October 30th (135 attendees). Many thanks to Kurt Kissling, Steve Kohl, Michelle Buchler and others that helped put the program together and make it a success.
2. The Program Committee calls will be monthly going forward. I believe that the third Wednesday of the month at 5:30 will be planned, so that other groups can plan around those dates and time. (11/18, 12/16, 1/20, 2/17, 3/17, 4/21, 5/19, 6/16, 7/21, 8/18 and 9/15). If there are any conflicts, please let me know, and we will make arrangements. Otherwise, I will circulate an appointment for each date with the call in number.
3. The Program Committee proposes to hold four programs in 2010: March (Real Property, DNRE Reorganization), June (Higgins), September (Annual Meeting) and November/December (TBD).
4. I propose that we seek a regional or national level speaker, perhaps in conjunction with the Annual Meeting. I would ask that we budget \$5,000 for that. (With thanks to Anna Maiuri for the suggestion!)
5. I would ask that all of the other committees that plan on holding programs coordinate with the Program Committee so that we do not duplicate topics or infringe on dates. I am aware of the Sustainability and Climate Change program proposed for April 2010, and will coordinate with George and Courtney on dates.

6. I would ask that members of the Council review the speaker's list at <http://www.michbar.org/environmental/sections/services.cfm> to update the topics on which they are available/willing to speak. We should also add a column for Climate Change/Energy.

**D. Michigan Environmental Law Journal (Schroder)**

Mr. Schroder was not in attendance and did not provide a written report.

**E. Technology Committee (Tatum/Denton)**

Mr. Dunsky started the discussion regarding whether the section should consider hiring an administrator to deal with many of the section details that Mr. Tatum has been handling very ably for many years. Mr. Tatum suggested a list of different tasks that this administrator would be responsible for performing. Ms. Patricia Paruch stated that the Real Property Section does have a full time administrator for the Real Property Section, however, they have a much larger budget. The Real Property Section has 3,500 members versus our section that has approximately 600 members.

Ms. Paruch stated that there were many benefits to having a full time administrator, including handling ongoing support for programs and also provides a good consistent liaison with State Bar people to determine what services are available. "She indicated that the Real Property Section pays \$3,200 per month. Much discussion ensued whether the section could hire either a full or part-time administrator, what type of hiring process to undertake and what compensation might be appropriate. Craig Hupp and Pat Paruch stated that they would work with Charlie Denton to consider an administrator position.

**6. ADJOURNMENT**

Due to the lateness of the hour, Mr. Dunsky asked for a motion to adjourn at approximately 7:30 p.m. All other items on the agenda were tabled for the next meeting.

Mr. Dunsky moved for adjournment, seconded by Craig Hupp and the motion passed unanimously.

## MEETING MINUTES – January 20, 2010

**Present at the University of Michigan Law School:** John Byl, Michael Caldwell, Charlie Denton, Dennis Donohue, Christopher Dunsky, Lisa Gallinari, Ken Gold, Sara Gosman, Jeff Haynes, Steve Huff, Kurt Kissling, Anna Maiuri, Jim O'Brien, Dustin Ordway, Patricia Paruch, Jim Roush, Robert Schroder

**Present via telephone conference:** Chuck Barbieri, Kurt Brauer, Steve Gobbo, Josh Gubkin, Tammy Helminski

### 1. INTRODUCTION AND REVIEW AND APPROVAL OF MINUTES FROM NOVEMBER 5, 2009 MEETING

Chris Dunsky welcomed everyone to Ann Arbor for the meeting.

Prior to the meeting, Secretary-Treasurer, Anna Maiuri, circulated draft Minutes of the Council's November 5, 2009 meeting to the Council members. There were no comments to the meeting Minutes. There was a motion by Charlie Denton to approve the Minutes. The motion was seconded by Bob Schroder. The motion passed unanimously.

### 2. SECRETARY/TREASURER'S REPORT (MAIURI)

#### A. Current Status of the Accounts.

The current status of accounts and review of financial reports from the State Bar of Michigan was presented. There were no corrections noted.

Ms. Maiuri suggested that members of the Council send her an e-mail every time that they have a conference call using the Council's conference call number so that she can get an accurate accounting of funds used for conference calls.

#### B. Discussion of 2009-10 Draft Budget.

After a review of the 2009-2010 draft budgets, a motion was made by Charlie Denton to approve the revised budget and seconded by Jeff Haynes. The motion passed unanimously.

### 3. CHAIRPERSON'S REPORT (DUNSKY)

#### A. Committee Chairs and Vice Chairs for 2009/2010.

Mr. Dunsky stated that Mr. Jim Roush has graciously volunteered to serve as the new Vice Chair of the Technology Committee.

Mr. Josh Gubkin has graciously volunteered to be the Chair of the Hazardous Substances and Brownfield Committee. Tammy Helminski has volunteered to be the Vice Chair of that Committee.

Ernie Chiodo has graciously volunteered to be the Chair of the Litigation and Administrative Law Section.

Mr. Dunsky also reported that Peter Holmes resigned as assistant editor for the Michigan Environmental Law Journal.

Ms. Maiuri suggested that more women also volunteer to participate with the students as to increase diversity in the section.

#### **4. STANDING COMMITTEE REPORTS**

##### **A. Deskbook Committee (Haynes)**

Mr. Haynes reported that one chapter has been posted to the website. There are four in edit and four chapters in draft. Eight other chapters are 90% done and editors are working on four other chapters. Mr. Haynes added that the goal was to complete the Deskbook by the end of September, 2010. Mr. Haynes also discussed Google Scholar which allows searches for free. John Tatum is working on a hyperlink to Google Scholar. Google Scholar does not have Michigan Rules and Administrative Law decisions, however, Law Writer does and it fills that gap.

##### **B. Membership Committee (Ordway)**

Mr. Ordway reported that on December 11, 2009, a membership reception was held at the United Way offices in Detroit. Sara Gosman, Noah Hall and others attended. Dustin Ordway also suggested that we might want to plan a law school reception in Lansing. Chuck Barbieri said he would work with Mr. Ordway on a Lansing event to be scheduled within the next six weeks.

##### **C. Program Committee (Brauer)-Provided via email report (copied herein) to Mr. Chris Dunsky on Tuesday, January 19, 2010.**

Attendees: Kurt Brauer (Chair), Michael Caldwell, James O'Brien, James Roush and AnnMarie Sanford

###### **1. Upcoming Programs:**

- A. March 16, 2010 — Air Committee Program, Lansing Community College West/MTEC. The meeting will include presentations on the Johnson Memo/Endangerment Finding, the Mobile Source Rule, the Tailoring Rule Overview and a panel discussion on Tailoring Rule Implementation. S. Lee Johnson is coordinating

the program in conjunction with AWMA and members of the Program Committee.

- B. May 6, 2010 — Sustainability and Climate Change Program. The program will be held simultaneously at two locations, MAREC in Muskegon and Next Energy in Detroit. Portions of the program will be video-conferenced to the participating locations. Keynote speakers will present in Detroit and Muskegon. The program will also include a panel discussion on the implications of a future with non- gasoline powered vehicles. Afternoon breakout topics will include green building risks, professional liability and contract terms for green building, energy efficiency, the role of independent power producers, utility contracting, greenhouse gas reporting and carbon management, transmission siting, and zoning and permitting issues relating to wind, solar, biomass and digesters. The role of incentives in sustainability and climate change, green leases and supply chain management issues will be discussed. George Curran and Cortney Goldberg are heading up the program with assistance from Alison Waske and other members of the Program Committee.
- C. June 18, 2010 Program — The annual Higgins Lake adventure will include a discussion of energy issues with Skip Pruss of Michigan Department of Energy, Labor and Economic Growth. Mr. Brauer will follow up with Mr. Pruss' office to confirm his attendance, as well as the attendance of others on Mr. Pruss' staff.
- D. September 2010 — Michael Caldwell will coordinate the annual meeting program with assistance from AnnMarie Sanford. Mr. Caldwell will discuss topics with Ms. Sanford and provide proposed topics (including a potential panel discussion) at the Program Committee's next meeting. The group suggested that with the notification that Ms. Humphries would be leading the newly merged Michigan Department of Natural Resources and Energy, an invitation should be extended for her to speak at our annual meeting program. To date, the annual meeting date has not been set, but Mr. Brauer will follow up with Ms. Humphries to determine whether she is available to speak once our date is selected.
- E. November/December 2010 — The Program Committee suggested that we continue the tradition of the last two years, and see if AWMA wishes to hold a joint program in the late fall. Mr. O'Brien mentioned that we may want to reach out to other professional organizations (e.g. Michigan Association of Environmental Professionals). Mr. O'Brien will prepare a list of such organizations and contacts, and determine if there is an appetite within those organizations to hold a joint program.

2. Mr. Brauer suggested that the Program Committee meet in person prior to our September annual meeting, in order to compile a schedule for programs for 2011. The Program Committee consensus was that such a meeting should take place in August, in order to develop a list of proposed dates and program topics.
3. Next Meeting — February 17, 2010 at 5:30 p.m. Call-in #1-800-270-1153; Passcode: 123915.

**D. Michigan Environmental Law Journal (Schroder)**

Mr. Schroder made an appeal to the members of the Section for help with the Environmental Law Journal. Mr. Schroder suggested that Committee Chairs get more involved with the Michigan Environmental Law Journal and that perhaps that the Chairs suggest that each Committee provide a few articles per year. Mr. Schroder expressed concern that interest seemed to have dropped off and he would like to have the Council encourage more article generation.

Mr. Schroder stated that Peter Holmes has resigned as Assistant Editor of the Journal. When Mr. Holmes was involved, he got information out to the law schools for the Essay Competition and worked with students on case notes for the Environmental Law Journal. He also stated that there is a stipend for that work for students. Mr. Holmes also did proofreading for the Journal. Mr. Schroder is looking for a new Assistant Editor.

Mr. Schroder stated that an article should be no more than ten double spaced typed pages and that an expansion of a previous article is also accepted. Mr. Schroder stated that only four articles were received in all of 2009. He stated that this would be a good opportunity for young attorneys to get some recognition and establish themselves as environmental law practitioners. Mr. Denton suggested contacting the whole list serve to submit articles and to be specific on the topics requested. Mr. Dunsky committed that he would send a list serve announcement asking for a replacement for Mr. Holmes and making a call for articles. Mr. Dunsky also said he would make separate calls to committee chairs to generate more article interest.

Ms. Gosman said that she would post the Ninth Annual Environmental Law Section Essay Contest flyer at the University of Michigan Law School. {See attached}.

**E. Technology Committee (Roush)**

Jim Roush provided the report on behalf of John Tatum. Mr. Roush stated that the State Bar has the capability for helping with a monthly newsletter if the Section is interested. A template is available and support services are also available by the Section.

Mr. Roush mentioned that while the list serve feature is sometimes not very user friendly it is the best that the Section can use at the moment.

5. **SUBJECT MATTER REPORTS (JOHNSON/KISSLING)**

A. **Air Committee**

The Air Committee is planning a spring conference in March in Lansing at the Lansing Community College-West. A whole morning is planned for rule making and the Greenhouse Gas rule and related topics. The program will include the MDNRE, industry, attorneys and consultants.

B. **Environmental Litigation and Administrative Practice (Huff/Chiodo)**

On September 23, the ELAP Committee presented "Indoor Air Quality: Law, Medicine and Science" in Clinton Township with several guest speakers. (A similar presentation was given on September 25 in Chicago, but with fewer guest speakers.) Approximately 15 environmental lawyers, CIH's and other environmental consultants were in attendance. Due to interest and questions, not all of the scheduled topics were covered. The Committee plans to schedule another presentation/panel discussion in February or March to cover the remaining topics of the state of law regarding expert testimony admissibility, various "sick building" issues and mass toxic tort litigation. The Committee also hopes to continue and expand upon its efforts to take some of these presentations to the environmental law societies of the various Michigan law schools. Given the section's expressed intention to reach out to more of the state's law students, the presentations at the law schools would also allow time for discussion and questions about how to prepare for a career in environmental law, practicing environmental law, etc.

C. **Hazardous Substances and Brownfield Committee (Gubkin/Helinski)**

Josh Gubkin was welcomed as the new Chair of the Committee. He indicated that he is in the planning stages of reviewing programs with other committees and that he would work with Kurt Brauer in coordinating programs.

D. **Natural Resources (Mack)**

No report. Kurt Brauer did mention that he was hoping to get the new Director, Becky Humphries and Skip Pruss, perhaps, to join us at Higgins Lake. The Higgins Lake event this year is scheduled for June 18, 2010.

E. **Water (Steiner/Gosman)**

Ms. Gosman introduced the invasive species presentation that was going to be held later that day in Ann Arbor and gave a brief description of the panel that was presenting.

Ms. Gosman also indicated that the Michigan Bar Journal was hoping to do an issue on water and that was coming up in May. Ms. Gosman stated that she had sent an e-mail soliciting new members to the Water Section and was delighted to have increased the group membership to about 100 members.

F. **Sustainability Committee and Climate Change (Curran/Goldberg)**

No report.

6. **LIAISON REPORTS**

A. **State Bar of Michigan Board of Commissioners Liaison (Steve Gobbo)**

No report.

B. **Real Estate Section (Paruch)**

Ms. Paruch indicated that the Real Estate Section does use an e-Newsletter that they generate and distribute every month. It is usually about 2 to 3 articles per month and talks about upcoming events. They have received very positive results and feedback from the e-Newsletter. Ms. Paruch indicated that she felt that the Section should consider using this tool and that she volunteered to help if the Section was inclined to develop a newsletter. She said that the State Bar helps with the template and it is fairly easy to do. Mr. Dunsky said that he would like to review the possibility of doing an e-Newsletter and see how it works. Mr. Dunsky said that he would add the newsletter possibility to the e-mail that he intends to do to the list serve when he is soliciting articles. Mr. Dunsky would also ask for volunteers to help the Section with starting the newsletter.

7. **UNFINISHED BUSINESS**

A. **Report of Ad Hoc Committee**

See attached report submitted by Dustin Ordway, Chair, on behalf of the Ad Hoc Committee dated January 18, 2010.

B. **Report of Ad Hoc Committee on ELS Administrative Position (Denton)**

Mr. Denton said that he would like to defer action this item until June. At that time he will have more information to present.

C. **Status of the Legal Milestone (Barbieri)**

Mr. Barbieri reported that the Legal Milestone presentation is planned for June 9, 2010. He is working on the details for a program with Jeff Haynes who has also been active in getting the Legal Milestone recognized. Further details will be available soon.

**8. NEW BUSINESS**

A. **Report on Reforms Being Considered by the Committee on Business Impact (Barbieri)**

Mr. Barbieri stated that state revenues are so slim that court budgets will likely be cut soon. Possible reforms being considered is to develop a business court for 5 to 6 counties. Recommendations are to be made by April and the Supreme Court is expected to take action by late spring or early summer.

B. **Request for Mentor Program (Jamison)**

Mr. Eric Jamison suggested that the Section consider a mentoring program for students and attorneys. There was considerable discussion among the Council as to whether a mentoring program should be formal or informal. The consensus was that members of the Council will be available for students and there will be more communication between students and Council members so there can be more involvement between the two groups.

Mr. Dunsky stated that Eric Jamison of Wayne State University suggested a concept of pairing attorneys with law students. After considerable discussion as to what mentoring really means in this context, Mr. Gold suggested that it would be acceptable to have an occasional lunch with a law student but a mentoring relationship is probably too much to ask. Mr. Ordway suggested that Section Members consider externships with law students and he stated that his experience has been very positive in that regard.

**9. ADJOURNMENT**

Due to the lateness of the hour, Mr. Dunsky called for an adjournment. Motion was made by Mr. Ordway to adjourn, seconded by Mr. Schroder and the motion passed unanimously.

## **MEETING MINUTES – March 12, 2010**

**Present via telephone conference:** Chuck Barbieri, Michael Caldwell, George Curran, Charlie Denton, Dennis Donohue, Christopher Dunsky, Jeff Haynes, Kurt Kissling, Anna Maiuri, Dustin Ordway, Patricia Paruch, Robert Schroder, John Tatum and Tom Wilzak.

The meeting began with Mr. Chris Dunsky stating that this conference call meeting had been scheduled to address some of the items that had not been addressed at the January 20, 2010 meeting. The items to be discussed during this conference call meeting were to:

- A. Review of the January 20, 2010 minutes;
- B. Discussion on the upcoming May 6, 2010 Second Annual Sustainability and Climate Change Conference;
- C. Discussion on the Environmental Law Section (ELS) Administrator position; and
- D. Consider the requests for monetary contributions from Community Legal Resources, and the Great Lakes and St. Lawrence Cities Initiative.

### **1. REVIEW AND APPROVAL OF MINUTES FROM JANUARY 20, 2010 MEETING**

Mr. Dunsky presented the January 20, 2010 minutes. There were no comments to the minutes. A motion was made by Mr. Charlie Denton to accept the minutes. The motion was seconded by Mr. John Tatum and was passed unanimously.

### **2. DISCUSSION OF THE PLANNED MAY 6, 2010 SECOND ANNUAL SUSTAINABILITY AND CLIMATE CHANGE CONFERENCE (CURRAN)**

Mr. George Curran stated that the Sustainability and Climate Change Committee had developed a program for May 6, 2010. The plan was to have the meeting broadcasted simultaneously from NextEnergy Detroit and the Merrit Center in Muskegon (through Grand Valley State University). Mr. Curran said that he would send out a detailed program by the following Monday. The keynote speaker was expected to be Senator Patricia Birkholz. Sen. Birkholz would speak about Bills 1056 and 1067 and the Brownfield Redevelopment Act financing changes. Another expected speaker was Vince Helwig from MDNRE. Another part of the program was planned to consist of DTE Energy and General Motors representatives talking about non-gasoline powered vehicles and the business case for sustainability. Three afternoon sessions were also planned, one on business and economics; the second on climate change and regulation; and the third on alternative energy. Mr. Todd Fracassi stated that Chad Geirger of Wolverine Power was also scheduled to speak.

Mr. Curran encouraged members of the Council to spread the word about the upcoming conference and to attend.

### **3. REPORT OF THE AD HOC COMMITTEE ON ELS ADMINISTRATIVE POSITION (DENTON)**

Mr. Denton discussed the possibility of hiring an environmental law section administrator to assist the section in various administrative tasks including setting up programs, soliciting articles, updating the ELS website, assisting council members in fulfilling their duties, etc. Mr. Denton stated that the items to be discussed at this meeting were whether to post an ad to solicit interested persons and if so, when we would expect the selected candidate to start.

A discussion ensued with respect for the need for an ELS Administrator. Mr. Dustin Ordway asked Ms. Paruch how the Administrator for the Real Estate Section had worked out and whether Ms. Paruch felt that the Administrator provided a useful service. Ms. Paruch stated that the Real Estate Section has had an administrator for many years and her name is Arlene Rubenstein. Ms. Paruch explained that Ms. Rubenstein has provided consistency and has helped guide the Section through many administrative hurdles within the State Bar and she is able to get things done efficiently and effectively. Ms. Paruch commented that the Real Estate Section is much larger than the ELS and that this position would not require as many hours as Ms. Rubenstein devotes to her duties. Ms. Paruch believed that an Administrator would help the ELS keep up with mailing lists and could assist in setting up programs. Mr. Tatum added that the Administrator could also help remind folks of deadlines and keep the goals of the ELS Chair on task.

After some discussion, a consensus was reached that the Section would need a job description to be drafted and circulated before the Section could post a job opportunity. Mr. Tatum mentioned that he had hoped we could have someone on board by the time our meeting in Higgins Lake would occur in June.

There was a motion by Mr. Denton to circulate a proposed job description in the next few days and obtain comments on that job description and then solicit applicants. The motion was seconded by Ms. Paruch. The motion passed unanimously.

### **4. REQUESTS FOR ELS MONETARY CONTRIBUTION FROM COMMUNITY LEGAL RESOURCES AND THE GREAT LAKES AND ST. LAWRENCE CITIES INITIATIVES.**

Mr. Dunskey described the requests for monetary contributions from Community Legal Resources and the Great Lakes and St. Lawrence Cities Initiatives. Mr. Schroder indicated that it has not been the tradition of the Environmental Law Section to make any kind of monetary contributions for non-profits. The primary reason given in the past was because the requestor was asking the ELS to take a position on a specific issue. The Council has generally avoided taking any type of action that could be viewed in a political type fashion.

Mr. Haynes also discussed that giving money to these types of organizations has not historically been part of the mission of the Section. Ms. Paruch added that the Real Estate Section only provides a contribution to Access to Justice and for pro bono and does not contribute to any other causes. Mr. Dunskey stated that the State Bar discourages donations but there is no prohibition. Mr. Dunskey stated that the ELS

bylaws are silent on the issue and reiterated that there is no prohibition on making donations, however, there has been no affirmative authorization either.

Mr. Dunsky said that the bylaws state that the mission of the ELS is education. Consequently, Mr. Haynes suggested that the ELS should “stick to its mission” and that it continue to spend its money supporting scholarships and writing competitions for those students who are interested in pursuing environmental law practice.

Mr. Haynes made a motion for the Environmental Law Section to respectfully decline contributing for either charity. The motion was seconded by Anna Maiuri and the motion passed unanimously.

## **5. ADJOURNMENT.**

There was a motion to adjourn by Ms. Paruch and seconded by Mr. Barbieri. The motion passed unanimously.

REPORT OF  
ENVIRONMENTAL LAW SECTION  
NOMINATING COMMITTEE

On May 6, 2010, Christopher Dunsky, Chair of the Environmental Law Section, appointed a Nominating Committee consisting of Chuck Barbieri, Charlie Denton (Chair of the Committee), Kenneth Gold, Sharon Newlon, and Susan Topp. Their task was to recommend a slate of candidates for the offices of Chairperson-Elect and Secretary-Treasurer, and members of the Council of the Section to succeed those whose terms win expire at the close of the next annual meeting, in accordance with Article IV, Section 1, of the Section Bylaws.

Charles Denton submitted an oral report to the Environmental Law Section Council at its meeting on June 19, 2010. The Council approved the slate of nominees recommended by the Nominating Committee. Anna Maiuri has been nominated for Chairperson-Elect and Dustin Ordway has been nominated for Secretary-Treasurer. Craig Hupp was nominated for a second three-year term on the Council, which will expire, if approved, in 2013. Cortney Goldberg, Sara Gosman, Bob Reichel and Scott Steiner were each nominated to serve as Council members for 3- year terms expiring in 2013.

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

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

## REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee of Ken Gold, Sharon Newlon, Susan Topp and Charlie Denton conferred multiple times this Spring to consider potential candidates consistent with the requirements for service as officers and as members of the Environmental Law Section Council. Based on its review, the Nominating Committee makes the following recommendations:

Chair:	Charlie Denton will automatically become Chair by operation of the Bylaws
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Chairperson- Elect:	Anna Maiuri
Secretary-Treasurer:	Dustin Ordway
Second 3-year term on Council:	Craig Hupp

First 3-year term on Council:	Cortney Goldberg
	Sara Gosman
	Bob Reichel
	Scott Steiner

Voting on these positions will be held at the Environmental Law Section annual meeting at 4:30 p.m., in Grand Rapids on September 30, 2010. In accordance with the Section Bylaws, other nominations for these positions may be made from the floor at the annual meeting, and thereafter the officers and members of the Council of the Section for the 2010-2011 year will be elected by Section members. The nominees' addresses and brief summaries of their qualifications are provided below:

### OFFICERS

Chair:

Charles M. Denton  
Barnes & Thornburg, LLP  
171 Monroe Avenue, N.W., Suite 1000  
Grand Rapids, MI 49503

Charlie Denton is a partner in the Grand Rapids office of Barnes & Thornburg, LLP and is administrator of the firm's Environmental Law Department in Michigan and Northern Indiana. Charlie was Secretary-Treasurer and is Chairperson-Elect. He formerly served on the Council, and was Chair of the Hazardous Substances & Brownfields Committee of the State Bar of Michigan Environmental Law Section. He is also a co-chair of the ABA's Alternative Dispute Resolution Committee, and serves on the CPR Environmental Panel of Distinguished Neutrals.

## Chairperson-Elect:

Anna Maiuri  
Miller Canfield Paddock and Stone, PLC  
840 West Long Lake Road  
Suite 200  
Troy, MI 48098-6358

Anna Maiuri is a principal and practice group leader of the Energy, Environmental and Regulatory Practice Group at Miller Canfield as well as a leader in the firm's Climate Law Initiative. She has served on the Environmental Law Council of the State Bar for the past 6 years and been actively involved in the program and membership committees. She is currently serving as Secretary-Treasurer of the Environmental Law Section. In November 2008 and 2009, she traveled to China and gave presentations to the Anhui Provincial EPA, Division of Environmental Supervision, on how to use laws and regulations more effectively to enforce environmental laws in China.

Secretary-Treasurer:

Dustin P. Ordway  
Ordway Law Firm, PLLC  
116 Ottawa Avenue, N.W.  
Grand Rapids, MI 49503

Dustin P. Ordway has specialized in environmental law since 1986. Based in Grand Rapids, Mr. Ordway has a regional practice that includes local (Michigan), regional (Midwest, including, e.g., Illinois and Ohio) and more distant (e.g., Texas and California) cases. His clients include large corporations, closely held companies, municipalities and individuals - anyone who has a matter with MDNRE, U.S. EPA - Region 5, and their counterparts in other jurisdictions. Mr. Ordway has also served as common counsel for groups in numerous matters. In addition to his environmental practice, Mr. Ordway was certified as a facilitative mediator in the 1990s and works with counsel and their clients to settle cases (non-environmental litigation as well as environmental disputes) in state and federal court. He currently serves as Chair of the Membership Committee and as head of the ad hoc committee that considered whether the ELS should change its name and/or set up an energy committee of the Environmental Law Section.

## COUNCIL MEMBERS

### Second Three-Year Term:

R. Craig Hupp  
BodmanLLP  
6th Floor at Ford Field  
1901 St. Antoine Street  
Detroit, MI 48226

Craig Hupp has 25 years experience in environmental law, His areas of specialty include hazardous waste law and remediation, water quality and environmental due diligence and brownfields. He is an expert with regard to environmental considerations in lending transactions and author of an environmental policy manual for a group of 80 Michigan banks. He serves as a facilitator in environmental disputes and is active with community environmental groups in Detroit. He has served as Chair of the Section's Hazardous Substances & Brownfields Committee and has served one term as a Council Member. He has published several articles in the Section's Journal and has served as faculty at two sessions of the Section's Boot Camp for Environmental Lawyers. He co-chaired the Section's 2009 Climate Change conference.

### New Three-Year Term:

Cortney E. Goldberg  
Environmental, Health & Safety Counsel  
Dow Corning Corporation  
PO Box 994; C01282  
Midland, MI 48611

Cortney Goldberg is currently regulatory counsel at Dow Coming Corporation. She is responsible for the areas of environmental law, import, export, product labeling and transportation. Previously, Ms. Goldberg was a partner at Bodman LLP in the Environmental Practice Group. Her practice focused on environmental litigation, due diligence, real estate transactions and various types of environmental cleanup and regulatory matters. She has served a Co-Chair of the Section's Climate Change & Sustainability Committee.

Sara Gosman  
University of Michigan Law School  
Ann Arbor, MI

Sara Gosman is a lecturer on environmental law at the University of Michigan Law School; she teaches classes on toxics, environmental justice, and recent environmental decisions by the U.S. Supreme Court. Ms. Gosman is also a legal advisor to the National Wildlife Federation on water resource issues, particularly implementation of the Great Lakes-St. Lawrence River Basin Water Resources Compact She is currently Vice-Chair of the Water Committee of the Environmental Law Section.

Robert Reichel  
Assistant Attorney General  
Michigan Department of Agriculture  
Lansing, MI

Bob Reichel is an Assistant Attorney General in the Environment, Natural Resources & Agriculture Division of the Michigan Department of Attorney General. Since joining that office in 1983, he has practiced exclusively on civil and administrative environmental matters. He has handled a wide variety of issues ranging from enforcement of remediation and waste management laws to the defense of regulatory takings claims. For the last four years, he has supervised the Resource Management Section of the Division and focused on Great Lakes, wetlands, oil and gas, mining, and other natural resource management matters. Mr. Reichel has been an active member of the Environmental Law Section since 1984, participating in a variety of Section and committee activities, including, most recently, serving as a panelist in a 2010 program concerning invasive species in the Great Lakes co-sponsored by the Section and the University of Michigan Law School.

Scott J. Steiner  
Rhoades McKee  
161 Ottawa Avenue, N.W., Suite 600  
Grand Rapids, Michigan 49503

Scott Steiner has practiced environmental law for over 21 years. He is Chair of Rhoades McKee's Environmental Law Practice Group and a member of its Sustainability, Energy and Climate Change Practice Group. He specializes in Brownfield redevelopment and other complex real estate projects involving sites with contamination or regulated features such as wetlands, lakes, streams or critical dunes. He also represents clients in regulatory matters involving use of natural resources and waste compliance. He has been recognized by his peers with inclusion in *The Best Lawyers in America* in the area of Environmental Law. He is a member of the Grand Rapids Bar Association Environmental Law Section (past president), the State Bar of Michigan Environmental Law Section, including the Water Law (current co-chair), Natural Resources and Brownfields Committees and the American Bar Association's Section of Environment, Energy, and Resources (including membership on its Water Law and Natural Resource committees).

Respectfully submitted,

Charles M. Denton  
Nominating Committee Chairperson