



MICHIGAN ENVIRONMENTAL LAW JOURNAL

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Message From the Chair



Enjoy this issue of MELJ. In addition to a report by the Section's Nominating Committee for next year's officers and Council members, it contains three articles by Section members regarding Clean Air Act enforcement, how federal litigation improved the governance of the Detroit Water and Sewerage Department, and recent Michigan legislation affecting wetlands.

It also contains an article by Wayne State law student Mathew Clark that explores potential legal problems that could affect a proposal to provide financial assistance to Detroiters who are unable to pay their water bills.

The Nominating Committee's recommendations for officer and council positions, reviewed and approved by the Council, are included in this issue for your consideration in preparation for the Annual Meeting, when we will elect section members to these positions. The Nominating Committee recognizes contributions by members of the Section in considering who to nominate to these positions. As an organization of volunteers, we depend on one another to find time in our busy schedules to organize events, contact speakers, set up meetings, schedule and lead calls, reach out to section members, coordinate with the State Bar offices, draft articles and chapters, edit and update Deskbook text, reach out to law students interested in environmental law, work cooperatively with our fellow members of the bar, and much more. All of this, collectively, is what provides value to our section members. The Nominating Committee recognizes involvement by the members of our section by considering those contributions when planning nominations to leadership roles on the Council. Council members in turn encourage other section members to participate and become more involved.

Michigan is fortunate to have a rich environmental history—rich in natural resources, rich in legal tradition, and rich in the quality of work done by counsel across the state engaged on behalf of their clients. Our section offers an opportunity for attorneys for all parts of the environmental community to come together, share experiences, renew acquaintances with colleagues, and learn from one another. Each year, the leadership process renews with the nomination of new officers and council members. We hope you experience the value of belonging to the section—and that you will increase that value by participating on committees and the council.

The program for our Annual Meeting on the afternoon of September 19 promises to be enjoyable and educational. More about the program is in "Upcoming Events" below, which will

be supplemented in the coming weeks, on LinkedIn and through the Listserv, as more details are available. Please join us at the Lansing Center.

As always, do not hesitate to contact me or any Council member to get more involved or with questions or feedback for us.

Dustin P. Ordway, Chair
dpordway@ordwaylawfirm.com

Message From the Editor

Christopher J. Dunsky
Editor, Michigan Environmental Law Journal

This issue of the *Journal* reflects the fact that summer in Michigan means water. Mike Perry gives us a comprehensive and up-to-the-minute report on actions in Lansing and Chicago regarding recently enacted 2013 Public Act 98, which substantially revises Parts 301 and 303 of NREPA regarding wetlands and inland lakes and streams. The Section will make more information available on this important subject through a webinar at noon on August 15; check "Upcoming Events" below for details. Continuing the water theme, Craig Hupp was inspired by Nick Kyriakopoulos's article in our spring issue about potential regionalization or privatization of the Detroit Water and Sewerage Department (DWSD). Craig draws on his knowledge and experience as counsel for Macomb County in *United States v. Detroit* before Judges Feikens and Cox to explain how governance and management of DWSD has improved greatly in recent years and how DWSD is now largely independent of Detroit city government. On a related note, Matthew Clark reminds us that many Detroit residents need assistance to pay their water bills. He identifies and discusses several potential legal obstacles to a plan under which DWSD might provide such assistance.

Finally, Lee Johnson changes the subject to enforcement of the Clean Air Act by reporting on a recent Sixth Circuit decision involving DTE's Monroe power plant.

Thanks to all our authors for sharing their experience and knowledge with us. We have a continuing need for articles about issues of interest to Michigan environmental lawyers. If you'd like to publish an article, please contact me at cdunsky@comcast.net.

Upcoming Events

Thursday, August 15, 2013, Noon–1:00 p.m.

"Perspectives on Recent Wetlands Amendments in Michigan"

On July 2, 2013, Governor Snyder signed 2013 PA 98 into law. The Act significantly amends Part 303 of Michigan's Natural Resources and Environmental Protection Act, MCL 324.101, *et seq.*, dealing with wetlands and has generated considerable controversy.

Less than six weeks later, on August 15, 2013, Ross Hammersley (of Olson, Bzdok & Howard) and Todd Losee (of Niswander Environmental) will sort it all out for you in a webinar that you

won't find anywhere else! For anyone whose practice even touches upon natural resources and environmental law, this webinar is an important event. For anyone whose practice involves wetlands and permit requirements, this webinar is an unmitigated "can't miss."

Register at <https://www4.gotomeeting.com/register/190006575>

Thursday, September 19, 2013

Annual Business Meeting, Elections & Program, 1:30–6:00 p.m.

The ELS Annual Business Meeting & Program will be held Thursday, September 19, at Lansing Center, in conjunction with the State Bar's Annual Meeting. Registration is requested for proper facilities planning. Visit the Bar's [Annual Meeting page](#) and the ELS web page for updates.

Wednesday, November 6, 2013

Annual Joint ELS-AWMA Lansing Conference



Joint program with Air Committee and Air and Waste Management Ass'n, Lansing Community College, on topics of relevance to both groups, including policy and statutory updates.

Help Promote Section Events and Activity!

Watch the Section's web page for updates regarding these and other events currently in the planning stages.

Connect with the Environmental Law Section on LinkedIn & Facebook

Follow ELS on [LinkedIn](#) and [Facebook](#). Join the Environmental Law Section (Like us) on Facebook and LinkedIn to stay informed of environmental law seminars, forums, education, and networking.

Correction

This note corrects a statement in the introductory section of the article "**2012 Public Acts–Environment and Natural Resources**" in the Spring 2013 issue of the *Michigan Environmental Law Journal*.

The third paragraph of the introductory section included the statement "[T]he Legislature also significantly broadened the scope of activities that can be awarded grants from the Michigan Natural Resources Trust Fund (MNRTF) to include forestry and mineral extraction projects." In fact, none of the public acts enacted by the Legislature in 2012 expanded the scope of grants that can be approved by the MNRTF to include these types of projects. As it was originally charged and as it continues administering the grant program today as directed by the Michigan Constitution and related statutes, the MNRTF Board may only approve grants for development or acquisition projects for state, county, or local parks and recreation programs.

Report of Environmental Law Section Nominating Committee

June 21, 2013

Introduction/Summary

Dustin Ordway, Chair of the Environmental Law Section, appointed a Nominating Committee consisting of Kurt Brauer (Chair of the Committee), Lee Johnson, Tammy Helminski, Kurt Kissling, and Ross Hammersley. Their task was to recommend a slate of candidates for the offices of Chairperson-Elect and Secretary-Treasurer, members of the Council of the Section to succeed those whose terms will expire at the close of the next annual meeting, re-appoint members whose first three-year terms are ending (and who are willing to serve another term), and, if necessary, fill any unexpired terms in accordance with Article IV, Section 1, of the Section Bylaws.

Kurt Brauer submitted an oral report to the Environmental Law Section Council at its meeting on June 21, 2013. S. Lee Johnson has been nominated for Chairperson-Elect, and William Schikora has been nominated for Secretary-Treasurer. Robert P. Reichel and Scott J. Steiner, each of whose terms expire September 30, 2013, were each nominated to serve as Council members for a second three-year terms expiring September 30, 2016. Scott M. Watson, Nicholas J. Schroeck, and Scott J. Sinkwitts were each nominated to serve as Council members for a first three-year term expiring September 30, 2016.

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 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.

Notice of Nominations and Election Procedures

The Nominating Committee of Kurt Brauer (Chair of the Committee), Lee Johnson,¹ Tammy Helminski, Kurt Kissling, and Ross Hammersley (with Dustin Ordway participating in an *ex officio* capacity) conferred on several occasions, most recently on June 11, 2013, to consider potential

¹ While Mr. Johnson participated in the identification of candidates for each of the positions set forth in this report, and in the evaluation of candidates for the Secretary-Treasurer position and of the Council Member nominees, he did not participate in any discussion regarding candidates for the position of Chair Elect.

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 recommends that the following slate of candidates be put forward for election at the Environmental Law Section Council's 2013 annual meeting:

Chair:	Kurt Brauer will automatically become Chair by operation of the Bylaws
Chairperson-Elect:	S. Lee Johnson
Secretary-Treasurer:	William R. Schikora
Second 3-year term on Council:	Robert P. Reichel Scott J. Steiner
First 3-year term on Council:	Scott M. Watson Nicholas J. Schroeck Scott J. Sinkwitts
Completing Term Expiring September 30, 2014, Vacated by William R. Schikora:	Jamie W. Scripps

Voting on these positions will be held at the Environmental Law Section Annual Meeting scheduled for 1:30 p.m. in Lansing on September 19, 2013.

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 2013-2014 year will be elected by Environmental Law Section members.

Nominated Candidates Addresses and Qualifications

The nominees' addresses and brief summaries of their qualifications are provided below:

Chairperson:

Kurt M. Brauer
Warner Norcross & Judd LLP
2000 Town Center Ste 2700
Southfield, MI 48075



Mr. Brauer is a partner in the firm's Environmental Law Practice Group, practicing in its Southfield office. His practice focuses on environmental matters and brownfield redevelopment. He currently serves as co-chair of the firm's Economic Incentives Group. He assists clients in all manner of economic development, environmental compliance, and regulatory matters. He assists clients in acquiring, managing, and redeveloping brownfield properties, including negotiating redevelopment incentive packages with local and state government units and resolving complex real estate matters. He has assisted clients in securing a broad array of financial incentives. Representative clients include pharmaceutical

manufacturers, real estate developers, alternative energy producers and equipment manufacturers, film production entities, retail centers, mining concerns, and clients in the food production, high-tech manufacturing, and aerospace industries.

Mr. Brauer has been actively involved in the Program Committee since 2002, serving as chair of the committee 2006-2010. He has also served as chair of the Membership Committee 2010-2012. After serving on the Environmental Law Section Council for six years, he is currently serving as chair-elect of the Environmental Law Section. Mr. Brauer is an author of the Administrative Law chapter of the Section's *Deskbook (2nd Edition)*.

Chairperson-Elect:

S. Lee Johnson
Honigman Miller Schwartz & Cohn LLP
660 Woodward Ave, Ste 2290
Detroit, MI 48226



Mr. Johnson is a partner in Honigman Miller Schwartz and Cohn's Environmental Law Practice Group. He counsels large and small manufacturers, real estate developers, mining firms, and utilities regarding environmental regulation, with particular emphasis on air pollution regulation and the environmental aspects of commercial transactions. He represents businesses and individuals in administrative disputes with the United States EPA, the Michigan Department of Environmental Quality, and other state regulatory agencies, and in environmental law litigation. He also assists firms that are seeking permits and other authorizations from environmental regulatory agencies, including installation permits for major and minor air emission sources and renewable operating permits.

Mr. Johnson has been actively involved in the Section's Air Quality Committee since 1994, serving as vice-chair of the committee in 1996-1999 and chair of the committee in 1999-2000 and 2006-present. Mr. Johnson served on the Environmental Law Section Council for six years, 2000-2006. He is also involved with the Air & Waste Management Association (AWMA), having served as secretary of the East Michigan Chapter from 2005 to 2008, as vice-chair in 2008-2009 and chair in 2009-2010. Since 2007, Mr. Johnson has been instrumental in coordinating a very successful series of annual joint programs with the Environmental Law Section, and the East and West Michigan Chapters of AWMA. Mr. Johnson is the author of the Air Resource Protection chapter of the Section's *Deskbook (2nd Edition)*.

Secretary-Treasurer:

William R. Schikora
William R. Schikora PC
125 Walnut St
Northville, MI 48167



Mr. Schikora is a sole practitioner in Northville, representing clients in all manner of environmental law. He is in his second term as a member of the Environmental Law Council,

which term would expire September 30, 2014. He is currently the chair of the Program Committee, a position he has held since 2010.

Mr. Schikora began his career working as an environmental engineer for Chevron Corporation before returning to the great State of Michigan for law school in 1992. His practice has focused on environmental law for his entire 18 year legal career, and in 2010 he began his career as a solo practitioner. Bill works with numerous industrial clients on transactional, remediation, and redevelopment matters across the U.S. and in many foreign countries. Bill is a founding member and co-chair of the Michigan Energy Forum, an organization sponsored by Ann Arbor Spark which supports energy-related businesses and entrepreneurs in Michigan. He has served as co-chair of the Section's Program Committee from 2009 to the present.

COUNCIL MEMBERS

Second Three-Year Term:

Robert P. Reichel
Assistant Attorney General
Natural Resources & Environmental Quality
Constitution Hall, 525 W. Allegan St, 5th Floor
Lansing, MI 48933



Bob Reichel is an assistant attorney general in the Environment, Natural Resources, & Agriculture Division of the Michigan Department of Attorney General. He is currently first assistant (assistant division chief) of that Division, which serves as counsel to the Michigan Departments of Natural Resources, Environmental Quality, and Agriculture & Rural development on a wide range of natural resource management programs.

Bob received his undergraduate (B.A. Political Science, 1977) and law (J.D. 1980) degrees from the University of Michigan. Since his appointment as an assistant attorney general in 1983, he has worked almost exclusively on environmental protection and natural resource matters. Through much of his 30 year career in the Department of Attorney General, he focuses on environmental response and remediation litigation and solid and hazardous waste management regulation. Over the last seven years, his practice has focused on Great Lakes, invasive species, and other water and land resource concerns, and has served as lead counsel for Michigan in the "Asian Carp" litigation in the U. S. Supreme Court, the U.S. District Court for the Northern District of Illinois, and the Seventh Circuit.

Bob has been an active member of the Environmental Law Section since 1984, and a member of the Section Council since 2010. He has participated in a number of Section-sponsored programs and contributed articles to the *Michigan Environmental Law Journal*, including an article entitled Great Lakes States' Asian Carp Fight Continues. He has served as the vice chair of the Environmental Litigation and Administrative Practice Committee for the 2012-2013 year, and hopes to continue to serve in that capacity for the 2013-2014 year.

Scott J. Steiner
Rhoades McKee PC
161 Ottawa Ave NW, Ste 600
Grand Rapids, MI 49503



Mr. Steiner is a chair of the firm's Environmental Law Practice Group and a core member of the Sustainability, Energy, and Climate Change Practice Group, Scott practices in the areas of real estate law, land use law, and condemnation. He focuses on complex commercial and industrial real estate projects involving sites with contamination or regulated features such as wetlands, lakes, streams, or critical dunes.

Scott's representative experience includes: all aspects of guiding clients through property and business transactions with environmental issues; representation of clients in efforts to achieve closure of contaminated sites under state and federal laws; redevelopment of "brownfield" sites; counseling clients on environmental liability and regulatory compliance matters; securing land use permits and approvals; and representation of property owners and governmental agencies in condemnation and property tax appeal proceedings.

First Three-Year Term:

Scott M. Watson
Warner, Norcross & Judd LLP
111 Lyon St NW, Ste 900
Grand Rapids, MI 49503



Scott Watson is an associate in the Environmental Law Practice Group of Warner, Norcross, and Judd, LLP. Scott practices environmental law, focusing on environmental litigation, site remediation, solid and hazardous waste, and natural resources and mining. He is the chair of the Environmental Law Section of the Grand Rapids Bar Association and is active in the State Bar of Michigan Environmental Law Section, where he is a co-author of the Part 201 chapter in the *Environmental Law Deskbook*, has participated in a number of webinars, and currently chairs the technology committee. Scott received a J.D., magna cum laude, and M.S. in environmental law, magna cum laude, from Vermont Law School, and a B.S. in ecology and evolutionary biology, with honors, from the University of Michigan.

Nicholas J. Schroeck
Executive Director
Great Lakes Environmental Law Center
440 Burroughs St Box 70
Detroit, MI 48202



Nick Schroeck is the executive director of the Great Lakes Environmental Law Center. Nick also directs the Transnational Environmental Law Clinic at Wayne State University Law School, where he is an adjunct professor. Nick previously worked for the National Wildlife Federation, America's largest conservation organization, out of their Great Lakes Natural Resources Center in Ann Arbor. Prior to joining NWF, Nick was a Sea Grant fellow with the Great Lakes Commission. Nick has represented clients in a variety of water and air quality litigation in state and federal courts. Nick is a licensed Michigan attorney and a graduate of Wayne State University Law School. He also holds a B.A. in urban studies and political science from Elmhurst College in Illinois. Nick currently serves on the board of directors of Saving Birds Thru Habitat. Nick has been involved in the leadership of the Water Committee, serving as the co-chair for the 2011-2012 year and as chair for the 2012-2013 year. He hopes to continue as chair of the Water Committee for the 2013-2014 year.

He is a much sought-after speaker on environmental topics. He was the keynote speaker for the Section's November 2012 conference at Lansing Community College, and spoke at conferences at Indiana University's School of Law and at the [American Bar Association's 42nd Spring Conference hosted by the Section of Environment, Energy, and Resources](#), discussing stormwater management.

Scott J. Sinkwitts
Corporate Counsel
CMS Energy
1 Energy Plaza
Jackson, MI 49201



Scott J. Sinkwitts is an attorney with Consumers Energy Company, the state's second largest utility and one of the largest combined gas and electric utilities in the U.S., serving 6.8 million of Michigan's 10 million residents. With his office located in Jackson, he is responsible for air and water issues affecting the corporation including permitting, operations, enforcement, and litigation. He regularly counsels his clients with regard to issues involving the U.S. Environmental Protection Agency and the Michigan Department of Environmental Quality. He has been involved in the Environmental Law Section's Air Committee for a number of years, helping to plan seminars and conferences and is also vice-chair of the Michigan Manufacturing Association Lawyer's Committee. Prior to his practice in environmental law, he worked in commercial litigation for another Consumers Energy Company affiliate and in private practice. He has a degree in civil engineering from Michigan State University and received his law degree from Detroit College of Law at Michigan State University in 1997.

**Completing Term Expiring September 30, 2014
Vacated by William R. Schikora:**

Jamie W. Scripps
Senior Consultant
5 Lakes Energy, LLC
503 Mall Ct #323
Lansing, MI 48912



Jamie Scripps is a senior consultant with 5 Lakes Energy, a Michigan-based policy consulting firm offering services in clean energy and the environment to the public and private sectors. Prior to joining 5 Lakes Energy, Jamie served as assistant deputy director for the Michigan Department of Energy, Labor, & Economic Growth. A graduate of the University of Michigan Law School, Jamie practiced with Sondee, Racine, & Doren PLC in Traverse City, and Venable LLP in Washington, DC, where she focused on environmental law. Jamie has also served as a lobbyist for the Michigan Environmental Council. Jamie currently sits on the Board of Directors for the Michigan Environmental Council and the West Michigan Environmental Action Council. She currently serves as the vice-chair of the Natural Resources Committee. In addition, she has worked closely with the Membership Committee to attract new members to the section.

Respectfully submitted,

Kurt M. Brauer, Nominating Committee Chair

The Detroit Water & Sewerage Department—On the Eve of a New Day
R. Craig Hupp, Bodman LLP[†]

This article supplements Nicholas Kyriakopoulos' comprehensive article about the Detroit Water & Sewerage Department (DWSD) and possible options for its restructuring.² Because of the change underway in DWSD since January 1, 2011, change not necessarily apparent to those not involved in the 1977 Sewer Case, *United States v. Detroit*, 77-71100 (E.D. Mich.), that article does not reflect all of the recent developments and describes the "old" DWSD. In addition, this article provides more background on several of the issues central to any debate over creating a water and sewer authority autonomous from Detroit.³

[†] The author has represented Macomb County in the 1977 Sewer Case since 2000. The views expressed in this article are his alone.

² N. Kyriakopoulos, [Should the Detroit Water & Sewerage Department be privatized?](#), 31 *Michigan Environmental Law Journal* 3 (Spring 2013), p. 17.

³ Although not related to the subject of this article, I must correct part of Kyriakopoulos' article—its repetition of a *Detroit News* article that my partner Tom Lewand was "fired" as Special Master by Judge Cox when he took over the case. Kyriakopoulos, *supra* note 1, at footnote 14. Although that was the headline, nothing was further from the truth. Judge Cox's letter to Mr. Lewand, attached to his Order Vacating February 8, 2002 Order Appointing F. Thomas Lewand as Special Master, makes that clear:

Overview

DWSD is in a period of transition. Gone for certain is the “old” DWSD of the Judge Feikens era. The “old” DWSD was a department tied tightly to the City of Detroit. That era ended in 2011 when the City and Wayne, Oakland, and Macomb Counties agreed to reforms in DWSD’s governance and Judge Cox ordered that DWSD sever ties with most of the supporting departments within the City of Detroit and become a largely stand-alone department. This “new” DWSD is now establishing its own finance, purchasing, information technology, law, and human resources departments under a new director and top management, guided by a reorganized and reenergized Board of Water Commissioners (BOWC). However, even as the “new” DWSD is getting underway, the “next” DWSD, an entity completely separated from the City, is poised to emerge. Emergency Manager Kevyn Orr has made it clear that the revenue stream that an independent DWSD may generate is a key piece in his plan for a sustainable fiscal future.⁴

This article begins by discussing DWSD’s governance and the core of the city-suburb dispute. It then reviews why, after 40 years, a federal judge concluded DWSD must be operationally and financially separated from Detroit, even if the City still retained ownership and some authority to govern. The article closes with a preview of the present proposal for the “next” DWSD as an independent regional authority and discussion of a number of issues that are posed by regionalization.

Regional Governance

Two themes in the public debate over DWSD’s future concern its governance: (1) whether or not the suburbs should have a say in running DWSD; and (2) whether the BOWC should be responsive to elected officials. In fact, contrary to accepted wisdom, the suburbs have had a say in governing DWSD for many years through the appointment of one commissioner for each of Wayne, Oakland, and Macomb Counties. But until the BOWC reforms of 2011, the appointment process and basic Board function largely prevented suburban views from being effectively expressed.

For many years the Detroit City Charter has provided for a seven-commissioner BOWC to oversee DWSD.⁵ The Charter provides that four commissioners must reside in Detroit, leaving three commissioners who by tradition are intended to represent the interests of Wayne, Oakland, and Macomb Counties. The suburban commissioners were appointed by Detroit’s

On behalf of the Court, I would like to thank you very much for your outstanding service as Special Master You have worked tirelessly on behalf of the Court to resolve the many complex issues involved in this litigation. In your service as Special Master, you have not only been of great service to the Court, but also the citizens of Southeast Michigan.

Respectfully yours, Sean F. Cox

United States v. City of Detroit, Case No 77-71100 (Docket Entry No 2329, Feb 3, 2011).

⁴ Emergency Manager Kevyn Orr, [City of Detroit Proposal for Creditors](#) (Jun 14, 2013), at pages 83-86.

⁵ The Charter of the City of Detroit, [§ 7.1202](#) (2012), at page 90 (formerly Sec. 7-1501).

Mayor who again by tradition considered and usually but not always accepted the list of candidates recommended by an elected official in each county—the Wayne County Executive, the Oakland County Water Resources Commissioner, and the Macomb County Public Works Commissioner. However, in practice, these commissioners were not always responsive to county concerns⁶ and on occasion a county’s request for a change in its representative went unheeded.

But the real issue was overall Board function. For decades its primary role was contract and budget approval in part because other city departments were not answerable to the BOWC. Strategic planning, risk management, and managerial oversight were largely ignored. Additionally, commissioners were not necessarily qualified to oversee an organization as large and complex as DWSD. DWSD management was principally answerable to the Mayor, not the BOWC. The commissioners had no staff to provide independent advice to counter what DWSD or City management might propose—a major problem during the Kilpatrick administration. Nor did the commissioners have the resources to explore issues of concern to them. And, as of 2010 the then-existing Board was tarnished by DWSD’s problems over the previous five years. Finally, DWSD as a department had lacked strong leadership since Victor Mercado’s resignation in June 2008. Although there were several directors and acting directors after Mercado, none had the strong support they needed from the Mayor, the BOWC, or the counties.

In 2005 Oakland County began to advocate for changes in DWSD governance to improve BOWC performance. Some of its recommendations were based on experience in Boston where the water board is supported by independent staff. With the appointment of Judge Cox and his determination to bring the 1977 Sewer Case to an end, all three counties renewed efforts to reform the BOWC, building on Oakland County’s original suggestions. To his great credit Mayor Bing agreed with the sense of their recommendations. The City and the counties agreed to reforms to restructure the Board of Water Commissioners, as memorialized in the “Stipulated Order.”⁷

The restructuring that the Stipulated Order requires was not in the number of commissioners or the distribution of votes—it remained seven commissioners, four City and three county. The county elected officials who had the authority to nominate commissioners remained unchanged. The restructuring consisted of appointing mostly new commissioners and giving the counties real power to appoint their representatives. Recognizing the level of commitment required to competently oversee a complex \$900 million utility, the Stipulated Order sets minimum qualifications for the commissioners and provides that they will be paid. The Stipulated Order provides that the Board will have three staff members with legal, finance, and technical expertise. Approval of rates and the capital program now requires a majority of five commissioners, requiring both city and suburban support on major financial decisions.

⁶ In fairness to all of the former commissioners, the BOWC’s ability to effectively oversee the old DWSD was limited.

⁷ Stipulated Order, Dkt. 2334 (Feb 11, 2011). All docket references are to *United States v. City of Detroit*, Case No 77-71100 (the 1977 Sewer Case).

Additionally and perhaps most importantly, the Board's authority to recruit and hire a new DWSD leader was legitimized by the Court. Although the Charter grants the Board this power, it had ceded power to the Mayor's office long ago.

Once in place, the new Board instituted a final reform—a committee structure to permit more detailed review and consideration of matters before coming to the Board for action.

In summary, DWSD has long had a board with regional representation, all of whom were at least somewhat answerable to elected officials. Now the county appointed commissioners are more directly responsive to suburban concerns and, much more importantly, all of the commissioners have the qualifications and the resources to competently perform their responsibilities.

While the new BOWC organization has led to greatly improved leadership, direction, and decision-making, DWSD's difficulties in achieving long term compliance with its NPDES permit stem from the much larger problems within the government of the City of Detroit and within DWSD.

The Real City-Suburb Conflict

In newspaper articles, political rhetoric, and occasionally in Judge Feikens' opinions, disputes between the City and the suburbs involving DWSD are cast in terms of rates and control. Neither was or is the real issue. The real issue has been mismanagement of DWSD by the City, mismanagement within DWSD, and, depending on the era, corruption affecting DWSD. Because the suburbs have had little effective voice at the BOWC and because the BOWC was not structured or empowered to effectively manage DWSD, the suburbs had no real voice or leverage to effect changes in how DWSD was managed. They were left to complain about the rates, a matter over which they had a little control. And, during the Feikens era, Judge Feikens exercised jurisdiction over any significant challenge to the rates, turning rates disputes into federal litigation.

However, it should be self-evident that a well-managed utility will cost its ratepayers less over the medium and long-term, that all ratepayers are penalized by and pay for a mismanaged system, and that Detroiters, because of their lower incomes on average, are penalized proportionately more. Thus the concerns of suburban and Detroit ratepayers were and are the same.

Further, the sad truth is that it has long been the three counties, not the Mayor or City Council, who have challenged the City's and DWSD's mismanagement. No city politician has campaigned to streamline DWSD in order to reduce rates until Mayor Bing and Council Persons Charles Pugh and Gary Brown supported the recent reform efforts. To the contrary, City Council's recent refusal to support DWSD's streamlining efforts demonstrates that it has been part of the problem, not part of the solution.

DWSD's Finances

About 80% of DWSD's water revenue and about 50% of its sewer revenue comes from suburban customers.

DWSD now has a total annual budget well over \$1 billion, consisting of a budget for operating expenses and debt service of \$900 million plus an annual capital budget that averages over \$250 million.⁸ Few businesses in the region have larger total budgets and fewer companies have invested more in plant and equipment in the last 10 years.

DWSD is highly leveraged from a debt perspective. Almost half of DWSD's revenue goes to debt service. DWSD now has over \$6 billion in long-term water and sewer debt, structured such that annual debt service payments will be generally level at about \$400 million each year for the next 20 years and declining amounts for the following 10 years, assuming no more borrowing occurs.⁹ But DWSD's current five-year capital improvement program projects another \$1.2 billion in debt.¹⁰

Essentially all of DWSD's debt is secured by DWSD's water and sewer rate revenue, largely as revenue bonds issued under the Revenue Bond Act of 1933.¹¹ Accordingly, DWSD has generally enjoyed good access to capital markets. Unfortunately, even though the source of repayment of the water and sewer bonds is backed by rate revenue, in the last year DWSD bonds have been downgraded to junk bond status because of the City's general financial crisis and, more recently, uncertainty over Emergency Manager Orr's potential actions.

DWSD is essentially a fixed-cost system. That is, most of DWSD's costs are not very sensitive to the amount of service (water supplied or wastewater treated) that DWSD provides. That truth is masked by the fact that DWSD has traditionally set its rates on a commodity basis (*i.e.*, it charges per unit of water or wastewater), giving the false impression that DWSD's costs vary with volume. They do not. For example DWSD's \$400 million annual debt service must be paid regardless of water sales or wastewater flow. On the operating side, equipment maintenance and repair costs are not strongly correlated with water sales or wastewater flow either. The best opportunity to reduce operating costs—streamlining DWSD's labor force—was not pursued by the old DWSD for political reasons and organized labor pressure. However, in 2012 after Judge Cox's order, the "new" BOWC has used its new authority to pursue streamlining as discussed below. This offers the promise of annual savings of \$100 million per year.

⁸ City of Detroit, [Basic Financial Statements](#), Water and Sewer Funds.

⁹ *Id.*

¹⁰ DWSD, [Water & Sewer Capital Improvement Programs](#) (Jan 2013). Kyriakopoulos, *supra* note 1, at page 21 repeats an estimate that DWSD needs to spend \$20 billion to achieve wastewater compliance with regard to phosphorous. That estimate grossly exceeds any estimate of compliance costs in the foreseeable future

¹¹ [MCL 141.101](#) *et seq.*

DWSD's History of Noncompliance With the Clean Water Act and the Extraordinary Measures Required to Cure

The benefit of an independent DWSD is best appreciated when viewed against the background of the last 40 years of DWSD operations. Opinions in the 1977 Sewer Case tell the history of Detroit's inability to maintain sustained compliance at the wastewater treatment plant (WWTP).¹² Throughout, it is clear that many of DWSD's problems stemmed from a dysfunctional city government.

In response to Detroit's inability to comply with a Consent Judgment entered at the beginning of the 1977 Sewer Case, Judge Feikens commissioned an investigation. Based on that investigation, he found "extraordinary remedies" were required to achieve compliance—notably appointing Mayor Young as a special administrator of DWSD with "all of the functions, duties, power, and authority" of the Board of Water Commissioners, DWSD, all departments, and boards of the City "without necessity of action" by City Council if the Council might impede or interfere with the actions to bring DWSD into sustained compliance.¹³ Further the BOWC, Council, and city departments and employees were enjoined from failing to immediately comply with or from interfering with the court's order.

Even with these extraordinary measures it was four years before DWSD achieved compliance. In the meantime, the Vista sludge hauling scandal demonstrated how the extraordinary powers granted by the court could be abused.¹⁴

In August of 1997, the WWTP again began violating its NPDES permit. Detroit and the Michigan Department of Environmental Quality (MDEQ) negotiated an Administrative Consent Order to resolve the violation but Judge Feikens stepped in, finding the ACO "did not address causes of non-compliance." Feikens appointed a Committee to Investigate the Causes of the Violations. This committee found that many of the immediate causes of non-compliance had been identified by DWSD as early as 1995. Although DWSD had come into compliance by April 1999, it had taken "extraordinary efforts" to do so, which were "not long-term solutions, do not address the causes of non-compliance, and cannot be sustained to provide reliable, compliant operation of the WWTP."¹⁵ "The nearly two-year period of non-compliance as well as the prospect of renewed non-compliance, unless the causes of non-compliance are corrected,

¹² A thorough review is provided in Opinion & Order Denying Without Prejudice the City of Detroit's Motion to Dismiss, Dkt. 2399, (Sep 9, 2011). I emphasize this inability as being Detroit's and not DWSD's because the history shows that, notwithstanding failings within DWSD, most of the root causes behind DWSD's noncompliance lay within city government and other city departments.

¹³ Order Appointing Administrator of City of Detroit Wastewater Treatment Plant, 476 F Supp 512 (ED Mich 1979).

¹⁴ *United States v. Bowers*, 828 F2d 1169 (6th Cir 1987) (affirming RICO convictions of a DWSD official and a vendor in a case where a DWSD sludge hauling contract was approved by the mayor exercising his powers as special administrator.)

¹⁵ Order Appointing Special Administrator for the Detroit Wastewater Treatment Plant of the Detroit Water and Sewerage Department, Dkt. 1651, (Feb 7, 2000).

presents a serious health, safety, and environmental risk to the people of Southeast Michigan.”¹⁶

Once again Judge Feikens gave unprecedented powers to the Mayor of Detroit Dennis Archer including:

[F]ull power and authority to control, manage, and operate the WWTP, including all functions and powers of the Detroit City Council, the Detroit Board of Water Commissioners, the DWSD, and any other departments, boards, or division of the City . . . to the extent they affect the ability of the special administrator to meet the requirements of sustained compliance with the NPDES permit¹⁷

The order further provided: “The special administrator must provide for long-term, sustained, reliable compliance,” and went on to specifically require:

- That WWTP dewatering equipment be supplemented, upgraded, and maintained;
- Action on equipment maintenance;
- A capital improvement program;
- Improvements in budgeting and finance, reforms to the purchasing and materials management processes;
- Reforms in human resources related to hiring, training, compensation, and revision of job descriptions, and a chief operations officer to oversee the performance of DWSD’s director and assistant directors.

This effort culminated in a \$500 plus million dollar overhaul of the WWTP.¹⁸

The Special Administrator order stayed in place well into Kilpatrick’s term.¹⁹ However, after contractors and sewer customers began to allege Kilpatrick was abusing his authority under the order, Judge Feikens terminated that authority in January 2006.²⁰

Reviewing the 27 years between the first order appointing a special administrator and the end of the second order, it is fair to say that not one of the three mayors used his extraordinary powers to ensure DWSD was capable of “long-term, sustained, reliable compliance.”

Moving the clock forward to 2010, MDEQ was prompted to undertake a comprehensive review of DWSD’s operations after several permit violations that began in the fall of 2009. MDEQ found DWSD’s biosolids handling and disposal operation limping along. DWSD’s difficulties in

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Order Continuing Special Administratorship for the Detroit Water and Sewerage Department, Dkt. 1728 (Dec 4, 2001).

²⁰ Opinion and Order Denying Oakland County’s Motion to Replace DWSD’s Court Appointed Special Administrator for Lack of Justiciability, Dkt. 1872 (Jan 6, 2006).

handling biosolids had caused and promised to continue to cause permit violations. MDEQ began discussions with DWSD with regard to steps to be taken to address the situation. Such was the state of affairs when Judge Feikens retired and Judge Cox began with the expressed goal of closing the case within six months. It appeared that the MDEQ/DWSD negotiations would produce an Administrative Consent Order that would cure Detroit's immediate compliance problems, but would not and could not correct the long term issues impacting sustainability. However, Judge Cox also required a comprehensive review of the causes of DWSD's noncompliance and the changes needed to insure long-term, sustained, reliable compliance. The reports he received from several independent efforts were "déjà vu all over again."²¹

In this same period, Detroit having negotiated an ACO with MDEQ, moved to dismiss the 1977 Sewer Case, arguing it had achieved compliance. Macomb and Oakland Counties objected strongly on the grounds that the inherent problems underlying DWSD's compliance problems had not been addressed. Judge Cox reached the same conclusion. Fate provided the final nail in the coffin—several permit violations occurred during the pendency of Detroit's motion. Needless to say, the motion to dismiss the case was denied.

In denying the motion, Judge Cox provided a comprehensive history of Detroit's compliance problems and their repeated causes.²² His summary of the "root causes" of noncompliance are worth quoting in full to give a sense of the scope of management and political failure:

These experts that have studied the DWSD have consistently, over many years, opined that the same root causes are an obstacle to compliance with the DWSD's NPDES permit, the remedial orders agreed to in this case, and the Clean Water Act: (1) the DWSD having an insufficient number of qualified personnel at the WWTP; (2) excessive and unnecessary delays in hiring qualified personnel across all job positions at the DWSD; (3) the DWSD's required use of the City's Human Resources Department, resulting in significant delays in filling critical positions at the DWSD; (4) the City's personnel policies, civil service rules, and union rules and agreements, restricting the compensation, recruitment and prompt hiring of necessary personnel at the WWTP; (5) insufficient training of personnel at the DWSD and WWTP; (6) lack of a succession plan at the DWSD; (7) obsolete job descriptions and qualifications for various positions within the DWSD; (8) untimely and inadequate purchasing of necessary equipment and supplies for the WWTP; (9) excessive delays in the processing of purchase requisitions for critical repair and/or replacement parts; (10) the City's flawed purchasing practices and procedures; (11) the City's ineffective procurement system; (12) the approval process for purchases over \$25,000, created by the City's Charter and/or ordinances, unnecessarily delaying contracts for essential

²¹The expression is generally attributed to Yogi Berra.

²²Opinion & Order Denying Without Prejudice the City of Detroit's Motion to Dismiss, Dkt. 2397 (Sep 9, 2011).

parts, equipment, and services at the DWSD; (13) the City's bidding and certification requirements, delaying contract approvals; and (14) the DWSD's repeated failure to replace aged and deteriorated capital equipment and to maintain solids dewatering facilities at WWTP.

The EPA and the DEQ have also identified many of these same root causes as impeding compliance. Notably, from the inception of this case in 1977, the EPA voiced its concerns regarding these very same issues. (*See, e.g.*, D.E. No. 1 at ¶ 26) (“the number of personnel employed [at the WWTP] has not been sufficient, personnel are not adequately trained, and purchasing of necessary and required supplies and equipment has not been timely or at an acceptable level. . .”). The DEQ has also identified these same root causes of noncompliance. *See, e.g.*, DEQ's 10/13/10 Response to CAP) (Stating that CAP “failed to adequately address the issues that are critical to ensuring long term compliance such as staffing, purchasing, long term solids disposal and maintenance planning.”). The Court agrees that these are root causes behind the DWSD's inability to sustain compliance with its NPDES permit, the remedial orders in this case, and the Clean Water Act.

While the DWSD has achieved short-term compliance with its NPDES permits at various times during the course of this action, it has only been able to do so because Judge Feikens used the Court's equitable powers to take actions to temporarily suspend institutional barriers. But even those measures have resulted in what experts have accurately characterized as a ‘sine curve of compliance and violations.’ (Consensus Action Report at 6). This is demonstrated by the most recent events in this action.

In summary, Judge Cox concluded that

[U]nless more fundamental corrective measures are taken to address the institutional and bureaucratic barriers to sustained compliance . . . the DWSD will remain in this recurring cycle and will never achieve sustained compliance.”

. . . .

The Court further concludes . . . that an effective equitable remedy to achieve sustained compliance will require this Court to order structural changes regarding the DWSD that will likely override the City of Detroit's Charter, its local ordinance, and/or some existing contracts. (Emphasis in the original.)

Judge Cox then gave City politicians one more chance to turn the DWSD ship about. He ordered the Mayor, the City Council president, the City Council president pro tem, and a current Water commissioner to meet and confer and within 60 days “propose a plan that addresses the root cause of non-compliance” In making their recommendations the so-called Root Cause Committee “*shall not* be constrained by any local Charter or ordinance provisions or by the

provisions of any existing contract [*i.e.* labor contracts].” (Emphasis in the original.) Judge Cox meant business, warning:

If local officials fail to devise and propose a workable solution to remedy the underlying causes of the recurrent violations of the Clean Water Act in this case, this Court will order a more intrusive remedy of its own.

The Root Cause Report

On November 2, 2011, the DWSD Root Cause Committee (Chris Brown, Detroit COO; Commissioner James Fausone, BOWC; Council President Charles Pugh; President Pro-Tem Gary Brown) tendered its report. Dkt. 2410-1 (Nov. 4, 2011). In concise terms the Committee reported that to ensure long-term, sustained compliance with the Clean Water Act, DWSD needed to become independent of other city departments and city requirements with regard to human resources, contracts and procurement, law, finance, and rates. With Judge Cox’s strong encouragement and the leadership of the Committee’s members, finally the obvious had been stated: without severing DWSD from the mismanagement and dysfunction within the rest of city government, sustained compliance could never be achieved.²³

Judge Cox adopted the Root Cause Committee’s report and Plan of Action.²⁴ However, both the Root Cause Report and Judge Cox’ order made clear that even as DWSD achieved essentially complete operational separation from the rest of city government, DWSD would remain a department of the City of Detroit.

For perhaps understandable reasons, although the Committee identified a variety of root cause impediments presented by existing labor contracts, the Committee “could not agree if the solution to these challenges could/should be left to negotiations or if Court ordered implementation was required.” Judge Cox did not duck the issue. He enjoined all current collective bargaining agreement provisions and work rules that threatened short-term compliance, directed DWSD to negotiate its own labor agreements, and prohibited future labor agreements from containing provisions that threaten long-term compliance.²⁵

The “New” DWSD

While the implications of Judge Cox’s November 4, 2011, order are still being worked out, the ultimate effect of his order is manifest. DWSD has made great progress in establishing its own Finance, Law, Information Technology, and Human Resources departments. The Board “celebrated” the New Year in 2012 by hiring a new director, Sue McCormick, the first director

²³ The reader is encouraged to read Emergency Manager Orr’s Proposal to Creditors, *supra* note 3, and [Detroit’s petition for bankruptcy](#), filed in U.S. Bankruptcy Court on July 18, 2013, to get fuller flavor of the dysfunction. See also [Report of the Detroit Financial Review Team](#) [to Governor Snyder](Feb 19, 2013) (“The City Charter contains numerous restrictions and structural details which make it extremely difficult for City officials to restructure the City’s operations in any meaningful and timely manner. These restrictions . . . make it all but impossible to restructure municipal services).”

²⁴ Order, Dkt. 2410 (Nov 4, 2011).

²⁵ *Id.*

actually hired and directed by the Board. Formerly the director of Public Services for Ann Arbor, she has filled the positions of corporate counsel, chief financial officer, chief operating officer, and chief IT officer—all accomplished in close consultation with the Board. DWSD has negotiated its own collective bargaining agreements with about half of its bargaining units. As noted above, the BOWC now has new commissioners, a committee structure, and financial and technical staff for assistance.

In the spring of 2012, DWSD engaged EMA, Inc. to recommend how to streamline DWSD's operations. EMA's initial assessment presented in August 2012 drew headlines when EMA estimated that over 5 years, the DWSD's work force could be reduced from 2,000 employees to fewer than 400. (Note: EMA's report also called for outsourcing non-core functions consisting of hundreds of jobs.) Job classifications could be reduced from 257 to 31. EMA estimated that streamlining could save over \$100 million per year with cumulative savings over 10 years of nearly \$1 billion.²⁶ Although City Council refused to approve a follow up contract to implement the proposed streamlining project in order to protect 1,500 union jobs, the BOWC used its authority to approve contracts involving less than \$2 million to continue the work.

Preliminary results from EMA's ongoing work are encouraging. EMA uses a group-facilitated process involving employee volunteers to review current job descriptions and duties and to help rewrite job classifications, duties, and activities. In the case of the WWTP, the employees' initial evaluation was that daily operations could be accomplished by about 140 employees, down from the 650 at the plant today. The streamlining relies on supporting investments in software and automation. Although only time will tell whether EMA's predicted reductions in workforce can be achieved, it is clear that very large reductions are possible. It is particularly notable that this streamlining is in large part a product of the input of DWSD's employees—clearly a long untapped resource.

The “Next” DWSD

Judge Cox directed the Root Cause Committee to continue to work on implementation of the recommendations in its report. Their efforts continued into 2013.

The Root Cause Report had identified a need for some of the savings resulting from a new DWSD to flow back to the City. In its final report to the Court, the Committee returned to the question of DWSD's autonomy from Detroit and the creation of a revenue stream.²⁷ The Committee reported that the State treasurer was of the opinion that DWSD was a valuable asset that could be used to generate income for Detroit, thereby addressing the city's financial problems. Further, the report noted that the City had retained various investment advisors, indicating the City's interest in generating a revenue stream from DWSD. Sensing what was in the wind, the Committee concluded that:

²⁶ DWSD, [Report to EMA](#) (Aug 8, 2012).

²⁷ DWSD, [Root Cause Committee Final Report](#) (Mar 13, 2013); Dkt. 2526-7.

In light of the current dialog about the City obtaining value for DWSD, and the ongoing barriers to achieving long-term compliance, the Root Cause Committee supports as the best option . . . the exploration of a more autonomous DWSD operational model that would be designed to provide a recurring revenue stream to the City of Detroit, enhance DWSD's operational and legal independence from city, better insure compliance and preserve the City of Detroit's long- term ownership of the system.

The Committee recommended that two independent authorities be established, one to hold the assets of DWSD as, in effect, a trustee for Detroit, and a second operating authority to operate the system. The proposal contemplated that the operating authority would have control over and operate the assets to provide water and sewer services and would pay the holding authority for the use of the assets. Several theories have been suggested as supporting such payments including a payment in lieu of taxes (commonly referred to as a "PILOT" charge)²⁸ or a capital lease. As a separate entity, the operating authority would not necessarily be bound by *Bolt v. City of Lansing* (see discussion below). The holding authority would pass those payments to Detroit. The proposal further contemplated that the operating authority would look like the current BOWC. The Committee estimated the revenue stream could vary from \$15 million to \$70 million per year, financed by operating savings and reduced borrowing costs.

At the same time, Judge Cox was evaluating DWSD's progress in separating administratively from Detroit while achieving compliance with its permit. No doubt, he also considered the implications of the appointment of an emergency manager for Detroit. At the end of March 2013 he concluded the DWSD was in substantial compliance with its permit and that sufficient progress on separating DWSD had occurred. He dismissed and closed the case on March 27.²⁹ However, the case continues. An order by Judge Cox had been subject to an interlocutory appeal and shortly after Judge Cox closed the case, the Sixth Circuit reversed the appealed order and remanded the underlying issue (the right of a union to intervene in the case) for further consideration. In addition, the City Law Department filed an appeal of a number of rulings which, with the closing of the case, had become final and ripe for appeal. There are now interesting questions as to whether jurisdiction in the case lies in the district court or court of appeals. Regardless, it is likely that Emergency Manager Orr and not a federal judge will control any further reorganization of DWSD.

Emergency Manager Orr is giving the Committee's proposal for a separate DWSD authority careful consideration and, at least for now, has made a "Metropolitan Area Water & Sewer Authority" (Authority) part of his Proposal to Creditors where the Committee's concept is

²⁸The ability of a municipality to charge a tax exempt utility for services that would otherwise be supported by property tax payments is recognized in *Chocloy Twp. v. Marquette*, Michigan Court of Appeals Case No 90424 (Aug 12, 1988); *County of Oakland v. City of Detroit*, 81 Mich App 308, 312 (1978); OAG 1975-76, No. 5050, p 624.

²⁹ Opinion & Order Terminating Second Amended Consent Judgment and Closing This Case, Dkt. 2528 (Mar 27, 2013).

fleshed out in more detail.³⁰ The Proposal to Creditors cautions that “Any transaction would be contingent upon the City and relevant third parties reaching agreement on many matters, including, but not limited to, governance, amounts to be paid to the City, and the terms and conditions of such transaction.” The payment stream resulting from concession or lease payments by the Authority would be unrestricted and could be encumbered or otherwise monetized. The Proposal to Creditors does not estimate the amount of a possible revenue stream.

A new revenue stream from a new Authority could make a substantial difference to creditors. The Proposal to Creditors estimates that after streamlining, the City may have a cumulative budget surplus of \$800 million over 10 years that could be used to pay current creditors, not counting any revenue stream from the Authority. That is all the City would have to pay estimated unsecured claims of \$11.5 billion.³¹ That is less than the 10 cents on the dollar frequently bandied about in the press. Against this background, the additional revenue stream from a regional water and sewer authority could make a relatively big difference to unsecured creditors.

Kyriakopoulos provided a good summary of one of the current legislative proposals that have been made.³² Those proposals may not be necessary. There is already a statute under which a regional water and sewer authority could be established, Municipal Sewage and Water Supply Systems.³³ This statute is flexible as to bylaws and organizing documents. Further, unlike the recent legislative proposals, the Root Cause Committee’s concept preserves the present balance of power and leaves the suburban power of appointment with the elected officials who have exercised that power for many years. Their staffs are most familiar with DWSD and its operating and financial challenges. These elected officials led the recent reform of the BOWC and can rightfully claim substantial credit for DWSD’s about face. The foregoing does not denigrate in any way Mayor Bing and Judge Cox’s indispensable roles in the change that has occurred.

Objections to an Independent Regional Authority

As postulated in the Proposal to Creditors, a regional authority would look much like the new DWSD, but would be completely independent of Detroit. Complete separation would eliminate all remaining administrative and operational inefficiencies inherent in status as a department of Detroit. It is expected that an independent metropolitan authority would also enjoy significantly improved bond ratings so its debt could be refinanced at more attractive interest rates, reducing overall debt service.

³⁰ Proposal to Creditors, *supra* note 3, at pages 83-86.

³¹ *Id.* at pages 98-99.

³² Kyriakopoulos, *supra* note 1, at page 23.

³³ 1955 PA 233, [MCL 124.281](#) *et seq.*

DWSD as an Income Producing Asset of the City

A variety of concerns have been raised related to separating DWSD into an independent regional authority. First and foremost is that DWSD is a valuable asset of Detroit and that regionalization of DWSD would deprive DWSD of that value. Although there are divergent views about who has made the investment in DWSD's assets, it is clear that DWSD in its present form as a city department is not an asset that produces income to support other municipal services. There are two ways to view Detroit's investment in DWSD. In the conventional view, Detroit is akin to a landlord of a building who uses rent revenue to improve his building. Regardless of the fact that improvements to the building were paid for with the tenant's rent, the landlord, not the tenant, owns the improvements. Thus, although rates from suburban ratepayers have paid for a substantial part of DWSD's capital assets, they are nonetheless owned by Detroit and the suburbs have no right or interest in their disposition.

But at least some of the public debate has been about whether the transfer of ownership or control of the water and sewer system will deprive "Detroiters" of something that they invested in. When viewed from the equitable perspective of "Who has paid?" one can reach a different answer to the question whether the suburbs have some interest in DWSD. In the case of the sewer system, the City's general fund investment (*i.e.*, funds generated from tax revenues) in the sewer system was repaid by DWSD to the City in installments between 1970 and 1975 at the City's initiative and in an amount (\$15,279,000) determined by its auditors.³⁴ Thus, starting in 1976, Detroit has not supported the sewer system with tax revenues and, from this viewpoint, Detroit taxpayers have no investment in the sewer system. Since then, all of the sewer assets have been paid for by government grants or by the ratepayers. And, as noted above, 50% of the ratepayers live outside Detroit. For all intents and purposes, the story on the water side is the same. Although the City's early investment from tax revenues in the water system has never been paid back, the billions spent since the mid-1970s to expand, upgrade, and improve the water system came from grants and the ratepayers as well. Further, most of the water assets paid for with tax revenues have been fully depreciated and most have been replaced. Thus, the Detroit taxpayer investment in the water system is now negligible. In recent years, most of the water revenue and, hence, most of the investment in water assets, has come from ratepayers outside of Detroit.

In deciding DWSD's future, if Emergency Manager Orr must consider the interests of those "who paid for the DWSD system," he must attend to the concerns of suburban as well as city ratepayers.

But the real question is not who paid for the system, but whether DWSD as a city department is of financial value to the City.

As a matter of law, DWSD as a city department may not use rate-generated revenue to supplement the City's general fund. Under Michigan statutory law governing governmental

³⁴ Correspondence, Charles Scales, Deputy Director, DWSD to BOWC (Aug 18, 1975).

accounting³⁵ and Michigan’s common law of taxation,³⁶ government-operated utilities such as DWSD must maintain their funds on a “utility” or “enterprise fund” basis separate from the municipality’s general funds, just as if the municipal utility were a stand-alone private company, and rates must correspond to the cost of the services provided. Revenue generated from rates and charges in excess of expenses (what might be described as profit in a private entity) may *not* be distributed to the municipality for use as general revenue because if such excess rates were used in that fashion they would be deemed taxes as a matter of law.³⁷ However, to the extent the municipality provides services to its utility (e.g., the legal services, human resources services, etc.), it may charge the “utility” for associated costs,³⁸ and vice versa, if the “utility” provides services to the municipality (e.g., provides water or sewer services), it must charge the municipality the associated cost.

Further on the sewer side of DWSD, under longstanding rate settlements DWSD has a “Look Back” procedure in which, conceptually, any excess revenue from any customer from one rate year is offset by a corresponding credit to that customer in a subsequent rate year. Likewise revenue shortfalls in one year are offset by a compensating charge in a later year. While the Look Back process is complicated in application, it has the effect of preventing DWSD from keeping any “profit” it might make on sewer services.

There is a temptation, acute in times of shortfalls in general tax revenues, to shift municipal expenses inappropriately to the “utility.” This tension is experienced to a greater or lesser degree in most municipalities that provide utility services. During the Kilpatrick era, the BOWC was ill-equipped to detect or prevent the Mayor’s unlawful manipulation of DWSD procurement practices, which practically amounted to a raid on DWSD’s revenues. Additionally, Detroit’s suburban customers successfully challenged a number of instances in which City government attempted to improperly shift millions of City costs to DWSD.

In summary, DWSD as a city department does not and may not generate excess revenues to be used by the City as part of its general revenue. Like a Zen koan, DWSD can be of financial value to the City only if the City transfers it away.

Other Concerns Raised by Regionalization

There also is the concern that a regional authority would not be subject to local political control. The past 40 years in DWSD’s history show that local political control is no guarantee of a well-run, environmentally sound, or cost effective water and sewer system. City Council’s

³⁵ Uniform Budgeting & Accounting Act, [MCL 141.421](#) and the Revenue Bond Act, *supra* note 32.

³⁶ See generally *Merrelli v. St. Clair Shores*, 325 Mich 575 (1959), *Bolt v. City of Lansing*, 459 Mich 152 (1998), and their progeny.

³⁷ *Id.*

³⁸ It is true that DWSD’s reimbursement to the City’s general fund for services provided covers not only the direct and indirect payroll costs of the employees providing the services but also a portion of the general administrative overhead of the City. While in the short term, separation of DWSD could mean some loss of ability to recover that overhead (absent an agreement otherwise) in the medium term, Detroit’s administrative overhead will shrink correspondingly.

recent refusal to approve the EMA streamlining process due to union pressure demonstrates a continuing weakness with the current local political control. In any case, the Proposal to Creditors would not change control of DWSD or its governance. A seven-member board would continue with commissioners appointed as they are today.

Another concern is that the creation of a separate authority would prompt rate hikes. This concern is legitimate regardless who controls DWSD. Over the past 10 years the “old” DWSD raised city and suburban water and sewer rates much faster than inflation. Rates more than doubled while average household income in Detroit plummeted. Four years ago Detroit’s retail sewer rates were so high compared to Detroiters’ average household income that USEPA’s financial hardship policy was triggered and a number of pollution control projects were indefinitely deferred because Detroiters cannot afford their cost. One goal of any restructuring should be to ensure that there is no materially adverse impact on rates. That means there should be an affordability limit on any revenue stream that a DWSD restructuring is expected to generate.

Some suspect that talk of a separate authority is cover for a plan to sell the system to private ownership. All that can be said at this point is that is not the proposal presently put forward by the Emergency Manager.

Water quality concerns have also been raised. There is no evidence that establishing a regional authority will or will not have an adverse impact on water quality. Whoever operates the system, whether a new public authority or a private company, must comply with Detroit’s NPDES permit. The City’s performance running DWSD set so low a benchmark for sustained environmental compliance that any future operator is likely to do a better job. An independent authority, divorced from the root causes of noncompliance, will have a much easier time staying in compliance. Noncompliance is likely to weigh more heavily on a private operator because it is unlikely that USEPA and MDEQ would be as lenient on a private operator with regard to penalties as they have been with the City of Detroit.

The real economic difference to ratepayers between public and private ownership of a water and sewer utility is that under private ownership, a return on investment must be achieved in addition to covering operating and capital costs. A typical business model for a private company is to generate return on investment by taking over inefficiently run publicly owned utilities, streamlining their operations, and generating a return on investment from the operating savings. When the new DWSD has completed its streamlining process, there may be little inefficiency remaining that could be squeezed out by a private operator to fund return on investment. Thus return on investment may need to come through additional rate increases. With Detroit’s bankruptcy filing on July 18, 2013, future developments regarding a regional authority will play out in bankruptcy court. Like a good mystery novel, there will be confusion and false leads along the way. We will have to wait to the final chapter (one after Chapter 9) to see how it actually turns out.

Sixth Circuit Rules EPA Challenges to Pre-Construction Emission Projections are Not Barred in All Circumstances

S. Lee Johnson, Honigman Miller Schwartz and Cohn LLP

In *United States v. DTE Energy Company*,¹ a case of first impression, the United States Court of Appeals for the Sixth Circuit ruled that the United States Environmental Protection Agency (EPA) may bring an enforcement action to ensure that pre-construction emission projections comply with Clean Air Act regulations at a “basic level,” but the agency may not go so far as to “second-guess” the emission projections.² The case involved a \$65 million project at DTE Energy’s Monroe Power Plant that began in March 2010.³

The 1977 Clean Air Act Amendments created a pre-construction permit program for major air emission sources known as New Source Review.⁴ The New Source Review program applies only to new major emission sources or to major modifications of existing sources.⁵ Existing sources were “grandfathered” from New Source Review.⁶ Applicability of New Source Review can be a significant issue because sources subject to the program are required to install Best Available Control Technology or Lowest Achievable Emission Rate technology, as well as meet other requirements, which are often very expensive.⁷

Whether a project at an existing source is a “major modification” depends upon whether the project will result in a “significant net emissions increase” of a regulated pollutant from that source.⁸ Over time, EPA has modified the criteria and procedures for determining whether a given project will result in a significant net emissions increase.⁹ Prior to 1992, the determination was made by comparing the maximum potential emission of the source after the project and comparing those emissions to recent actual emission rates. The difference in emissions is then compared to applicability thresholds that vary by pollutant and depending on whether the area in question is in attainment with National Ambient Air Quality Standards. This test is now known as the “actual-to-potential” test.¹⁰

In 1990, the actual-to-potential test was struck down as it applied to power plants on the grounds that the test improperly assumed that sources operated continuously.¹¹ Accordingly, in 1992, EPA promulgated a new applicability test for power plants known as the actual-to-projected-actual test under which prior emissions are compared to projections of future actual

¹ *United States v. DTE Energy Co.*, [711 F3d 643](#) (6th Cir 2013).

² *Id.* at 649.

³ *Id.* at 648.

⁴ *Id.* at 644-645, citing [42 U.S.C. § 7475](#).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 645.

⁸ *Id.*

⁹ *Id.* at 645-647.

¹⁰ *Id.* at 645.

¹¹ *Wisconsin Electric Power Co. v. Reilly*, [893 F2d 901](#) (7th Cir 1990).

emissions, rather than potential emissions.¹² Changes in emissions that were projected to occur but were caused by an independent factor, such as an increase in demand for electricity, and not caused by the project under evaluation, could be excluded from the emission projection.¹³ This exclusion is commonly referred to as the “demand growth exclusion” though any emission change unrelated to the project could be covered by this exclusion.¹⁴

The actual-to-projected-actual test was further refined by EPA and extended to other industries in rulemakings in 2002 and 2007.¹⁵ Under the current regulations, a facility’s obligations under the New Source Review program depend upon whether a project will result in a significant net emissions increase under the actual-to-projected-actual test and, if not, whether there is a reasonable possibility that future emissions could exceed the applicability threshold.¹⁶

There are four categories of emission projections under the New Source Review program:

1. When the projected actual emissions exceed the applicability threshold, the facility owner or operator must apply for a New Source Review permit and comply with all the requirements that such a permit entails.
2. If the projected emissions increase is less than the threshold, but more than 50% of the threshold, the source does not require a permit but must report its emissions to EPA or the state implementing agency, monitor emissions for at least five years and submit a report if, in fact, the emissions exceed the applicability threshold in future years.
3. If the emission increase is projected to be less than 50% of the applicability threshold, the source must add back any emissions that had been excluded under the demand growth exclusion. If, in this modified calculation, the emissions increase exceeds 50% of the applicability threshold, the source must maintain a record of its calculations but is not required to seek a permit or make any reports.
4. Finally, if the projected emission increase is less than 50% of the applicability threshold even when demand grown exclusion emissions have been added back in, the source has no further obligations and is not required to retain a copy of its calculations.¹⁷

In the present case, DTE Energy began a project at its Monroe Power Plant in March 2010.¹⁸ The project involved replacing tubing, an economizer and reheater piping, installing an exciter,

¹² 711 F3d at 645-646

¹³ *Id.* at 646.

¹⁴ *Id.* The court noted that the basic prerequisite to the application of the exclusion is that “the pre-change source must have been able to accommodate the projected demand growth physically and legally . . . ‘a fact-dependent determination that must be resolved on a case-by-case basis.’” *Id.*, quoting 57 Fed. Reg. 32,327 (Jul 21, 1992).

¹⁵ 711 F3d at 646-647.

¹⁶ *Id.* at 647.

¹⁷ *Id.*

¹⁸ *Id.* at 648.

and refurbishing boiler feedwater pumps at a cost of \$65 million, involving approximately 600 workers and requiring 83 days to complete.¹⁹ Prior to commencing construction, DTE Energy calculated the future actual emissions and projected an emission increase of 3,701 tons per year of sulfur dioxide and 4,096 tons per year of nitrogen oxides.²⁰ An increase of 40 tons per year of either pollutant exceeds the New Source Review applicability threshold.²¹ However, DTE Energy also determined that all of the emission increase fell under the demand growth exclusion.²² Therefore, DTE Energy's calculations placed the project in the third category listed above, requiring DTE Energy to maintain a record of its calculations but not requiring it to obtain a permit for the project.

DTE reported its emission projections to the Michigan Department of Environmental Quality (MDEQ) in March 2010, one day before the project began.²³ EPA learned of the project in May 2010 and issued a notice of violation on June 4, 2010 alleging that the project resulted in a significant net emissions increase and, therefore, was a "major modification" requiring a permit.²⁴ After attempts to negotiate a resolution of the dispute failed, EPA filed suit against DTE Energy in the United States District Court for the Eastern District of Michigan and moved for a preliminary injunction.²⁵ The preliminary injunction motion was denied. DTE Energy then moved for summary judgment, which the District Court granted.²⁶

In its ruling, the District Court accepted DTE's argument, which it characterized as a contention that a determination that a project has caused a significant net emissions increase cannot be made until at least one year of post-project emission monitoring has been completed.²⁷ The District Court found that the New Source Review regulations give facility owners "the option of either getting a permit before commencing their projects, or measuring their emissions afterward and running the risk of the Government bringing an enforcement action."²⁸

Accordingly, because EPA filed its action less than one year after the project was completed, and before at least a full year of actual emissions data was available, EPA's enforcement action was premature. Therefore, the District Court dismissed EPA's complaint without prejudice to EPA's ability to file a similar action "if and when post-construction emission monitoring shows a need to do so."²⁹

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*, citing [40 C.F.R. § 52.21\(b\)\(23\)\(i\)](#).

²² 711 F3d at 648.

²³ *Id.* The court noted that "[t]he Michigan Department of Environmental Quality did not take any action in response to DTE's submission." *Id.*

²⁴ *Id.*

²⁵ *Id.*, citing *United States v. DTE Energy Co.*, No. 10-13101 (ED Mich Jan 28, 2011).

²⁶ *United States v. DTE Energy Co.*, No. 10-13101, 2011 U.S. Dist. LEXIS 95175, 2011 WL 3706585, at *4 (ED Mich Aug 23, 2011), discussed at 711 F3d 648-649.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

The Sixth Circuit, in a 2-1 split decision, largely agreed with the District Court's reasoning, disagreeing only with the District Court's conclusion that no EPA enforcement action may be initiated under any circumstances unless a full year of emission data was available. The Sixth Circuit found that an owner or operator must make its emission projections according to the requirements in the New Source Review regulations, and if it does not do so, and proceeds with construction anyway, it is subject to an enforcement proceeding. These requirements include consideration of all relevant information, including emissions associated with startups, shutdowns and malfunctions, and excluding post-project emissions that could have been accommodated during the baseline period and that are unrelated to the project (*e.g.*, demand growth exclusion emissions).³⁰

The Sixth Circuit made clear, however, that the scope of EPA's enforcement authority before construction and operation of a project is narrowly limited:

However, this scheme does not contemplate approval of the projection prior to construction. The primary purpose of the projection is to determine the permitting, monitoring and reporting requirements, so as to facilitate the agency's ability to ensure that emissions do not increase. If there is no projection, or the projection is made in contravention of the regulations guiding how the projection is to be made, then the system is not working. But if the agency can second-guess the making of the projections, then a project-and-report scheme would be transformed into a prior approval scheme. Contrary to the apparent arguments of the parties, neither of these is the case. Instead, at a basic level the operator has to make a projection in compliance with how the projections are to be made. But this does not mean that the agency gets in effect to require prior approval of the projections.³¹

Thus, the Sixth Circuit ruled that EPA has the ability to prevent construction if an operator, for example, "uses an improper baseline period or uses the wrong number to determine whether a projected emissions increase" exceeds the applicability threshold.³²

Although the Sixth Circuit agreed with EPA to this extent, the court disagreed with several other claims and arguments made by EPA in its appeal. For example, the court noted that EPA repeatedly criticized DTE Energy for submitting its emissions projection to MDEQ one day before beginning construction.³³ The court, however, found that this was fully consistent with a project-and-report system which specifically states that the owner or operator is not required

³⁰ 711 F3d at 649-652.

³¹ *Id.* at 649.

³² *Id.* at 650.

³³ *Id.*

to obtain any determination from EPA before proceeding with construction if the emissions are below the applicability threshold.³⁴

EPA also complained that DTE Energy was managing the cost of electricity from Monroe Unit #2 to keep its emissions from increasing.³⁵ In fact, the available emission data since the project was completed in 2010 show that emissions have decreased. However, the Sixth Circuit found that this was “entirely consistent with the statute and regulations” and furthers the goal of the Clean Air Act by keeping emission rates lower.³⁶ The court specifically rejected EPA’s claim that the New Source Review program is designed to force every source to eventually adopt state of the art emission control technology, noting that the statute and regulations allow sources to replace parts indefinitely without losing their grandfathered status as long as these projects do not increase emissions.³⁷

Accordingly, the Sixth Circuit clarified that its reversal of the District Court’s decision on such narrow grounds was not an endorsement of these other arguments made by EPA:

Our reversal does not constitute endorsement of EPA’s suggestions. A pre-construction projection is subject to an enforcement action by EPA to ensure that the projection is made pursuant to the requirements of the regulations. The district court having ruled to the contrary, we must reverse and remand. But we make no determination as to whether defendants have complied with those projection regulations.³⁸

The Sixth Circuit’s opinion was written by Judge Rogers, joined by Judge Daughtrey. Chief Judge Batchelder dissented from the decision stating that she agreed with much of the majority opinion but disagreed with the outcome of remanding the case to the District Court. Noting that emissions have decreased, rather than increased, from Monroe Unit #2 since the projects at issue, Chief Judge Batchelder argued that the actual emissions data demonstrate indisputably that no increase in emissions has occurred, and therefore, no major modification occurred, thereby rendering the case moot.³⁹ Chief Judge Batchelder was also concerned that the majority opinion was inconsistent by, on the one hand, affirming that the regulations do not require prior EPA approval of projects and do not allow EPA to second-guess emission projections and, on the other hand, ruling that EPA can initiate pre-construction enforcement actions to challenge the emission projections.⁴⁰ Chief Judge Batchelder noted that EPA does not

³⁴ *Id.* at 651.

³⁵ *Id.* at 650, 651.

³⁶ *Id.* at 650.

³⁷ *Id.* at 651. “To the contrary,” the court noted, scholars have noted that New Source Review has given operators both the ability and the incentive to extend the life of existing sources instead of building replacements.” *Id.* (citations omitted). While other scholars have called for the elimination of grandfathering, the court continued, “It is Congress, not the EPA nor the courts, that has the power to make such changes.” *Id.*

³⁸ *Id.* at 652.

³⁹ *Id.* at 652-653 (Batchelder, CJ, dissenting).

⁴⁰ *Id.* at 653.

contend that DTE Energy failed to make an emission projection or failed to follow the regulations for making projections. Instead, EPA “relies on its expert’s opinion to second-guess DTE [Energy’s] technical/scientific projections.”⁴¹ Because this case does not involve a failure to make a projection or a failure to follow the regulations, Chief Judge Batchelder argued that it was “neither necessary nor appropriate to address them here.”⁴² Accordingly, Chief Judge Batchelder would have dismissed EPA’s appeal as moot or affirmed the judgment of the District Court.⁴³

On remand to the Eastern District of Michigan, DTE Energy sought leave to file a motion for summary judgment based on its compliance with the pre-construction emission projection requirements. EPA sought a stay of summary judgment briefing on the grounds that EPA may wish to amend its complaint to add claims of Clean Air Act violations at other DTE facilities and that the issues DTE Energy raised have already been briefed in a pending motion. At a status conference on June 20, 2013, the District Court granted DTE Energy’s motion for leave to file a motion for summary judgment. At the time of this writing, EPA has not yet filed its response to DTE Energy’s summary judgment motion.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 653-654.

2013 Public Act 98 Significantly Changes Michigan's Wetlands Protection Program

Michael H. Perry, Fraser Trebilcock Davis and Dunlap PC[†]

Introduction

On July 2, 2013, Governor Snyder signed Senate Bill 163 into law as [2013 Public Act 98](#) (PA 98 or Act). The Act significantly amends [Part 301](#) (inland lakes and streams) and [Part 303](#) (wetlands) of Michigan's Natural Resources and Environmental Protection Act, MCL 324.101, *et seq.*¹ PA 98 states that it is immediately effective. The United States Environmental Protection Agency (EPA) may have a contrary view in light of the State of Michigan's failure to obtain the EPA's prior approval of PA 98.² This article briefly describes the history of Michigan's wetland protection program and the events of the past 15 years that led to the adoption of PA 98.

Michigan's Wetlands Protection Program

The Goemaere-Anderson Wetland Protection Act (GAWPA) became effective on October 1, 1980. It prohibited certain activities within a wetland unless expressly allowed by the statute or a permit obtained from the then Michigan Department of Natural Resources (MDNR).³ The GAWPA allowed certain uses in a wetland without a permit such as the grazing of animals, farming, horticulture, silviculture, lumbering and ranching activities, including plowing, irrigation, irrigation ditching, minor drainage, the construction and maintenance of farm or stock ponds, the maintenance, operation or improvement of a drain (including the straightening, widening or deepening of an existing private agricultural drain or that portion of a drain established pursuant to Michigan's drain code or a drain constructed pursuant to other provisions of the Act), the construction or maintenance of farm roads, forest roads, drainage necessary for the production and harvesting of agricultural products, maintenance or improvement of public streets, highways or roads within the public right-of-way, and other uses beyond this article's scope.

In 1983, the MDNR and EPA entered into a memorandum agreement pursuant to which the MDNR was authorized to administer section 404 of the federal Clean Water Act, 33 USC §1344. In 1984, the United States Army Corps of Engineers (COE) entered into a similar memorandum agreement with the MDNR. As a condition of receiving this authority, Michigan had to

[†] Disclosure and Disclaimer: The author represented parties involved in the legislative process which culminated in the enactment of PA 98. This representation included, among other things, appearing before the Senate and House Natural Resource Committees and advocating against the adoption of the legislation. This article intends to present an objective report about the process which resulted in the adoption of PA 98 and the possible implications thereof. Any opinions which may appear herein are solely the author's and are not endorsed by the Michigan State Bar, the Environmental Law Section and any of its other members.

¹ The Act also amends portions of [Part 13](#) (permits) and [Part 325](#) (Great Lakes submerged lands). These amendments are outside the scope of this article.

² See generally, [40 CFR §233.16\(d\)](#), the federal rule that governs the procedures for EPA's review of revisions of a state wetlands program. See also, "EPA's May 31, 2013 'Advice,'" text preceding footnote 23, *infra*.

³ See [1979 Public Act 203](#), codified at MCL 281.705(a)-(d) (repealed 1995).

administer the Wetlands Protection Program insofar as it pertained to the waters of the United States and the wetlands adjacent thereto in a manner consistent with federal law.

Federal Wetlands Jurisdiction

The EPA and COE have jurisdiction over waters of the United States, including the wetlands adjacent to those waters. These waters include, among others, the Great Lakes and all other waters connected thereto. Federal regulations define adjacent wetlands as those which border, are contiguous to, or neighboring the waters of the United States.⁴ There has been a substantial amount of litigation regarding the nature, scope and extent of the "waters of the United States." The law on this issue has remained unsettled following the decision in *Rapanos v. United States*, [547 US 715](#) (2006). After *Rapanos* the EPA issued a multi-page guidance document on the identification of waters protected by the Clean Water Act.⁵ The EPA uses the guidance to oversee and implement programs under the Clean Water Act and the COE uses the guidance to implement section 404 of the Clean Water Act. This jurisdictional issue is at the heart of PA 98.

EPA's Informal Review of Michigan's Wetland Protection Program

In 1997, the Michigan Environmental Council and the Lone Tree Council claimed that Michigan was not properly administering section 404 and requested the EPA to require Michigan to reform its section 404 program or withdraw the EPA's approval of it. The EPA treated this request as a petition to withdraw approval of the program as provided for by 40 CFR 233.53(c)(1).⁶

In January, 2003, the EPA preliminarily decided not to institute formal program withdrawal proceedings and instead recommended how Michigan should reform its wetland protection program.⁷ The EPA's final report in 2008 said that it would not begin withdrawal proceedings even though the EPA found deficiencies in Michigan law such as Michigan's exemptions for farming and other activities which were broader in scope than the exemptions for ongoing and established activities in the federal regulations and the exemptions for discharges associated with drainage or other activities that allow a wetland to be changed from one exempted use to another. Michigan also exempted activities designed to bring a wetland into farming and other uses. The EPA also said that Michigan's exemption for drainage permits contained in Parts 301 and 303 were less stringent than the federal regulations. The EPA said that Michigan needed to amend Part 303 to comport with federal law and the Michigan Department of Environmental Quality (MDEQ) agreed at that time to propose the federally requested amendments.

MDEQ's Wetlands Program Summary in March of 2009

Governor Granholm's 2010 budget proposed to eliminate funding for the wetlands protection program and turn it over to the EPA. The MDEQ's response in March of 2009 was a "wetland

⁴ [40 CFR §328.3\(c\)](#).

⁵ Guidance on Identifying Waters Protected by the Clean Water Act, [Final Guidance](#) (Mar 9, 2012).

⁶ [62 FR 14846](#) (Mar 28, 1997) and [62 FR 61173-61174](#) (Nov 14, 1997).

⁷ [68 Fed. Reg. 772](#) (Jan 7, 2003).

program question & answer document."⁸ The MDEQ's March 2009 response included, among other things, a finding that the federal government lacked jurisdiction over, and therefore would not protect, the following "Michigan Wetlands":

- More than 930,000 acres of isolated wetlands that were not physically connected to lakes or streams. This amounted to 17% of Michigan's wetlands.
- Wetlands adjacent to streams that were not "relatively permanent." The MDEQ determined that 36% of Michigan's streams are "intermittent or ephemeral" but did not have an estimate as to the number of acres of wetlands that would be left unregulated.
- Wetlands adjacent to but not directly abutting relatively permanent streams. The Department lacked an estimate of the number of acres in this and the next category.
- Wetlands adjacent to 26,384 isolated lakes and ponds in Michigan.

Rather than repeal Part 303 in 2009, the Michigan Legislature created the Wetland Advisory Council (WAC).⁹ The WAC was to evaluate and make recommendations on, among other things, the adoption of legislation to make Michigan's program consistent with the requirements of section 404 of the Clean Water Act,¹⁰ and was to submit its final report by August 15, 2012.¹¹

The WAC met 17 times between January 15, 2010 and August 7, 2012,¹² and issued its final report on August 15, 2012. The WAC members unanimously believed that Michigan should retain its approved section 404 program and assumed that the legislative changes necessary to do so could be adopted.¹³ WAC's final report noted that the MDEQ and/or the WAC had addressed 19 of the 22 issues that EPA identified in its 2008 report. The remaining three issues pertained to permitting exemptions for utilities, drains and agriculture practices under the Michigan program. WAC's report states, among other things, that the "US EPA has made it clear these amendments are necessary for the state to retain its approved section 404 program status." The WAC's membership was unable to reach a consensus on the amendments and did not make any recommendations on statutory language.¹⁴

WAC's report noted that in April 2012, Representative Jim Stamas had agreed to sponsor legislation to make Michigan compliant with the EPA's requirements for the section 404 program.¹⁵ On September 12, 2012, Representative Stamas introduced House Bill 5897 but the bill did not get out of the House Committee on Natural Resources.¹⁶

⁸ MDEQ, [Wetland Program Question & Answer Document](#) (Mar 2009).

⁹ 2009 PA 120, effective Nov 6, 2009, *codified at* MCL 324.30329 (repealed, effective Apr 1, 2013).

¹⁰ MCL 324.30329(8)(c).

¹¹ MCL 324.30329(9)(a) and (e), respectively.

¹² The WAC's meeting minutes and agendas are available on the MDEQ website. MDEQ, [Wetland Advisory Council](#).

¹³ Wetland Advisory Council, Final Report (Aug 15, 2012), [Introduction](#), p. 1.

¹⁴ *Id.*

¹⁵ Wetland Advisory Council, Final Report (Aug 15, 2012), [Methods/Activities](#), p. 4.

¹⁶ *Id.* See [HB 5897](#) (2012).

EPA's Recommended Legislative Changes

In April of 2011, the EPA summarized the legislative changes that Michigan needed to make its section 404 wetlands program consistent with federal law:¹⁷

- Federal law exempted ongoing and established farming, silviculture or ranching operations but did not exempt activities that bring an area into farming, silviculture or ranching. Michigan's exemption did not require farming or other operations to be established or ongoing.¹⁸
- Michigan law exempted drainage necessary for commercial farming.¹⁹ Federal law did not.
- Michigan exempted drainage ditch maintenance, operation or improvement including the straightening, widening or deepening of a drain.²⁰ Federal law exempted only maintenance of drainage ditches, and did not exempt the construction of drainage ditches.
- Michigan exempted the operation and improvement of agricultural drains, including straightening, widening or deepening, while federal law did not. Michigan exempted road maintenance and improvement from a permitting requirement.²¹ Federal law exempted only activities that did not change the character, scope or size of the original right of way.

The 2013 Legislative Process

On February 6, 2013 State Senator Michael Green introduced Senate Bill 163 to amend Parts 13, 301, 303, and 325 of NREPA. The bill's sponsor and its other advocates said that the adoption of SB 163 was necessary to allow Michigan to retain its section 404 program. On May 22, 2013, the Senate passed SB 163 and sent it to the House of Representatives. The House Committee on Natural Resources held two hearings on the bill. The House passed it on June 13, 2013, and gave the bill immediate effect. On July 2, 2013, the Governor signed the bill.

Federal regulations required Michigan to keep the EPA Regional Administrator fully informed of any proposed changes to the state's statutory authority.²² If the Regional Administrator determines that a proposed revision is substantial, he or she must publish and circulate notice to interested persons, must provide an opportunity for a public hearing, and must consult with the COE, among others.. The Regional Administrator has the authority to approve or disapprove substantial revisions in the wetlands program and must publish notice of the decision in the Federal Register. "Substantial revisions" include but are not limited to revisions that affect the area of jurisdiction, scope of activities regulated, and criteria for the review of permits.²³ PA 98

¹⁷ See generally, Elston, [Summary of Regulatory Changes Needed in Michigan Section 404 Program to Ensure Federal Consistency](#) (Apr 25, 2011).

¹⁸ *Id.* at 2, citing [MCL 324.30305\(2\)\(e\)](#).

¹⁹ *Id.* at 3, citing [MCL 324.30305\(j\)](#).

²⁰ *Id.* at 4, citing [MCL 324.30305\(h\)\(i-iii\)](#).

²¹ *Id.* at 4, citing [MCL 324.30305\(k\)\(i-iii\)](#).

²² [40 CFR §233.16\(a\)](#).

²³ [40 CFR §233.16\(d\)\(3\)](#).

affects the area of jurisdiction, the scope of activities regulated and criteria for the review of permits. To date, EPA has not completed a formal administrative review of PA 98. However, the EPA has repeatedly informed Michigan officials about its views of the legislation.

EPA's May 31, 2013, "Advice"

On May 31, 2013, EPA Region 5 sent an e-mail to certain MDEQ personnel regarding SB 163. The e-mail observed that SB 163 had corrected a "number of deficiencies" in the current law, noting specifically that SB 163 would make the farming and drain maintenance exemptions consistent with the federal program.²⁴ However, the EPA said that the bill introduced 22 "new inconsistencies" with federal law, regulation, guidance or case law. These inconsistencies included, among other things, exemptions for the maintenance of agricultural drains in their as-built condition as of July 1, 2014, exemptions for extension of culverts, livestock access (to the extent not limited to ongoing operations), the side casting of drain spoil materials, maintenance or repair of utility lines and installation of utility lines, placement of biological residues in a wetland, the use of a "mitigation credit" and other inconsistencies with the compensatory mitigation rules. Last but not least, the EPA's e-mail said:

- Section 30321(5)'s definition of "contiguous" is inconsistent with the federal use of that term within the context of the definition of "adjacent" in the section 404 guidelines. The EPA asserted that the new definition of "not contiguous" impermissibly narrowed the broad definition of contiguous found in Michigan Administrative Rule 281.921(1)(b) and stated that this new definition is also inconsistent with federal law because it could be interpreted to exclude "adjacent" waters and wetlands section 404 protects; and
- The exclusion of an agricultural drain from the definition of "contiguous" is inconsistent with federal law and guidance.

The Michigan House Natural Resources Committee held a hearing regarding Senate Bill 163 on June 4, 2013. The MDEQ's representative who spoke during the hearing did not mention the EPA's May 31, 2013, e-mail. No vote on the bill was taken that day. Another hearing was scheduled for June 6, 2013.²⁵

On June 5, 2013, representatives of the Tip of the Mitt Watershed Council and the Michigan Environmental Council sent a copy of the EPA's May 31, 2013, e-mail to each member of the House of Representatives. The Councils' joint transmittal message said that if SB 163 as passed by the Senate is enacted into law, "the environmental community will repetition the EPA to revoke Michigan's authority to implement the program."²⁶

²⁴ Tinka Hyde, [Fwd ACTION: Michigan 404](#) (May 31, 2013).

²⁵ [Minutes of the House Standing Committee on Natural Resources](#) (Jun 4, 2013)

²⁶ [June 5, 2013 letter to Michigan House of Representatives.](#)

On June 6, 2013 the House Natural Resources Committee voted to recommend passage of the bill and sent it to the House. No member of that Committee said anything about the substance of the EPA's e-mail.

June 12, 2013 Amendment to SB 163

On the floor of the House, an amendment to SB 163 was offered and adopted. This amendment to the bill, entitled "enacting section 2," states:

Part 303 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.30301 to 324.30327, **is repealed effective 160 days after the effective date**, as published in the federal register, **of an order by the administrator of the United States Environmental Protection Agency** under 40 CFR 233.53(c)(8)(vi) **withdrawing approval of the state program** under 33 USC 1344(g) and (h).²⁷

MDEQ and EPA Meeting

The MDEQ Director met with EPA Region 5 officials during the week of June 24 at Region 5's headquarters in Chicago. Apparently during that meeting EPA's personnel expressed their concerns with SB 163. The author believes that the MDEQ Director endeavored to persuade the EPA that SB 163 provided the requisite consistency with federal law while at the same time providing clarity to Michigan property owners. The author understands that Region 5's personnel did not express approval of SB 163.

2013 PA 98

The following summarizes the agricultural and drain-related sections in [PA 98](#) that significantly change Michigan law insofar as it applies to both the "waters and wetlands of the United States" and "Michigan Wetlands."²⁸

- **Part 301 (Inland Lakes and Streams)**

PA 98 eliminates the exemption for a permit for the construction of a private agricultural drain. The new maintenance exemption applies only to activities that maintain the location, depth and bottom width of a drain as constructed or modified before July 1, 2014.

PA 98 eliminated the exemption for the "improvement" of all drains and allows an exemption only for the maintenance of a drain that was either legally established and constructed before January 1, 1973 pursuant to the drain code or was constructed or modified under a permit issued under Part 301. PA 98 defines "maintenance of a drain" to mean the "physical preservation of the location, depth and bottom width of a drain and appurtenant structures of the drain as constructed or modified before July 1, 2014." New section 30103(1)(g)(i-viii)

²⁷ [House Substitute for SB 163](#) (Jun 12, 2013) (emphasis added).

²⁸ SB 163 also includes changes to [Part 13](#) (permits) and other matters in [Part 325](#) (Great Lakes Submerged Lands) which are beyond this article's scope.

specifies a number of "best management practices" that one must follow when performing drain maintenance.²⁹

New section 30103(3) defines an agricultural drain as "a human-made conveyance of water that meets all of the following requirements: does not have a continuous flow, flows primarily as a result of precipitation-induced surface runoff or groundwater drained through subsurface drainage systems, serves agricultural production," and was either constructed before January 1, 1973 or was constructed in compliance with Part 301.³⁰

New subsection 30103(11) provides that by December 31, 2013, the MDEQ must develop and maintain a general permit for legally established drains. Subpart (b) thereof allows a drain commissioner or drainage board to submit an application for an authorization under the general permit on a county-wide basis. Subpart (d) of this new section requires a drain commissioner or drainage board to submit an annual report to the MDEQ regarding the performance of the generally permitted drain activities.

Last but not least, new section 30101a states:

For the purposes of this part, the powers, duties, functions, and responsibilities exercised by the department because of federal approval of Michigan's permit program under section 404(G) and (H) of the Federal Water Pollution Control Act, 33 USC 1344, apply only to "navigable waters" and "waters of the United States" as defined under section 502(7) of the Federal Water Pollution Control Act, 33 USC 1362, and further refined by federally promulgated rules and court decisions that have the full effect and force of federal law. Determining whether additional regulation is necessary to protect Michigan waters beyond the scope of federal law is the sole responsibility of the Michigan Legislature based on its determination of what is in the best interest of the citizens of this state.³¹

Query whether this section means that Parts 301 and 303 apply only to "waters of the United States" thereby eliminating the regulation of "Michigan Wetlands," the waters and adjacent wetlands described in the MDEQ's March, 2009, report? Will this statement of legislative intent persuade the EPA to approve revision of Michigan's wetlands program in accordance with 40 CFR 233.16? Will it dissuade the US EPA from initiating formal program withdrawal proceedings? Time will tell.

- **Part 303**

PA 98 complied with and exceeded the EPA's requests to amend Michigan law. As of October 1, 2013, section 30305(e) as now amended restricts the permit exemptions for farming, horticulture, silviculture, lumbering and ranching activities to those that occur on an

²⁹ [2013 PA 98](#), at page 3.

³⁰ New section 30305(8) is the identical provision in Part 303. See 2013 PA 98, *supra* note 29, at pages 6-8.

³¹ New section 30328 is the identical section in Part 303. See 2013 PA 98, *supra* note 29, at pages 14-15.

established ongoing operation. Activities that bring into farming, ranching, horticulture or silviculture uses an area not previously in any of those uses, or that convert one use to another, are not now part of an established ongoing operation and therefore will not be exempt from Part 303's permit requirements. Minor drainage now expressly excludes drainage to convert from one wetland use to another and does not include the construction of a canal, ditch, dike, or other waterway or structure that drains or otherwise significantly modifies a stream, lake or wetland. PA 98 does not exempt the Michigan Wetlands from any of these new provisions.

New subsection 30305(h)(iii) prohibits any change in the dimensions of an agricultural drain as they exist by July 1, 2014. It also does not allow for any modification of an agricultural drain which results in additional wetland drainage or conversion of a wetland to a use to which it was not previously subject.³² New subsection 30305(l) contains a similar provision for other drains. The Michigan Wetlands are not exempt.

Both before and after the adoption of PA 98, section 30311 included a number of subsections pertaining to the criteria applicable to the issuance of a Part 303 permit. Subsections (2)(b), (4) and (5) included provisions pertaining to the availability of a "feasible and prudent alternative" to the proposed activity. Before the adoption of PA 98, subpart 5 provided that if it is otherwise a feasible and prudent alternative, an area not presently owned by the permit applicant which could be reasonably obtained, utilized, expanded or managed to fulfill the basic purpose of the proposed activity may be considered.

PA 98 amended subsection 5's "unowned area" provision by substituting "a property" for "an area" and added a rebuttable presumption that alternatives located on property not presently owned by the permit applicant are not feasible and prudent if all of these factors are present: the activity involves filling or dredging from a wetland as described in section 30304(a) or (b), the activity will affect no more than two acres of wetland, the activity pertains to the construction or expansion of a single family home and attendant features, the construction or expansion of a barn or other farm building, or the expansion of a small business facility and the activity is not covered by a general permit.³³

Also, new subsection 6 within section 30311 provides that consideration of a feasible and prudent alternative regarding the size of a proposed structure shall be based on the footprint of that structure rather than its square footage. New subsection 7 provides that the choice of and extent of the proposed activity within the proposed structure must not be considered in determining the feasible and prudent alternatives. Whether these additions to section 30311 will enhance a permit applicant's chances to obtain a permit or will encumber the opportunity to do so remains to be seen.

³² Sections 30305(h)(iii); 30305(l), *See* 2013 PA 98, *supra* note 29, at page 7.

³³ MCL 324.30311(5)(a-d). The multiple negatives appear in the amended statute as written. *See* 2013 PA 98, *supra* note 29, at page 9.

PA 98 amends MCL 324.30311d's "wetland mitigation" requirements. Subsection 5 now requires that when setting the "mitigation ratio," the MDEQ must consider the method of compensatory mitigation, the likelihood of success, differences between the functions lost at the impacted site and the functions expected to be produced by the mitigation project, temporary losses of aquatic resource functions, the difficulty of restoring or establishing the aquatic resource type and functions, and the distance between the affected aquatic resource and the mitigation site.

Section 30311d also includes a new subsection 6 that provides for protection and restoration of an impacted agricultural property subject to a "conservation easement." Alternatively, a permit applicant may satisfy its mitigation requirements by making a payment to a "stewardship fund" which new subsection 7 authorizes the MDEQ to establish. Money deposited into that fund may be used to develop mitigation for impacted sites or as an alternative to the financial assurance required under subpart 4. New subsection 8 requires MDEQ to submit proposed administrative rules on mitigation within one year after the effective date of the Act and defines or describes the objects or tasks for those rules. New subsection 9 requires MDEQ to submit revised administrative rules to encourage the development of wetland mitigation banks within one year of the effective date of the Act and contains requirements for those rules.³⁴

- **Blueberries**

Section 30312(6) requires the MDEQ to develop by October 1, 2013 a general permit for the alteration of wetlands for blueberry farming, and contains the permit's criteria, including, among other things, that the wetland must be restored when farming activities cease, the wetland must be placed under a conservation easement until the wetland is restored after farming activities cease, one may not convert the wetland to a "non-wetland," and no roads, ditches, reservoirs, pump houses, and related support facilities for shipping, storage, packaging, parking, and other similar purposes are allowed unless they come within another exemption in section 30305.

Section 30312d requires the MDEQ to develop a blueberry assistance program to provide wetland delineation and pre-application services and assistance.

- **"Contiguous" and Agricultural Drains**

New section 30321(5) defines "contiguous" by stating that a wetland is not contiguous if there is no direct physical contact and no surface water or inter-flowing groundwater connection to a body of water such as the Great Lakes, Lake St. Clair, an inland lake, a pond, river, or stream. This section requires the MDEQ to respond to a request for a determination whether a wetland is contiguous within 30 days after an on-site evaluation. Subsection 6 says that the MDEQ shall

³⁴ ELS member Brad Sysol will write an article for the Fall issue of this *Journal* regarding *Koontz v. St. Johns Water Management District* in which the Supreme Court held that the standards in *Nollan v. City of Tigard*, 512 US 374 (1994) and *Dolan v. California Coastal Commission*, 483 US 825 (1987) regarding the constitutionality of conditions imposed upon the issuance of land use permits, also apply when the government denies a permit and demands the payment of money as a condition for the receipt of the permit. *Koontz* clearly has implications for Michigan's new wetland mitigation requirements.

not consider an agricultural drain in determining whether a wetland is "contiguous." Subsection 7 states that a drainage structure such as a culvert, ditch or channel is not in and of itself a wetland. The EPA's May 31, 2013 e-mail stated that subsections 5 and 6 were clearly inconsistent with federal law.

Implications for Michigan's Wetlands Program

It is anticipated that one or more groups or organizations active in the environmental community will ask EPA Region 5 to begin proceedings to withdraw Michigan's section 404 program. The EPA may initiate a withdrawal proceeding whether or not it receives a petition asking it to do so. If the EPA withdraws Michigan's section 404 program, PA 98 will repeal Part 303.³⁵ The Michigan Wetlands described in the MDEQ's March 2009 report would then become unregulated, and the EPA and the COE would regulate wetlands adjacent to the waters of the United States.

In the interim, it is anticipated that EPA Region 5 will notify the MDEQ director that PA 98 is not immediately effective because the EPA's administrative process applicable to its review of the revision of Michigan's statutory scheme has not yet occurred.³⁶ If that happens, query whether the lack of PA 98's immediate effect will only apply to the "federal wetlands."

As of the publication of this article, Lansing was replete with rampant speculation about whether the EPA would give the Michigan Legislature one last chance to "fix" Part 303 or whether the EPA would proceed as described above. The House and Senate return to action on September 10, 2013. It remains to be seen whether the EPA will refrain from taking any action before then.

During the time that one or more of the above activities occur, Michigan farmers and drain contractors, among others, face continued uncertainty and confusion as to whether their activities are exempt from or subject to PA 98's new permitting requirements.

³⁵ 2013 PA 98, enactment section 2. See "June 12, 2013 Amendment to SB 163," text at footnote 27, *supra*.

³⁶ See generally, [40 CFR §233.16](#).

Water Affordability in Detroit: a Legal Analysis

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I. Introduction

Detroit, Michigan, the hallmark city in a state surrounded by an abundance of fresh water, is home to a water crisis of epic proportions. Tens of thousands of Detroit residents have suffered a lack of access to water in their homes because they cannot afford to pay their water bills.¹ The impact of the water crisis on individuals extends far beyond the health risks caused by lack of access to this vital resource. It can split families apart, as the State of Michigan may remove a child from the custody of his or her parent or guardian if it determines the child is at risk from the lack of access to water.² This article provides a legal analysis of the water crisis, from access to shut-offs, and offers prospective solutions for Detroit. A solution, however, must ultimately come from the political process, not the courts, though any solution must comply with several legal requirements.

II. The Legal Right to Water and Protection against Shut-Offs

Though there is a myriad of international, domestic, and local laws regarding water, there is no enforceable right to water access for those who cannot afford it. Though international law formally acknowledges a human right to water, it provides no mechanism to enforce that right.³ A July 2010 United Nations General Assembly resolution recognizes “the right to safe and clean drinking water and sanitation that is essential for the full enjoyment of life and all [other] human rights[.]”⁴ Similarly, the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services[.]”⁵ This can be broadly interpreted to include a right to water.⁶

The rights set forth in the UDHR are enshrined in two covenants: the International Covenant on Economic, Social and Cultural Rights (ICESR) and the International Covenant on Civil and Political Rights (ICCPR). The ICESR establishes a right to water, at least according to the committee that monitors the covenant.⁷ However, the ICESR is not binding upon the United States, because the United States Senate has not ratified it.⁸ The ICCPR, which the United States

¹ In 2007, Detroit’s Metro Times reported that as many as 45,000 Detroit residents receive water shut off notices per year. Curt Guyette, [Water Fight](#), *The Metro Times*, May 23, 2007 (accessed Dec 8, 2011).

² See Andrew Stelzer, Rachel Zurer, [Awash in Foreclosure](#), *The Progressive* (accessed May 3, 2012).

³ See Rose Francis, Laurel Firestone, Implementing the Human Right to Water in California’s Central Valley: Building A Democratic Voice Through Community Engagement in Water Policy Decision Making, [47 Willamette L R 495](#), 504 (2011).

⁴ [GA Res 64/292](#) (Jul 28, 2010).

⁵ [GA Res 217 \(III\) A, UN Doc A/RES/217\(III\), Art 25](#) (Dec 10, 1948).

⁶ George S. McGraw, [Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence](#), 8 *Loy U Chi Int’l L R* 127, 145-146 (2011).

⁷ [International Covenant on Economic, Social, and Cultural Rights, General Comment 15](#) (2002); [The International Covenant on Civil and Political Rights](#) (1966)

⁸ Thorsten Kiefer & Catherine Brölmann, Beyond State Sovereignty: The Human Right to Water, 5 *Non-St. Actors & Int’l L* 183, 190 (2005).

has properly signed and ratified, also provides a right to water access, at least to some extent.⁹ However, the ICCPR is a non-self-executing treaty, which means that it is enforceable only to the extent that a signatory nation enacts legislation that brings its domestic laws into compliance with the covenant.¹⁰ Because the U.S. has not adopted legislation to bring its laws into such compliance, the water rights established by the ICCPR are not enforceable under United States law.¹¹

In the United States, federal law does not guarantee its citizens a right to water access. This view is reflected in the fact that the United States abstained from voting on the 2010 UN General Assembly resolution which recognized water as a human right.¹² The United States Supreme Court has stated that the “Constitution does not provide judicial remedies for every socio-economic ill.”¹³ Some commentators have conceptualized legally protected water rights that go far beyond any currently accepted constitutional rights.¹⁴

Individual states, however, are free to enact their own legislation to protect against water shut-offs, though most states have not done so.¹⁵ Massachusetts, for example, offers relatively strong legal protections, prohibiting water and other utility shut-offs between November 15 and March 15.¹⁶ Massachusetts also gives year-round protection for households that face financial hardship *and* are home to either (a) a seriously ill resident; or (b) a child younger than one year, or, if all home resident adults are seniors who live with a minor.¹⁷ In New York, the judiciary has crafted certain policy exceptions to prevent water shut-offs when public necessity outweighs the need to shut off water service for nonpayment.¹⁸ New York courts have allowed such exceptions to prevent shut-offs that would affect public parks¹⁹ and public schools.²⁰ The exception, however, has not been applied to typical residential customers, whose water can be shut off under New York statutory law.²¹

Michigan’s laws on water shut-offs are unlike Massachusetts and similar to most states. Michigan law expressly allows local units of government to discontinue water service to any

⁹ *Id.* at 183.

¹⁰ *Buell v. Mitchell*, [274 F3d 337](#), 371-372 (6th Cir 2001).

¹¹ *See Hain v. Gibson*, [287 F3d 1224](#), 1243 (10th Cir 2002); *Buell*, 274 F3d at 371-372.

¹² *See McGraw*, *supra* note 6, at 190.

¹³ *Lindsey v. Normet*, [405 US 56](#), 74 (1972).

¹⁴ *See McGraw*, *supra* note 6, at 190.

¹⁵ For example, Kentucky’s enabling statute for local water providers, typical of most states, allows water shut-offs for delinquent residents. [KRS § 220.510\(1\)](#).

¹⁶ [220 CMR 25.03\(1\)](#).

¹⁷ [220 CMR 25.03\(1\)](#); [MGL 165 § 11B](#).

¹⁸ *People ex rel. Johnson v. Barrows*, 140 AD 24; 124 NYS 270 (4th Dep’t 1910), *aff’d*, 204 NY 664 (1912); *Board of Education of City of Lockport v. Richmond*, 137 NYS 62 (Supp 1912).

¹⁹ *People ex rel. Johnson*, 140 AD at 25.

²⁰ *Board of Education of City of Lockport v. Richmond*, 137 NYS at 64.

²¹ E.g., NY Village Law § 11.1116.

resident delinquent in paying the water bill, regardless of poverty or other hardships.²² In *Ripperger v. City of Grand Rapids*, the Michigan Supreme Court upheld this legal authority when Grand Rapids, in accordance with its local ordinance, shut off water services to delinquent customers.²³ The local government of Detroit, like Grand Rapids, grants its public water utility the power to discontinue service to customers who do not pay their bills.²⁴

III. Current Water Assistance Programs in Detroit

The City of Detroit currently offers two programs that assist residents in need: the Detroit Residential Water Assistance Program (DRWAP) and the Water Access Volunteer Effort (WAVE). DRWAP, which has existed since 2007, is jointly operated by the Detroit Water and Sewerage Department (DWSD) and the Detroit Human Services Department (DHS).²⁵ To the extent its funding allows, DRWAP assists residents (a) who are at the point of water shut off, or pending shut off; (b) who live in a single-family dwelling; and (c) whose income is at or below 200% of the federal poverty level.²⁶ The program caps assistance at \$175 annually per household.²⁷ As of December 25, 2009, the program was providing assistance to 2,047 households.²⁸ As of 2010, it is funded exclusively by voluntary donations. Detroit ratepayers have the option to donate to the fund 50 cents with each of their water bills.²⁹ The WAVE Program, a similar effort, is a 501(c)(3) nonprofit corporation established in 2003.³⁰ Prior to the creation of DRWAP, the WAVE program received the water bill donation funds. Now it is funded by DWSD donations and other donations.³¹

Despite modest success, DRWAP and WAVE fall short of solving Detroit's crisis of water access. In addition to substantive flaws with the programs, they also have major administrative problems that call into question their sustainability.³²

²² [MCL § 141.121](#); *Id.* § [108.9](#); *Id.* § [123.166](#); *Id.* § [71.6](#). Also, local laws of Michigan municipalities typically permit water shut-offs in the event of nonpayment. *See, e.g.,* [Southfield Code of Ordinances, § 2.155](#) (accessed Aug 2, 2013)

²³ [338 Mich 682](#), 687; 62 NW2d 585 (1954).

²⁴ [Detroit Municipal Code § 56.2-43](#).

²⁵ Loren Monroe, [Memorandum, City of Detroit: Office of the Auditor General](#), Nov 18, 2010 (accessed Dec 20, 2011).

²⁶ [Informational Flyer](#), Detroit Water and Sewerage Department (accessed Dec 18, 2011).

²⁷ Lara Zielen, [The Plight of the Waterless in Detroit](#), *LSA Magazine*, Sep 28, 2011 (accessed Dec 8, 2011).

²⁸ Monroe, *supra* note 25, at 3.

²⁹ *Id.*

³⁰ *Id.* at 1-2.

³¹ *Id.* at 1-2.

³² A 2010 Auditor General report found that DRWAP was operating without a governing document, as the DWSD-DHS memorandum of understanding had expired without being renewed and no new document was executed. The report found widespread program mismanagement by both DWSD and DHS, including improper maintenance of escrow funds, incorrect assistance payment quantities, and improper funding. The report also found that WAVE was dissolved as a corporate entity in October 2009, though it continues to function. Though WAVE has been funded in the past by annual \$100,000 DWSD payments, the Auditor General was unable to determine whether such funding was made in 2010. Monroe, *supra* note 25.

IV. Solutions

As explained above, the legal system provides no solution to the water shut-offs that plague Detroit. A solution must come from the political process. Short of a sea change in either the political establishment's views of the United States' international treaty obligations, or Constitutional rights, or federal legislation, state and local government are the most fertile arenas for change. Michigan could certainly enact laws and regulations, like those of Massachusetts, which protect against shut-offs. Michigan law already provides some level of protection against heat shut-offs.³³ Finally, a local solution is possible. In fact, a highly detailed local proposal already exists called the Detroit Water Affordability Plan.

A. Water Affordability Plan

The Detroit Water Affordability Plan (the Plan), developed by Roger Colton of the consulting firm Fisher, Sheehan, & Colton,³⁴ was the product of vibrant political advocacy by the Michigan Welfare Rights Organization and other community groups to bring full water access to all citizens of Detroit.³⁵ In response, the Detroit City Council, on July 19, 2006, passed a resolution authorizing implementation of a water affordability program.³⁶ The resolution did not explicitly adopt the Plan, but instead allowed DWSD to contract with a nonprofit called the Heat and Warmth Fund to design a program, with consultation from Roger Colton, who had authored the Plan.³⁷ However, DWSD never implemented the Plan, and eventually adopted DRWAP and the WAVE Program in its place.³⁸

Strictly speaking, the Plan would not outlaw shut-offs, but rather would subsidize vulnerable residents to make their water bills affordable. This follows the principle that a household in serious economic hardship needs assistance even if it has not yet fallen behind in water bill payments, because funds used to pay the water bill come at the expense of other vital uses. Under the Plan, Detroit households that meet the following two requirements would be eligible for assistance: (1) a household income at 175% of the federal poverty level³⁹ or less, and (2) household water usage that exceeds an "affordable burden" cost.⁴⁰ This "affordable burden" falls between two and three percent of household income.⁴¹ For households making 0-50% of

³³ [MCL § 400.1151](#), *et seq.*

³⁴ Roger Colton, [A Water Affordability Program for Detroit Water and Sewerage Department](#), Fisher, Sheehan, & Colton, Jan 2005 (accessed Dec 18, 2011).

³⁵ See Maureen Taylor, [A Birth Announcement: We Welcome the Water Affordability Plan!](#), *Michigan Citizen*, Sep 3, 2006 (accessed Nov 29, 2011).

³⁶ Detroit Journal of Common Council of the City of Detroit, 2006, 2059-2060.

³⁷ *Id.*

³⁸ See Menelik Hardy, [Water Affordability Plan Implementation is Imminent](#), *Michigan Citizen*, Jan 21, 2007 (accessed Dec 11, 2011).

³⁹ The 2004 federal poverty level, used when the Plan was drafted, was \$9,310 annually for a one-person household, \$12,490 for a two-person household, and \$15,670 for a three-person household. See Colton, *supra* note 34, at 7. The current federal poverty guidelines can be found at [2013 Poverty Guidelines](#), U.S. Department of Health and Human Services' Office of the Assistant Secretary for Planning and Evaluation (accessed May 22, 2013).

⁴⁰ Colton, *supra* note 34, at 7.

⁴¹ *Id.* at 14.

the poverty rate, it is two percent; for households between 50 and 100%, it is 2.5%; for those between 100 and 175%, it is three percent.⁴²

Households that qualify for assistance would receive a fixed credit to reduce their water bills to a proportion of household income deemed an “affordable burden.”⁴³ The fixed credit is based on a projection of the household’s annual income and water usage.⁴⁴ Once this calculation is made, the fixed credit would not change, even if the household were to reduce its water usage.⁴⁵ Therefore, households would have a financial incentive to decrease their water usage in order to devote a larger portion of income for other uses.

Customers already in arrearage from past unpaid bills, and who still meet the Plan’s eligibility requirements, would also earn credits to extinguish the arrearage over a two-year period.⁴⁶ Furthermore, the Plan would provide outreach efforts to encourage residents to conserve water, from information on identifying leaking water pipes, to water conservation kits mailed to residents.⁴⁷

According to the original estimates, the Plan would cost an estimated \$13.5 million annually.⁴⁸ This includes startup and administrative costs, assistance payments, and projected savings, including bad debt offsets, because a substantial portion of the extinguished water bill arrearage would not have been paid back in the first place.⁴⁹ Though these figures may have changed after the 2005 proposal, they provide a necessary starting point.

To pay for this program, the Plan calls for a fixed increase in water bill fees to Detroit customers on a per-customer basis (as opposed to a volumetric basis). The proposal calculates that the following fixed monthly rate increases⁵⁰ would essentially pay for the entire program: a \$1 increase for residential customers, a \$20 increase for commercial customers, a \$275 increase for industrial customers, and an \$80 increase for municipal, school, and large-scale housing customers.⁵¹

B. Legality of the Plan

The Plan was never formally approved by Detroit’s government, either by resolution or ordinance. For the Detroit city government to adopt the Plan in a substantive matter, it would

⁴² *Id.*

⁴³ *Id.* at 7.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* at 9-12.

⁴⁸ *Id.* at 13, 21-23. This 2005 projection is based on a study of Detroit’s socioeconomic situation and analysis of similar assistance programs implemented in Pennsylvania, New York, and Washington, D.C.

⁴⁹ *Id.* at 17.

⁵⁰ Small-volume Detroit residential water customers are approved for monthly billings but are billed on a quarterly basis. Large-volume customers are billed on a monthly basis. [Interim Collection Rules and Procedures](#), Detroit Water and Sewerage Department. Rev. Jan 22, 2003 (accessed Apr 29, 2011).

⁵¹ Colton, *supra note 34*, at 20.

likely have to pass an ordinance rather than a resolution. Municipal actions that are legislative in nature, setting forth a new plan or policy, must be passed by ordinance to be enforceable.⁵² In contrast, ministerial actions, which merely administer already existing laws, need only be accomplished by resolution.⁵³ Implementing the Plan is likely closer to being legislative in character.

Furthermore, even if the Plan was implemented, it would face several legal hurdles. The first is whether the Plan's extra charges to customers violates DWSD's duty to set water rates at an equitable and reasonable level.⁵⁴ The second is whether the system of water subsidies differentiates between classes of ratepayers in violation of equal protection doctrine.⁵⁵ The third is whether the Plan violates the Headlee Amendment to the Michigan Constitution, which prohibits local units of government from increasing taxes on its residents without voter approval.⁵⁶

a. Equitable and Reasonable Rates

Under the Detroit City Charter and Michigan law, the DWSD Board of Water Commissioners must set water rates that are equitable⁵⁷ and reasonable.⁵⁸ The Detroit City Charter does not elaborate on the meaning of this "equitable" standard.⁵⁹ The reasonableness requirement, a wholly judicial creation, has been explained to some extent. A rate that yields a profit for a private administrative body to spend on improvements to a water plant is reasonable.⁶⁰ Furthermore, a party challenging the reasonableness of a rate has the burden to show the rate is unreasonable.⁶¹

In one form or another, states generally follow a standard similar to this "equitable, reasonable" standard for water and other utility rates.⁶² In evaluating a utility subsidy program under this standard, the courts must determine whether the subsidy to a particular class of ratepayers (be it the poor, elderly, or another disadvantaged class) unreasonably discriminates

⁵² 1A Sutherland Statutory Construction § 30:3 (7th ed); 56 *Am Jur 2d Municipal Corps.*, § 286.

⁵³ *Id.*

⁵⁴ The Charter of the City of Detroit, [§ 7.1202](#) (2012), at page 90; *Preston v. Board of Water Comm'rs*, 117 Mich 589, 596; 76 NW 92 (1898).

⁵⁵ See, e.g. *Brittany Park Apartments v. Harrison Charter Twp.*, 432 Mich 798, 804; 443 NW2d 161 (1989).

⁵⁶ Const 1963, art 9, § 31.

⁵⁷ The Charter of the City of Detroit, [§ 7.1202](#) (2012), at page 90.

⁵⁸ *Preston*, *supra* note 54, 117 Mich at 596.

⁵⁹ See 25 *Mich Civ Jur Water* § 151.

⁶⁰ *Preston*, *supra* note 54, 117 Mich at 596. However, DWSD, as a public entity, is prohibited from making a profit under § 7.1203 of the Detroit City Charter. The Charter of the City of Detroit, [§ 7.1203](#) (2012), at page 91.

⁶¹ *City of Novi v. Detroit*, 433 Mich 414; 446 NW2d 118 (1989) (Notably, however, this case deals with the reasonableness of rates for water sold between municipal entities under MCL 123.141(2), which is not at issue here.).

⁶² See Margot Saunders *et al.*, [Water Affordability Programs](#), American Water Works Association Research Foundation, at 144 (accessed Dec 19, 2011). Other states use such language as "unreasonable" or "unjust" price discrimination.

against other classes of ratepayers, who must bear increased utility costs to pay for the subsidy.⁶³

Jurisdictions are split on whether subsidized utility plans comply with this standard. Some take a narrow interpretation, holding any subsidy plan discriminatory. Under this interpretation, subsidizing certain classes at the expense of others requires a policy decision that must be made by a legislative body, not a judicial or regulatory body.⁶⁴ Many courts hold that in the absence of an explicit statutory directive to consider these policy goals, rate setting bodies do not have this authority.⁶⁵

Other jurisdictions take a more relaxed view, using a balancing test to determine whether a subsidy plan unreasonably discriminates between classes. Factors in this balancing test typically include: (a) the costs associated with the plan; (b) the level of utility use by subsidized residents relative to other classes; (c) whether the plan targets a narrow class of people so that only customers in sufficient need are subsidized; and (d) the economic and social well-being of the subsidized residents.⁶⁶ This balancing test allows for a measure of equity toward the “deserving class” otherwise unable to afford essential services.⁶⁷ In balancing these factors, detailed, evidence-based projections are essential.⁶⁸

Due to lack of applicable Michigan case law, it is an open question whether Michigan courts would take a narrow view or a relaxed view on this issue. The fact that the Detroit City Charter does not specify limits to its “equitable” standard weighs in favor of a more relaxed, permissive interpretation, should the Plan be adopted by ordinance. Also, Michigan’s requirement that water rates be reasonable, fashioned by courts independent of any statutory directive, could provide support for a relaxed construction. Another relevant, though nonbinding, starting point is the Michigan Public Service Commission (MPSC) decision *In Re Consumers Power Co.*⁶⁹ In this administrative case, the MPSC allowed for reduced electricity rates for senior citizens, because seniors used less electricity than other classes of ratepayers.⁷⁰

If Michigan courts take a narrow view of the “equitable, reasonable” standard, the Plan would not pass judicial scrutiny. However, it would likely survive if the court applies a relaxed

⁶³ *Id.* at 144-152.

⁶⁴ *Id.*

⁶⁵ *Id.*; *Mountain States Legal Foundation v. Public Utilities Comm’n*, 197 Colo 56, 60; 26 PUR4th 609 (1979); *Rhode Island Consumers’ Council v. Smith*, 111 RI 271, 301-302; 99 PUR3d 209, later app, 113 RI 232 (1973) (a telephone rate case); *Telluride Power Co. v. Public Utilities Comm’n* 8 F Supp 341, 344 (DC Utah 1934) (an electricity rate case); *Mountain States Legal Foundation v. New Mexico State Corp. Comm’n* 101 NM 657, 659; 687 P2d 92 (1984).

⁶⁶ See, e.g. *Saunders*, *supra* note 62, at 144-152; *Hoechst Corp. v. Dep’t of Public Utilities* 379 Mass 408, 412-413; 399 NE2d 1 (1980); *Town Taxi, Inc. v. Police Comm’r of Boston*, 377 Mass 576, 582; 387 NE2d 129 (1979).

⁶⁷ *Town Taxi, Inc.*, *supra* note 65, 377 Mass at 582 (1979).

⁶⁸ See *Saunders*, *supra* note 62, at 148; *Mountain States Legal Found. v. Utah Pub. Services Comm’n*; 636 P2d 1047, 1052; 636 P2d 1047 (Utah 1981).

⁶⁹ *Re Consumers Power Co.*, 25 PUR4th 167 (Jul 31, 1978).

⁷⁰ *Id.* at 231. Note: this case was decided before passage of the 1984 Michigan Low Income Heating Assistance and Shut-Off Protection Act.

standard. Under the relaxed standard, the first consideration is cost. Again, estimated costs are based on 2005 projections, and a more current analysis would have to be undertaken. But, under the 2005 projections, the Plan's annual per-customer costs would range from \$12 for residential customers to \$3,300 for industrial customers.⁷¹ In total, the Plan would cost \$13.5 million annually.⁷² This cost would constitute approximately 19% of DWSD's 2011-2012 annual water sale revenue to Detroit customers.⁷³ In other words, according to this very preliminary accounting, DWSD would have to raise nearly 20% in additional revenue from Detroit customers to finance the Plan. Whether these costs weigh for or against the Plan would be a matter of court discretion, and would require analyzing the relative costs of other cities' water assistance programs.

Also relevant is the amount of water used by subsidized residents relative to other classes. While this article does not examine differences in water usage levels for Detroit citizens based on socioeconomic status, there is no immediate reason to believe poorer residents use more water than other residents. If anything, their limited funds may cause them to use less water, which would weigh in favor of the Plan.⁷⁴ Furthermore, water conservation is a central component of the Plan, both through direct advocacy efforts and through the incentives created by the fixed payment structure.

Whether the Plan targets a narrow class of people, so that only customers in sufficient need are subsidized, is a complicated issue for Detroit. The Plan is typical for water and utility affordability plans in that eligibility requirements are keyed to federal poverty guidelines.⁷⁵ The Plan's eligibility level (175% of the federal poverty level) is more inclusive than some cities' plans,⁷⁶ though other cities, including Los Angeles, also use the 175% eligibility level.⁷⁷ However, Detroit is different from many other cities in its high proportion of poverty. The Plan's 2005 proposal calculated that 43% of Detroit residents would be eligible for the Plan.⁷⁸ Courts have certainly considered the economic well-being of residents in asserting the validity of assistance plans, and a sufficient case can be made that all of these households do in fact need assistance. But in terms of sufficient narrowness, a court might be compelled to consider a plan that could subsidize nearly half of the city's residents to be overly broad. A narrower plan, more likely to pass legal scrutiny, might lower the 175% of poverty eligibility requirement, or provide assistance only to residents who actually miss water bill payments.

⁷¹ Colton, *supra* note 34, at 20.

⁷² Colton, *supra* note 34, at 13, 21-23

⁷³ DWSD's revenue statement of from Detroit water sales show \$71,540,060 collected in the 12-month period ending June 30, 2012. In addition, DWSD collected \$258,587,439 in revenue from suburban customers, and \$6,002,446 in miscellaneous revenue. [City of Detroit Water Fund](#), Jun 30, 2012 (accessed Jul 10, 2013).

⁷⁴ This circumstance would be analogous to the aforementioned decision, *In Re Consumers Power Co.*, 25 PUR4th 167 (Jul 31, 1978), in which the MPSC allowed for reduced electricity rates for senior citizens based on the fact that they used less electricity than other ratepayers.

⁷⁵ Saunders, *supra* note 62, at 157.

⁷⁶ *Id.* at 19, 23. At the time of the source's publication, Seattle water assistance eligibility requirements were set at 125% of the federal poverty level. Philadelphia's were set at 150%.

⁷⁷ *Id.* at 21.

⁷⁸ Colton, *supra* note 34, at 13.

b. Water Rate Classifications and Equal Protection

The Equal Protection Clause of the United States Constitution declares that “[n]o State shall . . . deny to any person . . . the equal protection of the laws.”⁷⁹ This doctrine requires similarly situated persons to be similarly treated.⁸⁰ When evaluating equal protection, the court applies one of three standards: strict, intermediate, or rational basis scrutiny, depending on the type of legislative classification, or other classification, taken by a state.

The court applies strict scrutiny to classifications that are inherently suspect, or impinge on fundamental rights.⁸¹ Under strict scrutiny, the state must show (a) that it has a compelling interest to impose the classification, and (b) that the method used to do so was the least intrusive available.⁸² If the state cannot meet this heavy burden, the challenged classification violates equal protection.⁸³ Classifications based on race, alienage, or national origin are inherently suspect.⁸⁴ In addition, fundamental rights include such explicitly enumerated constitutional rights as First Amendment rights,⁸⁵ as well as fundamental due process rights, such as the right to travel⁸⁶ or procreate.⁸⁷

The intermediate scrutiny standard requires that the challenged classification be substantially related to an important objective.⁸⁸ Though courts have not set forth a well-defined scope of classifications subject to intermediate scrutiny, it tends to be rights recognized as important but not at the level of fundamental constitutional rights.⁸⁹ Classifications based on such grounds as gender or illegitimacy typically require intermediate scrutiny.⁹⁰

All other classifications require rational basis scrutiny.⁹¹ Under this deferential standard to the government, the classification does not violate equal protection so long as it rationally furthers a legitimate government purpose and is not arbitrary.⁹² The court does not inquire whether a better method may exist to achieve the purported government purpose.⁹³ As long as a

⁷⁹ U.S. Const. amend. XIV, § 1.

⁸⁰ *Cleburne v. Cleburne Living Center, Inc.*, [473 US 432](#), 439 (1985).

⁸¹ *Zablocki v. Redhail*, [434 US 374](#) (1978).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Frontiero v. Richardson*, [411 US 677](#), 688 (1973).

⁸⁵ *Hammond v. Commissioner of Correction*, [259 Conn 855](#); 792 A2d 774 (2002).

⁸⁶ *Cochran v. Pinchak*, [401 F3d 184](#) (3d Cir 2005).

⁸⁷ *Skinner v. Oklahoma*, [316 US 535](#) (1942).

⁸⁸ *Clark v. Jeter*, [486 US 456](#) (1988); *Ball v. Massanari*, [254 F3d 817](#) (9th Cir 2001).

⁸⁹ See *Clark v. Jeter*, 486 US 456 (1988).

⁹⁰ *Clark v. Jeter*, 486 US at 461; *Gomez v. Perez*, [409 US 535](#), 538 (1973); *United States v. Klinzing*, [315 F3d 803](#) (7th Cir 2003).

⁹¹ See, e.g. *Exxon Corp. v. Eagerton*, [462 US 176](#) (1983).

⁹² *Kimel v. Florida Bd. of Regents*, [528 US 62](#) (2000).

⁹³ *Schweiker v. Wilson*, [450 US 221](#) (1981); *Massachusetts Bd. of Retirement v. Murgia*, [427 US 307](#) (1976).

reasonably conceivable set of facts could establish a rational relationship between the act and a legitimate government end, the court must defer to the state.⁹⁴

Economic and social legislation is typically analyzed under rational basis scrutiny.⁹⁵ More specifically, classifications based on wealth fall under rational basis.⁹⁶ For example, in *San Antonio Independent School District v. Rodriguez*, a Texas education finance law based on local property taxes was challenged on equal protection grounds because it resulted in greater financing for wealthier districts with greater tax bases.⁹⁷ The plaintiffs alleged that the law discriminated based on wealth, and that wealth was an inherently suspect classification warranting strict scrutiny.⁹⁸ The Court declined to consider the economically poor a suspect class, and instead applied a rational basis scrutiny to find the law constitutional.⁹⁹

Like in *San Antonio Independent School District*, the Plan's wealth classifications would likely warrant rational basis scrutiny. For purposes of analysis, the Plan will be evaluated under equal protection as if it had been passed as an ordinance, or if it had been adopted independently by DWSD. The Plan would not impinge on fundamental constitutional rights or impose an inherently suspect classification,¹⁰⁰ nor would it concern matters typically subject to intermediate scrutiny. Rather, the Plan would set classifications for subsidies based on income levels and would impose small additional rate charges for different types of Detroit water customers. These are clearly economic/ social classifications and would therefore be subject to rational basis scrutiny.

Indeed, courts typically analyze utility rate disputes under rational basis scrutiny.¹⁰¹ Under this deferential standard, governments have relatively wide latitude to set rates and pursue rate policy.¹⁰² For instance, when a North Carolina city added surcharges to sewerage services for

⁹⁴ *Kimel*, *supra* note 92; *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W Va*, [488 US 336](#) (1989).

⁹⁵ *Dandridge v. Williams*, [397 US 471](#), 485 (1970); *State ex rel DSM v. Mealey*, [33 Kan App 2d 947](#); 112 P3d 956 (2005).

⁹⁶ *San Antonio Independent School District v. Rodriguez*, [411 US 1](#) (1973); *Southern Christian Leadership Conference v. Supreme Court of State of La.*, [252 F3d 781](#), 154 Ed Law Rep. 773 (5th Cir 2001); *Shaffer v. Board of School Directors of Albert Gallatin Area School Dist.*, 687 F2d 718, 6 Ed. Law Rep. 487 (3d Cir 1982).

⁹⁷ *San Antonio Independent School District*, *supra* note 96.

⁹⁸ *Id.*

⁹⁹ *Id.* at 25.

¹⁰⁰ However, one important distinction exists between the law in *San Antonio Independent School District* and the Plan. In footnote 60 of *San Antonio Independent School District*, the majority noted that one of the difficulties in considering wealth a suspect classification was that such an economic class would be hard to define. The majority hypothesized that if an education financing law disparately treated a more sharply defined class of "poor people[.]" it would be more likely to fall under strict scrutiny. In this case, the Plan proposes distinct income-based guidelines for those eligible for subsidies. However, it is still unlikely to effectuate application of strict scrutiny. As will be discussed further, the vast majority of rate cases are analyzed under rational basis scrutiny, despite the fact that rate disparities often establish very defined classes of ratepayers.

¹⁰¹ *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F3d 237 (8th Cir 1994); see also *Willcox v. Consolidated Gas Co.*, [212 US 19](#) (1909); 16C CJS Constitutional Law § 1331 (Jun 2013).

¹⁰² *NextEra Energy Res LLC v. Iowa Utilities Bd.*, [815 NW2d 30](#), (Iowa 2012)

high-strength or high-volume ratepayers, the court found no equal protection violation.¹⁰³ Despite the fact that the surcharge affected exclusively industrial ratepayers, the court found that the municipality possessed a rational basis of making a profit, and was allowed under North Carolina law to make “reasonable [consumer] classifications” based on cost of service, purpose of service, quantity, character of service, time of use, “or any other matter that presents a substantial difference as a ground for distinction.”¹⁰⁴

Under the rational basis standard, a state or local government can also set utility rates based on policy goals not related to cost of service, so long as those rates maintain a rational relationship to the goals.¹⁰⁵ In *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, a ratepayer challenged a public utility agency’s preferential steam heat pricing to interruptible rate customers over standard rate customers.¹⁰⁶ The ratepayer argued that the utility’s cost of providing steam heat was the same, regardless of whether the customer was an interruptible or standard rate, and this cost uniformity should be reflected in its pricing.¹⁰⁷ The Eighth Circuit, applying rational basis scrutiny, found no equal protection violation.¹⁰⁸ The difference in pricing, though not based on cost of service, was rationally related to the policy goal of ensuring the steam loop’s economic viability by offering reduced rates to customers who would not otherwise use steam heat.¹⁰⁹

Applying rational basis scrutiny to the Plan, a court would likely find the Plan’s extra charges and the subsidies to the poorest ratepayers to be rationally related to the purpose of preventing shut-offs, thus passing constitutional muster. Following the holding in *Barket, Levy & Fine*, the fact that these charges and subsidies unrelated to the actual service cost would be inconsequential, as policy purpose need not be related to service cost. Furthermore, as described in the previous section on “equitable” and “reasonable” rates, Michigan law and the Detroit City Charter allow broad rate-setting discretion and do not explicitly prohibit implementing the type of extra charges and subsidies proposed in the Plan. Therefore, the Plan would survive an equal protection challenge under rational basis scrutiny.

c. Equal Protection under Michigan Law

In addition to the federal Equal Protection Clause, Michigan applies its own constitutional equal protection provision.¹¹⁰ Equal protection under Michigan law is coextensive with its federal constitutional counterpart.¹¹¹ This means that, though Michigan state courts are not legally bound by federal equal protection law, the state judiciary understands the Michigan provision

¹⁰³ *Gen. Textile Printing & Processing Corp. v. City of Rocky Mount.*, 908 F Supp 1295, 1301 (EDNC 1995).

¹⁰⁴ *Id.* at 1309.

¹⁰⁵ *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F3d 237 (8th Cir 1994).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 242.

¹⁰⁹ *Id.* at 243.

¹¹⁰ [Mich. Const 1963, art 1, § 2.](#)

¹¹¹ *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 486 Mich 311, 318; 783 NW2d 695 (2010); *Crego v. Coleman*, [463 Mich. 248](#); 615 NW2d 218, 223 (2000).

was designed to duplicate the federal clause and offer similar protections.¹¹² Therefore, federal equal protection law is highly persuasive.¹¹³

Like federal law, Michigan equal protection law applies either strict, intermediate, or rational basis standards of scrutiny.¹¹⁴ For the reasons described in the previous section, the Plan would be evaluated under rational basis scrutiny.¹¹⁵ However, in addition to this scrutiny, Michigan law imposes an additional legal hurdle.

To survive under Michigan equal protection law, the Plan must also pass the following two-prong test: (1) the classifications for different rates must be “based on natural distinguishing characteristics” that “bear a reasonable relationship to the object of the legislation[;]” and (2) all people in the same class must be “included and affected alike[.]” without “immunities or privileges extended to an arbitrary or unreasonable class while denied to others of like kind[.]”¹¹⁶ Analysis of this test typically adopts the classifications set by the ordinance or statute in question.¹¹⁷

As the court explained in *Brittany Park Apartments v. Harrison Charter Twp.*, application of this test does not require each member of a class to be treated with exact numerical equality.¹¹⁸ Rather, ratepayers must be treated objectively and reasonably.¹¹⁹ This reasonableness is determined by examining the factors relevant to the ordinance, and is “not subject to mathematical computation with scientific exactitude[.]”¹²⁰ For example, in *Brittany Park*, the court upheld an ordinance that assessed aggregate water fees on apartment owners for each unit in the apartment complex, even though this caused apartment owners to pay more than single homeowners for the same amount of water.¹²¹ The court upheld the ordinance because the municipality’s distinction between these ratepayers, in order to achieve its ends of charging aggregate fees for each single-family dwelling, was objective and reasonable.¹²²

The first prong of the test requires different rate classifications to be “based on natural distinguishing characteristics” that “bear a reasonable relationship to the object of the legislation.”¹²³ The Plan would classify residential customers based on income in terms of the subsidies they are entitled to. The “natural distinguishing characteristic” would be the ability to

¹¹² *Crego*, 615 NW2d at 223.

¹¹³ *Harvey v. Michigan*, [469 Mich 1](#), 6 n. 3; 664 NW2d 767 (2003).

¹¹⁴ *Shepherd Montessori Ctr. Milan*, *supra* note 111, 783 NW2d at 697-698.

¹¹⁵ *See Yaldo v. North Pointe Ins. Co.*, 457 Mich 341, 349; 578 NW2d 274 (1998).

¹¹⁶ *Brittany Park Apartments*, *supra* note 55, 432 Mich at 804; *Houdek v. Centerville Twp.*, [276 Mich App 568](#); 741 NW 2d 587, 599 (2007).

¹¹⁷ *Brittany Park Apartments*, *supra* note 55, 432 Mich at 805.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Land v. City of Grandville*, 2 Mich App 681, 689; 141 NW2d 370 (1966), quoting *Meridian Twp v. East Lansing*, 342 Mich 734, 749; 71 NW2d 234 (1955).

¹²¹ *Brittany Park Apartments*, *supra* note 55, 432 Mich at 805.

¹²² *Id.*

¹²³ *Id.* at 804; *Houdek v. Centerville Twp.*, *supra* note 116.

pay water bills. According to the Plan, households with incomes at 175% or below the poverty level are at risk of water shut-offs due to inability to pay.¹²⁴ Depending on their level of poverty, the Plan would determine each class of subsidized households (those between 0-50, 50-100, and 100-175% of the poverty level¹²⁵) that faces a different level risk of shut-off, and the subsidies would vary accordingly. Inability to pay would naturally distinguish the subsidized classes from those with higher incomes, who do not face the threat of shut-off. Moreover, the subsidies would likely be found to bear a reasonable relationship to the object of the legislation, because the subsidies would further the policy goal of preventing shut-offs.

Considering the per-customer charge aspect of the Plan, classifications are drawn between residential, commercial, industrial, municipal, school, and large-scale housing customers, all of whom must pay different flat fees not tied to their volumetric water usage. These flat fees are designed to obtain significant funds from each class of users, while protecting high-level water users from bearing disproportionate costs that would result if the charges were tied to volumetric water use.¹²⁶ It is unclear what kind of natural distinguishing characteristics would exist between these ratepayer classifications to explain their differing flat fee assessments, or how they bear a reasonable relationship to the object of the Plan. If the different flat fee assessments happen to be based roughly on the level of water usage for each classification, the Plan may very well pass scrutiny, because, though each ratepayer in the same class may use different levels of water, they would not have to be treated with exact numerical equality.¹²⁷

The second prong of Michigan's equal protection test requires that all people in the same class be "included and affected alike[.]" without "immunities or privileges extended to an arbitrary or unreasonable class while denied to others of like kind[.]"¹²⁸ The key analytical issue is how a class is defined. If a class is defined in accordance with the Plan, whereby different residential ratepayers are separated into different classes based on income and risk of shut-off, the members of each class would be treated alike, considering both the fee and subsidy portions of the Plan. Conversely, if a class is defined in terms not specified by the Plan, this test will prove problematic. For instance, if all residential ratepayers are considered a "class," a court would be inclined to find immunities and privileges extend to the subsidized customers, while such subsidies are denied to "others of like kind[.]" that is, residential ratepayers who do not meet subsidy income requirements and must instead pay to finance the subsidized customers. However, following *Brittany Park*, a class is to be defined with the objective of the ordinance in mind.¹²⁹ In this light, the second prong will likely have been met. Therefore, the Plan would likely survive a Michigan equal protection challenge.

d. The Headlee Amendment

¹²⁴ Colton, *supra* note 34, at 14.

¹²⁵ *Id.*

¹²⁶ Colton, *supra* note 34, at 18.

¹²⁷ *Id.* at 805.

¹²⁸ *Brittany Park Apartments*, *supra* note 55, 432 Mich at 804; *Houdek v. Centerville Twp.*, *supra* note 116, 741 NW 2d at 599.

¹²⁹ *Brittany Park Apartments*, *supra* note 55, 432 Mich at 805-806.

A third legal concern is whether the Plan would violate the Headlee Amendment, which prohibits local units of government from assessing taxes on its residents beyond those already authorized by law without approval by a majority vote of qualified electors.¹³⁰ If the charges assessed under the Plan qualify as a tax, they are prohibited by the Headlee Amendment, absent voter approval.

Whether this prohibition applies depends on whether the charge is defined as a tax or a fee: a tax is prohibited, while a fee is allowed.¹³¹ While no bright-line test exists to differentiate between the two, courts consider three criteria: (1) whether the charge serves a regulatory purpose or a revenue-raising purpose; (2) whether the charge is proportionate to the necessary service cost; and (3) whether the charge is voluntary.¹³² Under this analysis, set forth in *Bolt v. City of Lansing*, the more a charge is regulatory, proportionate to the cost of service, and voluntary in nature, the more likely it will be considered a fee. In accordance with the Michigan Constitution, the Headlee Amendment must be construed liberally in favor of local government entities.¹³³

Even under a favorable interpretation, the charges imposed by the Plan would likely be closer to a tax than a fee. To be regulatory in nature, a charge must specifically benefit the person who pays it, though it can also have the dual purpose of benefiting the public.¹³⁴ In this case, the Plan would administer a monthly charge on *all* customers in order to benefit *only* those residents eligible for the Plan. In this sense, its explicit purpose is to raise revenue.

As for proportionality to the service rendered, a charge has a presumption of reasonableness, unless it is facially wholly out of proportion to the expense involved.¹³⁵ In this case, the extra charge would be separate from the normal water rates and explicitly intended solely for funding the Plan. This separateness means that it is not proportionate at all to the customer's water service because it is not related to the service in the first place.

A more unorthodox analysis, similar to that taken by the dissent in *Bolt*, would view the charges not as separate, but in context of the entire water bill and the city's larger policy goals.¹³⁶ This

¹³⁰ [Mich Const 1963, art 9, § 31](#). Former DWSD Director Victor Mercado has articulated these challenges to some extent. See Bankole Thompson, [Affordable Water Plan Inches Forward](#), *Michigan Citizen*, Feb 26, 2006 (accessed Dec 9, 2011). While the City of Detroit Law Department has echoed this view, the City Council's Research and Analysis Division has disagreed, asserting that the Plan does not violate the Headlee Amendment. See David Whitaker, Re: Proposed Water Affordability Plan, City of Detroit City Council, Feb 24, 2006.

¹³¹ *Bolt v. City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998); 23 *Mich Civ Jur, Taxes* § 3.

¹³² *Mapleview Estates, Inc. v. Brown City*, [258 Mich App 412](#); 671 NW2d 572 (2003); *Bolt*, *supra* note 131, 459 Mich at 152.

¹³³ [Const 1963, art 7, § 34](#); *People v. Johnson*, 12 Mich App 139; 162 NW2d 667 (1968).

¹³⁴ *USA Cash # 1, Inc. v. City of Saginaw*, [285 Mich App 262](#); 776 NW2d 346 (2009); [Const 1963, art. 9, § 31](#).

¹³⁵ *Kircher v. City of Ypsilanti*, [269 Mich App 224](#); 712 NW2d 738 (2005).

¹³⁶ *Bolt*, *supra* note 131, 459 Mich at 173.

analysis would hold the Plan to be a valid regulatory action. Detroit, as a home rule city,¹³⁷ has police power to promote its residents' health, safety and general welfare.¹³⁸ Furthermore, the extra charge would be relatively small in proportion to the rest of the water bill, and thus, not wholly out of proportion to the general water service rendered. The more typical Headlee Amendment analysis, however, views charges in their separateness.¹³⁹

As for whether the charge would be voluntary, every Detroit DWSD water customer must pay the charge. The proposed Plan would not allow customers to opt out. Furthermore, the fact that the charge would not be based on individual customers' volumetric water usage weighs against it being voluntary. Though water is a necessity for all residents, the courts have recognized water usage to be voluntary to some extent, because customers can limit the amount of water they use, at least to a degree.¹⁴⁰ The Plan's per-customer charge, however, is not correlated to a customer's water usage, and it therefore has little if any voluntary quality. All these factors point to the charge being a tax rather than a fee.

However, even if this charge would constitute a tax, the Headlee Amendment's prohibition applies only to "any tax not authorized by law or charter when this section [was] ratified [on November 7, 1978]."¹⁴¹ The next inquiry, therefore, is whether the Plan's charges would have been authorized under Detroit's City Charter when the Headlee Amendment was ratified in 1978. Under Detroit's 1974 Charter, which was in effect when the Headlee Amendment was ratified, the Board of Water Commissioners was authorized to set "equitable rates" for both wholesale and retail water customers.¹⁴² This is the same standard set forth in the 2012 Charter.¹⁴³ And like the 2012 Charter, the 1974 Charter did not elaborate on the scope and meaning of this "equitable" standard.

Whether DWSD, acting under the 1974 Charter, would have been authorized to assess the Plan's extra charges, is an unresolved question. The Headlee Amendment permits municipal entities to levy previously authorized taxes, even those not actually being levied at the time the Amendment was ratified.¹⁴⁴ Therefore, the fact that DWSD was not assessing such a charge in 1978 is inconsequential. The only question is whether the Plan's per-customer charge could have been assessed under an "equitable" water rate standard, in the absence of any ordinance or other legislation.¹⁴⁵

¹³⁷ Home rule, codified under Michigan's Home Rule City Act, is a theory of government that allows cities and other municipal entities to maintain a relatively high degree of autonomy from the state to adopt charters, ordinances, and otherwise govern their own affairs. See [MCL § 400.1151](#), *et seq.*

¹³⁸ *Belle Isle Grill Corp. v. Detroit*, [256 Mich App 463](#), 480-481; 666 NW2d 271 (2003).

¹³⁹ *Bolt*, *supra* note 131, 459 Mich at 161-164.

¹⁴⁰ *Id.* at 162.

¹⁴¹ [Const 1963, art 9, § 31](#).

¹⁴² 1974 Detroit City Charter, § 7.1502.

¹⁴³ The Charter of the City of Detroit, [§ 7.1202](#) (2012), at page 90.

¹⁴⁴ *American Axle & Mfg., Inc. v. City of Hamtramck*, 461 Mich 352, 360; 604 NW2d 330 (2000).

¹⁴⁵ Paradoxically, whether DWSD could have implemented the Plan in 1978, without an ordinance being passed, is to be considered under the assumption that City Council has now passed an ordinance implementing the Plan.

To answer this question, a court may find relevant that assessing an extra per-customer charge to water bills, used to subsidize the poorest water residents, is not a traditional element of establishing water rates, in the absence of an ordinance.¹⁴⁶ The issue, however, is not whether assessing these charges would be a traditional function of DWSD’s ratemaking authority, but rather whether it fits under the “equitable” standard. For reasons similar to those discussed in the previous section on “equitable, reasonable” water rates, Michigan courts have not ruled on this issue, and it is difficult to predict the result in this circumstance.

e. A Modified Plan—Overcoming the Headlee Amendment Challenge

For the aforementioned reasons, the Headlee Amendment poses a potential challenge to the Plan. This challenge could be sidestepped, however, if the Plan was modified to be funded simply by a necessary increase in volumetric water rates, rather than a separate charge affixed to each customer’s water bill.¹⁴⁷ The Michigan Supreme Court has long declared that “water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water.”¹⁴⁸ Even the *Bolt* court, which established an expansive definition of a tax under the Headlee Amendment, quoted this declaration with approval.¹⁴⁹

The first consideration under the *Bolt* analysis is whether the amount charged has a valid regulatory purpose, or is a method to raise revenue. Under a modified Plan, providing water services is a valid regulatory purpose, long established under existing law.¹⁵⁰ Though financing the Plan might necessitate an increase in water rates, the rates themselves serve the primary purpose of paying for the service rendered to all customers. A secondary purpose of funding the Plan would more likely be acceptable to courts.¹⁵¹

The second factor of the *Bolt* analysis considers the charge’s proportionality to the necessary service cost. If the Plan is financed by general DWSD revenue from rates rather than a separate per-customer charge, the necessary volumetric rate increases must be analyzed in context of the water rates as a whole. Therefore, the proportionality of the water rates should be analyzed under the equitable, reasonable standard discussed above.

In regard to proportionality, the City of Detroit Law Department has objected to using rate revenues to finance water affordability efforts, asserting that it would amount to a “two-tier

¹⁴⁶ Retail water rates are typically calculated by estimating system costs, and then calculating per-customer units of service and the related costs, and customers are charged based on their level of water consumption. DWSD Rates: [Understanding DWSD Water Rates](#), Jan 2006 (accessed May 3, 2012).

¹⁴⁷ This action comports with § 7.1203 of the Detroit City Charter, which declares that “[a]ll moneys paid into the city treasury from fees collected for water, drainage or sewerage services shall be used exclusively for the payment of expenses incurred in the provision of these services[.]” Paying for the Plan is an expense incurred in the provision of water services to Detroit residents.

¹⁴⁸ *Jones v. Detroit Water Commissioners*, 34 Mich 273, 275 (1876).

¹⁴⁹ *Bolt*, *supra* note 131, 459 Mich at 162.

¹⁵⁰ [Detroit City Charter, § 7.1202](#); MCL [§ 71.6](#); *Id.* [§ 486.315](#).

¹⁵¹ *See USA Cash # 1, Inc.*, *supra* note 134, 285 Mich App at 262.

rate system” in violation of the Headlee Amendment under *Bolt*.¹⁵² However, as discussed in the section on equal protection, it is far from clear that this would constitute a two-tier rate system. Under the proposed modified Plan, residential water customers would not pay different water rates. Rather, those customers eligible for assistance are to receive subsidies, which would be financed by rate revenue. In any case, even if the modified Plan were to fit into a very broad interpretation of what constitutes a two-tier rate system, the *Bolt* court did not rule against two-tier rate systems. The *Bolt* court struck down a Lansing ordinance that assessed an annual service charge, which was then deposited into a separate “storm water enterprise fund” to pay for a new storm water drain system.¹⁵³ This does not resemble the financing approach adopted by a modified Plan, nor does it resemble a two-tiered rate system. In fact, the *Bolt* court explicitly supported the idea that water rates are not taxes in violation of the Headlee Amendment.¹⁵⁴

The third *Bolt* factor is whether the charge is voluntary in nature. The court has long held that water usage is voluntary in the sense that customers can choose their level of water usage, at least to some degree.¹⁵⁵ Therefore, funding the Plan through volumetric water rates would be voluntary, in contrast to a per-customer charge not correlated to water usage. Under all three of the *Bolt* criteria, a modified Plan would likely be held to impose a valid regulatory fee rather than a tax.

V. Conclusion

The citizens of Detroit need a robust water affordability plan that grants them access to one of life’s most essential resources. The law independently provides very limited guarantees to water access, and the solution must ultimately come from the political process. Ultimately, solutions are possible, but any solution must successfully navigate substantial legal challenges. Though the Headlee Amendment poses the most significant challenge to the proposed Detroit Water Affordability Plan, it is not insurmountable, provided that the Plan’s per-customer charge can be shown to have been allowed under the Detroit City Charter’s “equitable” standard. However, a modified Plan that raises revenue based on volumetric water usage, as opposed to a per-customer charge, would more easily pass Headlee Amendment scrutiny as a fee rather than a tax.

¹⁵² Pamela Turner, *Re: Water Affordability Plan*, City of Detroit City Council, Feb 10, 2010, 11.

¹⁵³ *Bolt*, *supra* note 131, 459 Mich at 155.

¹⁵⁴ *Id.* at 162.

¹⁵⁵ *Id.*