



MICHIGAN ENVIRONMENTAL LAW JOURNAL

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MESSAGE FROM THE EDITOR



As usual, it feels that sum is nearly gone although it arrived only a few short weeks ago. To prepare for the Section's annual meeting in September, this issue of the Journal contains a report by the Section's Nominating Committee regarding candidates for next year's officers and Council members. 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.

This issue also contains articles by Charles Barbieri about recently enacted Michigan solid waste legislation; by Pat Paruch on draft guidelines from the Michigan Department of Environmental Quality on Groundwater/Surface Water Interface (GSI) Pathway Compliance Options; and by Lee Johnson on the D.C. Circuit's recent decision in *National Environmental Development Association's Clean Air Project v. EPA*, barring the EPA from applying different standards in different regions under the Clean Air Act. Finally, it contains the first place award winning article by Wayne State law student Nathan Inks, on Wetland Mitigation in Michigan.

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.

Christopher J. Dunsky
Editor, Michigan Environmental Law Journal

Upcoming Events

Thursday, September 18, 2014

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

The ELS Annual Business Meeting & Program will be held Thursday, September 18, at DeVos Center in Grand Rapids, in conjunction with the State Bar's Annual Meeting.

The program will begin at 1:30 p.m. with confirmed speakers that will include: Matt Williams, Vapor Intrusion Specialist for the Michigan Department of Environmental Quality, who will provide a hands on demonstration of the installation and sampling of vapor monitoring points, and John Barkach, Senior Program Manager with the Great Lakes Environmental Center, Inc., who will explain the role of ecological evaluation in the assessment of Groundwater/Surface Water Interface and contaminated sediments. A senior official of the MDEQ also is expected to speak on recent developments.

After the program concludes, the Annual Meeting and election of Officers and Council members will commence, after which there will be an off-site mixer for anyone interested in gathering for dinner.

Registration is requested for proper facilities planning. Visit the Bar's [Annual Meeting page](#) and watch the ELS web page for updates which will be supplemented in the coming weeks, on LinkedIn and through the Listserv, as more details are available. Please join us in Grand Rapids.

Fall Webinars

Following on the heels of an unprecedented **three** webinars during July of 2014, the webinar series is in a brief hiatus, but will be back in full force starting in October as the ELS will commence an ambitious program of scheduling two webinars each month between October and July, in all likelihood on the first and third Wednesdays of the month. More details will follow after the Annual Meeting.

Tuesday, October 28, 2014

Annual Joint ELS-AWMA Lansing Conference



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

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Report of Environmental Law Section Nominating Committee

July 23, 2014

Introduction

Kurt Brauer, Chair of the Environmental Law Section, with the advice of Lee Johnson, Chairperson-Elect of the Section, appointed a Nominating Committee consisting of Lee Johnson (Chair of the Committee), William R. Schikora, Tammy Lynn Helminski and Ross Hammersley. Their task was to nominate a slate of candidates for the offices of Chairperson-Elect and Secretary-Treasurer for 2014-15 and members of Section Council.

Notice of Nominations and Election Procedures

Consistent with Article IV, Section 2 of the Bylaws, in selecting nominees, the Nominating Committee considered the need for representation on the Council of members with differing responsible legal viewpoints and who reside in various geographic areas of the State. The Nominating Committee also considered the need for representation on the Council of women and racial/ethnic minority members. The Nominating Committee also considered the prior contributions of members to the work of the Section.

After several meetings and deliberations, most recently on July 8, 2014, the Nominating Committee recommends that the following slate of candidates be put forward for election at the Environmental Law Section's 2014 annual meeting:

Chair:	Lee Johnson will automatically become Chair by operation of the Bylaws
Chairperson-Elect:	William R. Schikora ¹
Secretary-Treasurer:	Dennis Donohue
Second 3-year term on Council:	Rebecca J. Cassell Steven C. Kohl AnnMarie B. Sanford Jamie Weitzel Scripps
First 3-year term on Council:	Ross Hammersley ²

Voting on these positions will be held at the Environmental Law Section Annual Meeting scheduled for 5:00 p.m. at DeVos Place in Grand Rapids on September 18, 2014.

¹ While Mr. Schikora participated in the identification of candidates for each of the positions set forth in this report, he did not participate in any discussion or voting regarding candidates for the position of Chairperson-Elect.

² While Mr. Hammersley participated in the identification of candidates for each of the positions set forth in this report, he did not participate in any discussion or voting regarding candidates for first 3-year term on Council.

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 2014-2015 year will be elected by Environmental Law Section members.

Nominated Candidates and Qualifications

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

Chairperson:

S. Lee Johnson

S. Lee 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 Environmental Protection Agency, the Michigan Department of Environmental Quality and other state regulatory agencies, and in environmental law litigation.

Mr. Johnson has been actively involved in the Section's Air Quality Committee since 1994, serving as vice-chair and chair of the Committee. Mr. Johnson served on the Section's Council for six years.

He is also involved with the Air & Waste Management Association (AWMA), having served as secretary, vice-chair and chair of the East Michigan Chapter. Mr. Johnson has been instrumental in coordinating a very successful series of annual joint programs with the Section, and the East and West Michigan Chapters of AWMA.

Chair-Person Elect:

William R. Schikora

William R. Schikora is a sole practitioner in Northville, representing clients in all manner of environmental law. He currently serves as Secretary-Treasurer of the Section and prior to that served on the Council and as co-chair of the Section's Program Committee.

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 current solo practice. Bill works with numerous industrial clients on transaction, remediation and redevelopment matters across the U.S. and in many foreign countries.

He 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.

Secretary-Treasurer:

Dennis Donohue

Dennis Donohue is a partner in Warner Norcross and Judd LLP practicing in the area of environmental law, including mining, Clean Water Act permit development and enforcement issues, water withdrawal and groundwater discharge issues, hazardous waste management issues and sediment remediation. He has served two terms on the Environmental Law Section Council. Prior to that, Dennis served as chair of the Surface Water and Groundwater Committee and currently serves as chair of the Natural Resource Committee and co-editor of the Michigan Environmental Law Deskbook. Dennis is past chair of the Grand Rapids Bar Environmental Law Section, and is incoming chair of the ABA SEER Mining and Mineral Extraction.

First 3-Year Term On Council:

Ross Hammersley

Ross Hammersley is an attorney with Olson, Bzdok & Howard, P.C., an environmental and municipal law firm in Traverse City, where his practice focuses on land use and zoning matters, oil and gas leasing and development issues, energy policy and utility regulation, environmental conservation, and Brownfield redevelopment. His time is primarily spent assisting local municipalities, governmental entities, small businesses, and individuals with contractual, zoning, and real estate matters, as well as working with nonprofit corporations and condominium and summer resort associations.

Ross has been a member of the Environmental Law Section of the State Bar of Michigan since 2007, and is a co-chair of the newly-formed Great Lakes and Inland Waters Committee. Ross also volunteered as an editor of the Environmental Law Journal from 2010 to 2014, and has been published in the ELJ and the State Bar Journal. He holds a bachelor of science in ecology from the University of Michigan's School of Natural Resources & Environment, and is a cum laude graduate of the Michigan State University College of Law, where he served as Editor-in-Chief of the Michigan State Law Review.

Second 3-Year Terms On Council:

Rebecca J Cassell

Steven C. Kohl

AnnMarie B. Sanford

Jamie Weitzel Scripps

The Nominating Committee found that each of these current Council members have provided excellent service to the Council and, after confirming the willingness of each to serve a second term, unanimously voted to nominate each of them for a second term.

Respectfully submitted,

S. Lee Johnson, Nominating Committee Chair

Legislation Expands and Encourages Use of Beneficial Use By-Products

Charles E. Barbieri and Tyler Olney[†]

I. Introduction

The Michigan Legislature passed Public Acts 178-180 in 2014 to amend Part 115 of the amended Natural Resources and Environmental Protection Act (NREPA) and related environmental and agricultural laws to promote beneficial use by-products in Michigan.³ This legislation, which will become effective on September 15, 2014, attempts to reduce waste disposal by expanding the opportunity for businesses and individuals to use qualifying materials that were previously categorized as solid waste as beneficial use by-products. In addition to helping businesses avoid landfill costs, the legislation should provide savings as the materials can be used to replace other raw materials or products that would otherwise need to be purchased, extracted, manufactured, or otherwise obtained. The legislation should have a positive environmental impact, as it will extend the capacity of landfills and conserve resources, as well as promote the concept of sustainability, bringing Part 115 more in harmony with its stated goals.⁴ The legislation balances the need for assuring the environmental safety of the materials and limiting potential environmental liability if standards for use and storage are observed. This article will summarize the legislation, as well as explain definitions of qualifying substances and beneficial uses.

II. Prior Law

Prior to the beneficial use legislation, Part 115 restricted the use of high volume, low hazard materials. The previous definition of solid waste included inert materials and any commercial or industrial solid waste if not otherwise hazardous,⁵ except for a few limited exclusions such as certain slag material and scrap metal.⁶ This previous definition greatly inhibited the use of otherwise low risk environmental materials because of the stringent restrictions and regulations that were in place. Such inhibition was directly at odds with the intended goals of Part 115 of NREPA, which encourage and promote the recycling and reuse of materials in order to promote environmental conservation.⁷

[†] Charles Barbieri is a partner with Foster Swift Collins & Smith, PC and is a past chair of the Environmental Law Section. Tyler Olney is a law student at the Michigan State University College of Law.

³ Enrolled House Bill 5400 ([2014 PA 178](#)); Enrolled House Bill 5401 ([2014 PA 179](#)); Enrolled House Bill 5402 ([2014 PA 180](#)). [Part 115](#) of NREPA comprises MCL 324.11501 to MCL 324.11550 and concerns solid waste management.

⁴ "AN ACT to protect the environment and natural resources of the state" Natural Resources and Environmental Protections Act. [Act 451 of 1994](#).

⁵ "'Inert material' means a substance that will not decompose, dissolve, or in any other way form a contaminated leachate upon contact with water, or other liquids determined by the department as likely to be found at the disposal area, percolating through the substance." [MCL 324.11504\(2\)](#).

⁶ "'Solid waste' means garbage, rubbish, ashes, incinerator ash, incinerator residue, street cleanings, municipal and industrial sludges, solid commercial and solid industrial waste, and animal waste." [MCL 324.11506\(1\)](#).

⁷ "Optimizing recycling opportunities, including electronics recycling opportunities, and the reuse of materials shall be a principal objective of the state's solid waste management plan. Recycling and reuse of materials, including the reuse of materials from electronic devices, are in the best interest of promoting the public health and welfare. The

Prior rules, adopted in the early 1990's, forced costly testing and retesting of materials which required comparison to cleanup criteria that were adopted years ago and actually rescinded by subsequent regulatory and statutory changes in Michigan's remediation program. The former Part 115 inertness rules, which are now rescinded, required in many cases testing showing that the materials did not exceed Type B cleanup criteria that were based on very conservative assumptions established pursuant to 1982 PA 307, the predecessor to Part 201 of NREPA as amended.⁸ For example, Type B criteria established standards for carcinogens based on whether they posed a risk of greater than 1×10^{-6} .⁹ Part 201, which was later modified both from a regulatory and legislative standpoint, now uses criteria for carcinogens based on a 1×10^{-5} standard.¹⁰ Even the Part 201 criteria pose significant issues to recycling, as they in many cases still use stringent aesthetic standards for materials containing substances, like aluminum, iron and manganese, which are unnecessarily conservative in evaluating the risk of reusing certain material.¹¹

Moreover, many separated materials have been subject to a duplicative or additional layer of regulation based on source separated exemptions that contained stringent notification and management conditions, even though other statutes and rules governing such matters as air and storm water already provide regulation of the activities involving such materials.¹² Finally, the laws regarding liability protection for recycling were not clear under Michigan's statutory and regulatory scheme. Although some have argued that use of certain materials might be subject to protection as a permitted release, many have avoided using materials for fear of liability and due care legal ramifications.¹³ Also, while the previous rules established some materials as low hazard industrial wastes, these rules too have become outdated.

III. Legislative Changes

A. Solid Waste

The new legislation provides clearer standards when dealing with reusable, potentially cost effective, and environmentally safe materials. First, Part 115, as amended, will redefine the term solid waste, noticeably excluding from its definition inert materials and beneficial use by-products, in addition to coal bottom ash and stamp sands when used as cold weather road abrasive under specified conditions, soil washed or removed from sugar beets and other

state shall develop policies and practices that promote recycling and reuse of materials and, to the extent practical, minimize the use of landfilling as a method for disposal of its waste." [MCL 324.11514\(1\)](#).

⁸ [MAC R 299.4114-MAC R 299.4117](#) (now rescinded).

⁹ [MAC R 299.5711](#) (rescinded).

¹⁰ [MCL 324.20120a\(4\)](#).

¹¹ Aluminum has a residential health based drinking water value of 300 parts per billion compared to an aesthetic criterion of 50 parts per billion; iron has a health based drinking water value of 2000 parts per billion compared to an aesthetic cement of 300 parts per billion, and manganese has a health based drinking water value of 860 parts per billion when compared to an aesthetic criterion of 50 parts per billion. [MAC R 299.44 & 49](#). Even the health based numbers are misleading for many types of beneficial use by-products which typically are not in a form that are likely to leach.

¹² [MAC R 299.4119](#) (to be rescinded).

¹³ [MCL 324.20126a\(5\)](#).

previously listed materials, such as slag or slag products directed to a slag processor or reuser, sludges and ashes managed for agricultural and silvicultural purposes and source or site separated materials.¹⁴

B. Inert Material

Inert material, as defined by the legislation means rocks;¹⁵ trees and stumps if certain conditions are met;¹⁶ uncontaminated excavated soil or dredged sediment;¹⁷ excavated soil from a site of environmental contamination, corrective action, or response activity if the soil is not listed as a hazardous waste under Part 111 and if hazardous substances in the solid do not exceed cleanup criteria and background concentration as defined by Part 201;¹⁸ construction brick, masonry, pavement, or broken concrete reused for fill, rip rap, slope stabilization, or other construction as long as such material does not violate certain flood plain, wetland and inland lakes and streams statutes and does not contain material contamination such as lead based paint;¹⁹ Portland cement clinker produced by a cement kiln using wood, fossil fuels, or solid waste as a fuel or feedstock, but not including cement kiln dust generated in the process;²⁰ asphalt pavement or concrete pavement without rebar from public right-of-ways which are stockpiled or crushed for reuse as aggregate;²¹ cuttings, drilling materials, and fluids used to drill or complete a well installed pursuant to Part 127 of the public health code;²² or any other material determined by the Department of Environmental Quality ("DEQ") to be an inert material.²³

¹⁴ [MCL 324.11506\(1\)](#) broadly defines "solid waste" as garbage, rubbish, ashes, incinerator ash and residue, street cleanings, municipal and industrial sludges, solid commercial and industrial waste and animal waste, but recognizes the following exclusions: human body waste; medical waste; organic waste generated in the production of livestock and poultry; ferrous or nonferrous scrap directed to a scrap processor or reuser; slag or slag products directed to a slag processor or reuser; sludges and ashes managed as recycled or nondetrimental materials appropriate for agricultural or silvicultural use pursuant to DEQ plan; materials such as food residuals, sugar beet processing calcium carbonate, wood ashes, kraft pulping process lime, or aquatic plants used as animal feed, applied on, or composted and applied on farm or forest land for agricultural or silvicultural purposes; materials approved by DEQ for emergency disposal; source or site separated materials; coal ash when used as concrete, grout, mortar or casting molds, raw material in asphalt, as aggregate, road or building material, as road base or construction fill; inert material, soil washed or removed from sugar beets; soil relocated under Part 201 cleanup; diverted waste through a waste diversion center; beneficial use by-products; coal bottom ash used as cold weather road abrasive; stamp sands when used as a cold weather road abrasive in the Upper Peninsula by a public road agency or pursuant to a plan approved by such agency; any material that is reclaimed or reused in process that generated it; any secondary material determined under federal regulation is not a solid waste when combusted; or other wastes regulated by statute.

¹⁵ [MCL 324.11504\(2\)\(a\)](#).

¹⁶ [MCL 324.11504\(2\)\(b\)](#).

¹⁷ [MCL 324.11504\(2\)\(c\)](#).

¹⁸ [MCL 324.11504\(2\)\(d\)](#).

¹⁹ [MCL 324.11504\(2\)\(e\)](#).

²⁰ [MCL 324.11504\(2\)\(f\)](#).

²¹ [MCL 324.11504\(2\)\(g\)](#).

²² [MCL 324.11504\(2\)\(h\)](#).

²³ [MCL 324.11504\(2\)\(i\)](#).

This reform for inert materials eliminates the quandary that has caused firms to choose using landfills for such materials. One utility company reported that it spent over \$100,000 in 2013 to dispose of uncontaminated soil to avoid having to engage in expensive testing to prove the inertness of the material.²⁴ In addition, this reform will eliminate a notification for persons intending to receive more than 1000 cubic yards of construction brick, masonry pavement or broken concrete.²⁵

C. Beneficial Use By-Products

More significantly, the legislation creates several categories of beneficial use by-products and identifies a number of materials that fit these categories,²⁶ provided the materials are "stored for beneficial use or are used beneficially as specified and the requirements of [Section 11551\(1\)](#) [as explained below] are met."²⁷ According to the amended statute, beneficial use by-products are materials, such as power plant ash, foundry sand and pulp, and paper mill residuals, which can be used to replace or supplement a raw material or a competing product.²⁸ Rather than beneficial use materials being classified and disposed as solid waste, unless they could meet stringent requirements that were previously in place which required DEQ review and approval, they can be used and incorporated into products by following largely self-implementing and streamlined requirements. Those purposes or "beneficial uses" are defined in the legislation,²⁹ which has developed five different subcategories:

- Beneficial Use 1 materials will involve aggregate road material, or building material if it will be bonded or encapsulated by cement, limes or asphalt.³⁰
- Beneficial Use 2 will cover materials used as construction fill, road base or soil stabilizer, or road shoulder material, so long as certain requirements are met. To fall under the "construction fill" prong of this category, the by-product: (1) must be placed at least four feet above the seasonal groundwater table, (2) may not come into contact with any "surface water body," (3) must be covered by concrete, asphalt pavement, or other approved material, and (4) may not be greater than four feet in thickness except in areas when placed underneath a building or other structure or where incidental topography variances may so require.³¹ This material when used for construction is only suitable for nonresidential properties, which does not include a child care center, elementary school, elder care or assisted living center, nursing home or a single family or multifamily dwelling unless part of a

²⁴ POWERPOINT PRESENTATION ON BEHALF OF THE MICHIGAN MANUFACTURERS ASSOCIATION REGARDING HB 5400-5402

²⁵ [MAC R 299.4114\(a\)\(iii\)](#) (now rescinded).

²⁶ The complete list of beneficial use by-product materials includes: Cement kiln dust/lime kiln dust, coal bottom or wood ash, coal or wood ash, dewatered concrete grinding slurry, flue gas desulfurization material, foundry sand, lime softening residuals, mixed wood ash, pulp and paper mill ash, pulp and paper material, soil washed or removed from sugar beets, spent media from sandblasting, and stamps sands. [MCL 324.11502\(8\)](#).

²⁷ [MCL 324.11502\(8\)](#).

²⁸ *Id.*

²⁹ *Id.*

³⁰ [MCL 324.11502\(3\)](#).

³¹ [MCL 324.11502\(4\)\(a\)\(i\)-\(iv\)](#).

mixed use development where the dwelling units are above the ground floor.³² If a roadway base, soil stabilizer or road shoulder is constructed using Beneficial Use 2 materials, then the material must meet the following: (1) must not exceed four feet in thickness except in areas where exceedances are incidental to topographical variances, (2) may not be placed four feet above the seasonal groundwater table, (3) must not come into contact with a surface water body, (4) must be covered by asphalt pavement, concrete or other approved material or alternatively in the case of road shoulder materials six inches of gravel and (5) in the case of road shoulder material must be sloped.³³

- Beneficial Use 3 will mean application materials as a fertilizer or soil conditioner under Part 85 of NREPA, as amended,³⁴ or lining material under 1955 PA 162.³⁵ To qualify, the material must be applied at an agronomic rate consistent with generally accepted agricultural and management practices.³⁶ Further, the use, placement, or storage at the location of the use cannot violate the air statute, [Part 55 of NREPA](#),³⁷ as amended, or create a nuisance, cause groundwater to be no longer fit for one or more protective uses as defined by the DEQ and the administrative code,³⁸ or cause a violation of [Part 31](#) surface quality standards.³⁹
- Beneficial Use 4 involves the use of the material to stabilize, neutralize or treat waste; to treat wastewater or sludge; to stabilize hazardous substances, or to serve as landfill construction material.⁴⁰
- Beneficial Use 5 will mean material blended with inert materials or with compost and used to manufacture soil.⁴¹

Based on these different use categories, the defined beneficial use by-products will be given specific designations, which correspond to the way each needs to be handled. The table below provides a comprehensive list of all currently designated beneficial use by-products, as well as their designated beneficial use category. Many have more than one designation, and therefore, must comply with the requirements of the indicated category when so used.

³² [MCL 324.11502\(4\)\(c\)](#).

³³ *Id.* Opponents of the legislation argued in part that the four feet from seasonal water table standard is insufficient and that coal fly ash should not be allowed for Beneficial Use 2 standards. [Letter from James Clift](#), Policy Director Michigan Environmental Council to Senate Natural Resources, Environment, and Great Lakes Committee "Re: HB 5400- 5402 - Use of industrial byproducts" (May 22, 2014).

³⁴ [MCL 324.8501](#).

³⁵ [MCL 290.531- MCL 290.538](#) (as amended).

³⁶ [MCL 324.11502\(5\)\(a\)](#).

³⁷ See [MCL 324.5501](#) *et seq.* (providing applicable air pollution control laws).

³⁸ [MAC R 323.2202\(n\)\(i\)-\(iv\)](#) (providing a definition, with examples, of protected uses for groundwater).

³⁹ See [MCL 324.3101](#) *et seq.* (providing guidelines for surface water quality standards).

⁴⁰ [MCL 324.11502\(6\)\(a\)-\(d\)](#).

⁴¹ [MCL 324.11502\(7\)](#).

Beneficial Use by-products	Beneficial Uses
Cement Kiln Dust/ Lime Kiln Dust	1,2,3,4
Coal Bottom or Wood Ash	3
Coal or Wood Ash	1, 2, 4
Dewatered Concrete Grinding Slurry from Public Road Projects	1, 2, 3, 4
Flue Gas Desulfurization Material	1, 3
Foundry Sand	1, 2, 3, 4, 5
Lime Softening Residuals	3, 4
Mixed Wood Ash	1, 2, 3, 4
Pulp and Paper Mill Ash	1, 2, 3, 4
Pulp and Paper Mill Material	3
Soil Washed or Removed from Sugar Beets	3
Spent Media from Sandblasting	1, 2
Stamp Sands	1, 2

[Part 115, as amended](#), establishes other general or specific requirements for beneficial use materials. Generally, all beneficial use materials must meet the following: (1) The material must not be a Part 111 hazardous waste or mixed with hazardous waste material; (2) the material is not stored at the site of generation or used for more than 3 years, or the amount that is transferred offsite for use during a 3-year period equals at least 75% by weight or volume of the amount of that material, stored on site for beneficial use at the beginning of the 3-year period; (3) the material is stored in a manner that maintains its usefulness, controls wind dispersal and prevents the loss of material beyond the storage area; (4) the material must be stored in a manner that does not cause groundwater to no longer be fit for one or more protected uses, may not cause a violation of Part 31 surface water quality standard and otherwise does not violate Part 31; (5) the material is transported in a manner that prevents accidental leakage, spillage, or wind dispersal; (6) the material must be used for a legitimate beneficial purpose other than a means to discard the material, and (7) the material is used according to generally accepted engineering, industrial or commercial standards for that use.⁴²

In addition, Beneficial Use 2 materials will have to meet testing requirements.⁴³ A generator will only have to test its material once to show that it is not a Part 111 hazardous waste and does not exceed certain standards for specific constituents, unless raw materials or processes change in a way that could be reasonably expected to materially affect an analysis result in which case further testing will be required. Such testing results must be maintained for not less than 10

⁴² [MCL 324.11551\(1\)\(a\)-\(f\)](#).

⁴³ [MCL 324.11551\(1\)\(g\)](#). Persons opposing the legislation have argued that Beneficial Use 2 standards, which are generally based on 20 times Part 201 drinking water values for certain specific criteria relevant to the type of the beneficial use by-products, are too light. See, e.g., [Letter from James Clift](#), Policy Director Michigan Environmental Council to Senate Natural Resources, Environment, and Great Lakes Committee “Re: HB 5400- 5402 - Use of industrial byproducts” (May 22, 2014).

years after the date the material was sent off-site, and records must be made available to the DEQ upon request.⁴⁴

Some additional requirements apply for Beneficial Use 1 and 2 materials. For example, routine repair and replacement of roadways constructed using Beneficial Use 2 materials does not constitute generation of beneficial materials triggering reuse requirements, as long as the beneficial use by-products remain or are reused at the same roadway and are used in a manner that meets the definition of Beneficial Use 1 or 2.⁴⁵ On the other hand, if beneficial use by-products will be reused at some place other than the same location, then the requirements applicable to generators of beneficial use by-products must be met, except the party does not have to retest and can rely on analytical data from the prior use and other requirements will only apply if the beneficial use will change.⁴⁶ In addition, there is a requirement that Beneficial Use 2 materials be covered by concrete, asphalt or six inches of gravel, which applies at the time of placement and use.⁴⁷

Filling of potholes, shoulder erosion or shoulder deterioration will not result in a violation of Part 115.⁴⁸ Further, if road materials contain beneficial use by-products of ground, reheated, or known for reuse, then the requirements of the air statute, Part 55, must be met.⁴⁹ The statute as passed specifically allows for the state transportation department to insist upon additional data or information and to require that road building materials meet other state department specifications.⁵⁰

In the case of Beneficial Use 3 materials, the materials must go through the registration process and licensing processes used by the Department of Agriculture and Rural Development (DARD).⁵¹ In that regard, the beneficial use legislation specifies that the application must include directions for use to insure that the material is applied at an agronomic rate as reviewed by a certified crop advisor and a laboratory analysis report that shows that the result do not pose harm to human health or the environment, which can be established by showing that the results comply with the levels established pursuant to the association of the American Plant and Food Control Officials' Statement and Uniform Interpretation and Policy #25 and the Part 201 generic residential soil direct contract cleanup criteria for volatile and semi-volatile organic compounds and dioxins.⁵²

In the case of fertilizer, a certified crop advisor must determine an agronomic rate consistent with generally accepted agricultural and management practices which include a demonstration

⁴⁴ [MCL 324.11551\(2\)](#).

⁴⁵ [MCL 324.11551\(6\)\(a\)](#).

⁴⁶ *Id.*

⁴⁷ [MCL 324.11551\(6\)\(b\)](#).

⁴⁸ *Id.*

⁴⁹ [MCL 324.11551\(6\)\(c\)](#).

⁵⁰ [MCL 324.11551\(6\)\(d\)](#).

⁵¹ [MCL 324.8504-.8505](#) & [MCL 324.11551\(7\)](#); [MCL 290.532](#).

⁵² [MCL 324.11551\(7\)\(a\)-\(b\)](#).

that the material contains a minimum percentage of each plant nutrient guaranteed or claimed to be present, the percentage of dry solids, nitrogen, ammonia nitrogen, nitrate nitrogen, phosphorous and potassium in the material and the levels of calcium, magnesium, acidity or basicity measured by Ph, sulfur, chromium, copper, silver, chlorine and boron.⁵³

Further, for a soil conditioner or liming agent, the application should include percentage of dry solids in the material, levels of calcium, magnesium, acidity or basicity measured by Ph, sulfur, chromium, copper, silver, chlorine and boron.⁵⁴ In the case of a soil conditioner, scientifically acceptable data must reasonably assure the material will improve the physical nature of the soil.⁵⁵ In the case of a liming material, scientifically acceptable data must be submitted that will show the material will correct soil acidity.⁵⁶

Similar to Beneficial Use 2 materials, Beneficial Use 3 materials will not require more than initial testing for license or registration renewals unless materials or processes change in a way that could reasonably be expected to materially affect the laboratory analysis report or scientifically acceptable data.⁵⁷ The amended statute also sets some cumulative loading limits as a precaution to limit excessive application of materials over time.⁵⁸

The amended legislation also assigns DARD the duty to administer and enforce licensing and registration matters under Part 85 or the liming act, 1955 PA 162.⁵⁹ Otherwise, administration and enforcement responsibilities reside in the DEQ.

Beneficial Use 2 also requires that an owner having knowledge that that material has been used for Beneficial Use 2 on a property must notify a prospective transferee, such as a purchaser or lessee, that the material was used for Beneficial Use 2, including the date and location of use, if known.⁶⁰ Further, a contractor, consultant or agent of an owner of property who uses a material on the property for Beneficial Use 2 must provide notice to the owner that the material was used for Beneficial Use 2, including the date and location of use.⁶¹

The requirements to notify the DEQ are minimized under the statutory amendments. Written notice must be submitted to the DEQ before more than 5000 cubic yards of Beneficial Use 2 will be used as construction fill at a particular site for the first time.⁶² The generator will provide this

⁵³ [MCL 324.11551\(7\)\(b\)\(i\)\(B\)\(ii\)\(A\)-\(C\)](#).

⁵⁴ [MCL 324.11551\(7\)\(b\)\(iii\)\(A\)-\(B\)](#).

⁵⁵ [MCL 324.11551\(7\)\(b\)\(iv\)](#).

⁵⁶ [MCL 324.11551\(7\)\(b\)\(v\)](#).

⁵⁷ [MCL 324.11551\(8\)](#).

⁵⁸ [MCL 324.11551\(l\)\(i\)](#).

⁵⁹ [MCL 324.11554](#).

⁶⁰ [MCL 324.11551\(10\)](#). Some environmental groups opposed the legislation in part on the basis that written approval by the property owner is not required. See, e.g., [Letter from James Clift](#), Policy Director Michigan Environmental Council to Senate Natural Resources, Environment, and Great Lakes Committee "Re: HB 5400- 5402 - Use of industrial byproducts" (May 22, 2014).

⁶¹ [MCL 324.11551\(10\)](#).

⁶² [MCL 324.11552\(1\)](#).

notice, unless the material is provided by a broker, in which case the broker provides a notice. Finally, a generator or broker of more 1000 cubic yards of material use for Beneficial Uses 1, 2, 4, and 5 used between October 1 and September 30 will provide notice to the DEQ by October 30 each year identifying the types and amounts of materials generated, brokered, and stored and approximate shipped offsite and uses and conditions of use of that material.⁶³

D. Source Separated Materials

Source separated materials are defined as any of the following materials, so long as the materials are separated at the source of generation and not speculatively accumulated: (1) glass, metal, wood, paper products, plastics, rubber, textiles, garbage, or any other material approved by the department that is used for conversion into raw materials or new products;⁶⁴ (2) scrap wood and railroad ties used to fuel an industrial boiler, kiln, power plant, or furnace, for production of new wood products or for other approved uses;⁶⁵ (3) chipped or whole tires used to fuel an industrial boiler, kiln, power plant, or furnace, for production of new wood products or for other approved uses;⁶⁶ (4) recovered paint solids used to fuel an industrial boiler, kiln, power plant, or furnace, for production of new wood products or for other approved uses;⁶⁷ (5) gypsum drywall generated from the production of wallboard used for stock returned to the production process or other approved uses;⁶⁸ (6) flue gas desulfurization gypsum used for production of cement or wallboard or other approved uses;⁶⁹ (7) asphalt shingles that do not contain asbestos, rolled roofing, or tar paper used as a component in asphalt or used to fuel an industrial boiler;⁷⁰ (8) municipal solid waste incinerator ash that meets specified criteria;⁷¹ (9) utility poles or pole segments reused as poles, posts, or similar approved uses;⁷² (10) railroad ties used in landscaping, embankments, or other similar approved uses,⁷³ and (11) any other materials and uses approved by DEQ under section 11553(8).⁷⁴

Persons using source separated material shall provide notice to the DEQ by October 30 of each year a source separated material is used or reused between October 1 and September 30, if more than 1000 cubic yards of material was so used.⁷⁵

⁶³ [MCL 324.11552\(2\)](#) (such records may be designated confidential limiting production under Freedom of Information Act).

⁶⁴ [MCL 324.11506\(6\)\(a\)](#). This source separated category, along with the one provided for chipped and whole tires, was carefully crafted so that the materials recognized as such would not affect their ability to qualify as “renewable energy resources” entitled to “renewable energy credits” under the Clean, Renewable and Efficient Energy Act, [2008 PA 295](#).

⁶⁵ [MCL 324.11506\(6\)\(b\)](#).

⁶⁶ [MCL 324.11506\(6\)\(c\)](#).

⁶⁷ [MCL 324.11506\(6\)\(d\)](#).

⁶⁸ [MCL 324.11506\(6\)\(e\)](#).

⁶⁹ [MCL 324.11506\(6\)\(f\)](#).

⁷⁰ [MCL 324.11506\(6\)\(g\)](#).

⁷¹ [MCL 324.11506\(6\)\(h\)](#).

⁷² [MCL 324.11506\(6\)\(i\)](#).

⁷³ [MCL 324.11506\(6\)\(j\)](#).

⁷⁴ [MCL 324.11506\(6\)\(k\)](#).

⁷⁵ [MCL 324.11553\(2\)](#).

E. Low-Hazard Industrial Wastes

Part 115, as amended, also codifies a number of other materials as low-hazard industrial waste, which have a reduced potential for groundwater contamination. This designation allows disposal of the materials in less expensive and less rigorous Type III landfills rather than Type II landfills which have greater liner, leachate and other construction requirements. The previous regulation governing these materials only recognized a few substances as categorical low-hazard materials and applied standards for other materials which were based on the old health based Type B cleanup criteria promulgated under 1982 PA 307.⁷⁶ The amended statute now lists coal ash or wood ash, cement kiln dust, pulp and paper mill material, scrap wood, sludge from treatment and conditioning of water for domestic use, residue from thermal treatment of petroleum contaminated soil, media and debris, sludge from treatment and condition of water from a community water supply, foundry sand, mixed wood ash, scrap wood ash, pulp and paper mill ash, street cleanings, asphalt shingles, new construction or production drywall, chipped or shredded tires, copper slag, copper stamp sands, dredge material from non-remedial activities, flue gas desulfurization material, dewatered grinding slurry from public road projects, and any other material determined by the DEQ to be a low-hazard industrial waste.⁷⁷ For the time being, rules governing the storage of low-hazard industrial waste rules remain in place.⁷⁸

F. Standards for Approving New Uses and Materials

The legislation also provides requirements for qualifying other materials for inert, beneficial use by-product, source separated materials or low-hazard industrial wastes.⁷⁹ The DEQ will approve a material as a beneficial use by-product if the material can be generated in large volumes, the material serves a legitimate beneficial purpose other than disposal of the material, a market exists or will exist for the material, the material meets federal state consumer protection and product safety laws, and the material based on testing does not pose a direct contact risk, does not leach in a way that forms an unacceptable leachate, and does not cause emissions that violate [Part 55](#) (the air act) or cause a nuisance.⁸⁰ The DEQ also may approve the material even if testing data suggest a concern based on department evaluation of the potential for exposure and risk to human health and the environment, based on the material's nature, proposed use and environmental fate and transport in the environment.⁸¹

Furthermore, the DEQ can approve a material as inert, if the material serves a legitimate purpose, and hazardous substances in the material do not pose a direct contact risk, the material does not leach so that it exceeds Part 201 generic residential drinking water criteria or

⁷⁶ [MAC R 299.4122](#) (now rescinded).

⁷⁷ [MCL 324.11504\(7\)](#).

⁷⁸ [MAC R 299.4129-MAC R 299.4130](#).

⁷⁹ [MCL 324.11553\(2\)](#).

⁸⁰ [MCL 324.11553\(3\)](#).

⁸¹ [MCL 324.11553\(4\)](#).

surface water quality standards, and the material does not produce emissions that violate Part 55 or create a nuisance.⁸²

Additionally, the DEQ can approve a material as a source separated material if it can be recycled or converted into raw materials or new products by being returned to the original process or used or reused as an effective substitute for a commercial product.⁸³ The material must meet all federal and state consumer protection and product safety standards and must not create a nuisance and if applied on the land must be either an inert or beneficial use by-product.⁸⁴

Finally, the DEQ can approve a material as a low hazard industrial waste if leachate testing shows that the material does not leach above one-tenth the hazardous waste toxicity characteristic or ten times the generic residential groundwater drinking water cleanup criteria in Part 201.⁸⁵ To pursue this designation, an individual must make a request to the DEQ to approve a new material or use.⁸⁶ The request would need to contain within it a description of the material, which would include the process undertaken to generate said material.⁸⁷ Further, it would need to include results from tests of representative samples of any hazardous materials that could possibly be in the materials.⁸⁸ Finally, a description of the proposed use would need to be included.⁸⁹ The DEQ then would have to either approve or deny the request within 150 days of receiving it, unless otherwise agreed upon by the parties.⁹⁰ Should the DEQ find the petition insufficient, it would have to notify the requesting party within 60 days of receiving the request with specifications as to the required missing information.⁹¹

The DEQ is also permitted to impose further conditions or requirements upon the requester for the use of the material, so long as the conditions are reasonable and consistent with the purpose of Part 115.⁹² If such conditions were mandated, the DEQ would have to specifically include them in the approval. If the DEQ denies a petition for a beneficial use by-product or use, a requesting individual may seek an appeal pursuant to the Revised Judicature Act.⁹³ Also to be included in any approved petition from the DEQ is language saying that in no way is anyone forced to utilize beneficial use materials. The proposed legislation stresses that, while it will be

⁸² [MCL 324.11553\(5\)](#).

⁸³ [MCL 324.11553\(8\)](#).

⁸⁴ *Id.*

⁸⁵ [MCL 324.11553\(7\)](#).

⁸⁶ [MCL 324.11553\(2\)](#).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See [MCL 600.101 et seq.](#)

legal to incorporate such materials, the legislation will not mandate their use or punish those who opt out of using such materials.⁹⁴

G. Savings Clause

In crafting the legislation, the Michigan legislature included a provision that allows parties, which previously received a designation of their material as an inert, source separated material, site separated material, low-hazard industrial waste or a non-waste, to retain and rely on that designation unless the designation by its terms lapses or a party forfeits the designation.⁹⁵ For example, the DEQ has granted numerous categorical use exemptions or designations for asphalt shingles, concrete grinding slurry, gypsum drywall, fish waste, flue gas desulfurization, lime sludge, scrap wood, and tire material.⁹⁶

H. Part 201 Liability Protection

The legislation amends Part 201 of NREPA, which provides that certain individuals are liable for any release of hazardous substance.⁹⁷ Under the legislation, the placement, storage, and use of a beneficial use material or inert material in accordance with Part 115 will not constitute a "facility" or a "release" under Part 201.⁹⁸ Further, a person who stores, uses, or arranges a beneficial use by-product material or inert material in compliance with Part 115 will not be liable.⁹⁹

These reforms will help to promote the use of such materials, as confusion surrounding possible environmental liability has been one of the main reasons individuals have been hesitant to incorporate reusable materials into their projects.

I. Part 31 Reform

As part of the legislation, the Legislature included language providing that permit will not be required under Part 31 for circumstances when materials are used as a beneficial use 3 by-product in compliance with Part 115 or when any beneficial use by-product is stored in compliance with Part 115.¹⁰⁰

IV. CONCLUSION

Past reform efforts to spur reuse and recycling of large volume, low risk materials through regulatory rulemaking have failed. These past efforts insisted on the use of unrealistic criteria

⁹⁴ [MCL 324.11551a](#) ("This part does not require the use of any beneficial use by-product, including, but not limited to, the uses and beneficial use by-products identified in sections 11502 ty 11506, by any governmental entity or any other person.").

⁹⁵ [MCL 324.11553\(9\)](#).

⁹⁶ See MDEQ website section on [Exemptions and Guidance](#) under Solid Waste.

⁹⁷ See [MCL 324.20101 et seq.](#)

⁹⁸ See [MCL 324.20101\(1\)\(s\)](#)(defining a "facility"); see also [MCL 324.20101\(1\)\(mm\)](#)(defining a "release").

⁹⁹ [MCL 324.20126\(d\)\(iv\)](#). These liability protections do not preclude possible liability under federal laws such as the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), as amended. [MCL 324.20129\(6\)](#) does provide a defense against CERCLA claims by the State and contribution protection from other potentially liable parties.

¹⁰⁰ [MCL 324.3112e](#).

and extensive notification, recordkeeping, performance, testing, and petition requirements. In addition, past regulatory efforts did not focus on clarifying legal protections for beneficial reuse. The new legislation seeks to eliminate unneeded restrictions and provide a “NIKE - Just Do It” approach with safe, effective, and efficient standards for individuals who desire to incorporate beneficial use by-products into their products and projects, provided they comply with general industry specifications. Rather than inhibit the use of high volume, low hazard materials, this new legislation allows greater opportunities for materials to compete in open markets as substitutes for products and raw materials, which should lead to greater use of beneficial use by-products and ultimately result in a positive economic and environmental impact.

MDEQ-RRD Issues Draft Guidance on Groundwater/Surface Water Interface (GSI) Pathway Compliance Options

By Patricia Paruch, Kemp Klein Law Firm

On June 17, 2014, the Michigan Department of Environmental Quality issued an electronic bulletin advising that “The Michigan Department of Environmental Quality (MDEQ), Remediation and Redevelopment Division (RRD) announces the publication of the DRAFT Groundwater/Surface Water Interface Pathway Compliance Options Resource Material document.”¹ The announcement was directly linked to an email transmittal which attached the 24-page issued document in PDF format.²

The MDEQ-RRD transmittal note states “[t]his is a resource document for MDEQ staff and contractors to provide information on options for achieving compliance with the cleanup criteria requirements for response activity to address the groundwater/surface water (GSI) pathway.”³ The document summary further notes that it “is not intended to comprehensively describe all of the . . . options for achieving compliance” for the GSI pathway, but to “describe some of the methods and means for achieving compliance to and to identify other resources that may be helpful.”⁴

¹ MDEQ Publishes DRAFT Groundwater/Surface Water Interface Pathway Compliance Options Resource Material, [posted Jun 17, 2014](#) (last accessed Aug 26, 2014).

² Email from Michigan Department of Environmental Quality (MIDEQ@govsubscriptions.michigan.gov), available through [Michigan.gov website](#). See DRAFT Groundwater/Surface Water Interface Pathway Compliance Options Resource Material ([Draft GSI Guidance](#)).

³ *Id.*

⁴ Draft GSI Guidance, at 4. The cautionary note in MDEQ-RRD preface indicates:

This document is explanatory and does not contain any regulatory requirements. It does not establish or affect the legal rights or obligations for the GSI pathway. It does not have the force or effect of law and is not legally binding on the public or the regulated community. Any regulatory decisions made by the MDEQ regarding GSI compliance will be made by applying the governing statutes and Administrative Rules to relevant facts.

Id. at 2.

The Draft GSI Guidance should be relevant to any attorney who is involved with remediation activities at contaminated sites in the State of Michigan. Groundwater is frequently present at contaminated sites due to the composition of the subsurface soil layers deposited by receding glaciers. The groundwater below a particular site may or not be in an aquifer, which is generally defined as subsurface water that is capable of yielding a significant amount of water to wells or springs.⁵ Whether or not the groundwater exists in an aquifer, however, the presence of hazardous substances in the soil where water is present will almost always trigger the need for a GSI pathway analysis.⁶

Groundwater throughout the state is frequently connected below the surface to nearby surface water bodies. As defined in the Draft GSI Guidance, the groundwater/surface water interface or GSI “is the location at which groundwater vents to a surface water body.”⁷ Plumes of hazardous substances resulting from releases at thousands of sites across the state can travel with the groundwater. As the groundwater vents to surface water bodies, the contaminants can threaten the health and safety of human users of the surface water body, wildlife, fish, or other aquatic organisms.

The scope of the Draft GSI Guidance is to describe, in general terms:

- * GSI Pathway Relevancy
- * Conceptual Site Model (CSM)
- * Water Quality Standards
- * Acute Toxicity Requirements
- * Municipal Separate Storm Sewer Systems (MS4)
- * Industry Standard for Impervious Storm Sewer
- * GSI Pathway Compliance Options

The first step in deciding whether GSI is an issue for a particular contaminated site is determining whether the GSI pathway of exposure is relevant. The GSI pathway is relevant “when a remedial investigation or application of best professional judgment leads to the conclusion that a hazardous substance in groundwater can be reasonably expected to vent to surface waters of the state in concentrations that exceed the generic GSI criteria currently or in the future.” Draft GSI Guidance, §2.0, page 5. The Water Resources Division of the MDEQ (MDEQ-WRD) is charged with determining whether a particular water body should be classified as surface waters of the state. Generally, surface waters of the state include, in addition to lakes and ponds, intermittent or ephemeral streams, creeks, brooks, ditches, drains, and regulated and unregulated wetlands. *Id.*

The Draft GSI Guidance sets forth the key elements in determining whether the GSI pathway is relevant to a particular contaminated site, including an evaluation of the “hydraulic connection”

⁵ [MCL 324.8302](#).

⁶ Draft GSI Guidance, § 2.0, at 5-6.

⁷ *Id.*, Appendix A, at 17.

between the surface water body and the contaminated groundwater. MDEQ-RRD notes that one important element is that a determination that the “groundwater is not in an aquifer” (GWNIAA) does not eliminate the need to evaluate the GSI pathway. Draft GSI Guidance, §2.0, page 6. GWNIAA may be hydraulically connected to a surface water body and may vent or may reasonably be expected to vent hazardous substances in concentrations that exceed applicable screening levels even though it’s not in an aquifer. *Id.*

The Draft GSI Guidance promotes the use of a “conceptual site model” (CSM) as a tool that can “relay site specific information in a very expeditious and concise manner” in an analysis of the GSI pathway.⁸ A CSM is a “written and/or illustrative representation of the conditions and the physical, chemical and biological processes that control the transport of contaminants from areas with high concentrations of contaminants through environmental media to human or ecological receptors.”⁹ MDEQ-RRD notes that an accurate and complete CSM will include: site history; scope of the area to be characterized; identification of contaminants; areas of release and concentrations; delineation of migration pathways; identification of areas not contaminated and zones with highest concentrations; and identification of potential receptors.¹⁰ MDEQ-RRD states that a complete and accurate CSM will serve as the “primary instrument to communicate effectively” among all parties about the “decision making process and final remedial outcomes.”¹¹

Probably the most useful component of the Draft GSI Guidance document is the description and discussion of the various “GSI Pathway Compliance Options” that are available.¹² The Guidance notes that a person can demonstrate compliance if contaminant concentrations in monitoring wells or alternative monitoring points are below the generic GSI criteria, which are the water quality standards for a particular surface water body.¹³ If use of the generic GSI criteria is not appropriate or achievable at a given site, other compliance options, such as variances, mixing zones, alternative monitoring points, ecological assessments, modeling assessments, de minimis effect demonstrations, technical impracticability waivers, natural attenuation, use attainability analyses for wetlands, or storm water sewer sampling, may provide a means to achieve compliance.¹⁴

The Draft GSI Guidance also includes a list of “References” upon which MDEQ based its GSI analysis, including a number of USEPA reference documents that describe the alternative compliance methods in detail.¹⁵ The Guidance also includes a detailed “Storm Sewer Sampling Checklist” that is useful when evaluating whether contaminated groundwater is discharging

⁸ *Id.* § 3.0, at 6.

⁹ *Id.*

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² *Id.* §§ 7.0-7.12 at 11-16.

¹³ *Id.* § 7.1 at 11.

¹⁴ *Id.*

¹⁵ *Id.*, Appendix B, at 18-19.

from a site into storm sewers.¹⁶ The Guidance also includes a chart of “Self-Implementation Provisions” that details whether liable or non-liable parties can undertake evaluation activities without a response activity plan in various situations where GSI compliance may be an issue. The same chart also lists and describes the various notices that a person must submit to MDEQ if the person is using one of the alternative GSI compliance options.¹⁷

As noted above, a [pdf](#) of the Draft GSI Guidance is readily available online. Interested parties are asked to submit comments on the Draft GSI Guidance to MDEQ-RRD by **September 19, 2014**. Comments should be sent to:

Ms. Sara Pearson
MDEQ-RRD or PearsonS@michigan.gov
P.O. Box 30426
Lansing, MI 48909-7926

“Son of Summit Petroleum”: EPA Barred From Applying Different Standards In Different Regions Under The Clean Air Act

By S. Lee Johnson, Honigman Miller Schwartz & Cohn LLP

The United States Court of Appeals for the District of Columbia Circuit ruled on May 30, 2014, that the U. S. Environmental Protection Agency (EPA) may not issue policy directives instructing its Regional Offices to apply different standards and criteria under the Clean Air Act (CAA) to limit the scope of an adverse court decision.

In 2012, the United States Court of Appeals for the Sixth Circuit reversed an EPA determination that a natural gas plant and associated wells were one “source” for purposes of CAA permitting. *Summit Petroleum Corp. v. EPA*, [690 F.3d 733](#) (6th Cir. 2010). Specifically, the court held that “EPA’s determination that the physical requirement of adjacency can be established through mere functional relatedness is unreasonable and contrary to the plain meaning of the term ‘adjacent.’” *Id.* at 735.

Two months after EPA’s petition for rehearing was denied, EPA’s Director of the Office of Air Quality and Standards issued a directive to the Regional Air Directors regarding the *Summit Petroleum* decision. The *Summit* Directive,¹⁸ as it became called, instructed that “EPA may no longer consider interrelatedness in determining adjacency when making source determinations decision in its title V or [New Source Review] permitting decisions in areas under the jurisdiction of the 6th Circuit, *i.e.*, Michigan, Ohio, Tennessee and Kentucky.”

¹⁶ *Id.*, Appendix C, at 20.

¹⁷ *Id.*, Appendix D, at 22-23.

¹⁸ See [Memorandum from Stephen D. Page](#), Director, U.S. EPA Office of Air Quality and Standards Regional Air Division to Directors, Regions 1-10 (Dec 21, 2012).

Outside the Sixth Circuit, however, the *Summit* Directive stated “EPA does not intend to change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions.” Because Circuit Court jurisdictions do not always correlate with EPA Regional Office jurisdictions, the *Summit* Directive had the anomalous effect of requiring EPA Region 5 to apply different criteria when making source determinations in Michigan and Ohio than in Indiana, Illinois, Wisconsin and Minnesota. Similarly, EPA Region 4 was directed to apply different criteria in Tennessee and Kentucky than in the other Region 4 states in the southeast. Moreover, the *Summit* Directive effectively required the other EPA Regional Offices to disregard the *Summit Petroleum* decision when making source determinations.

The National Environmental Development Association’s Clean Air Project (NEDA/CAP), an association of resource extraction and manufacturing companies, brought a petition challenging the *Summit* Directive on the grounds that the directive violated the CAA and EPA regulations by establishing inconsistent permit criteria applicable to different parts of the country. The D.C. Circuit ruled that the *Summit* Directive violated EPA regulations requiring national uniformity in implementing the CAA and, therefore, did not need to consider whether the directive also violated the CAA itself.

Before reaching the merits of the case, the court first addressed EPA’s arguments that NEDA/CAP lacked standing to bring the petition, that the *Summit* Directive was not final agency action subject to review and that NEDA/CAP’s claims were not ripe for review. The court held that NEDA/CAP had standing because its members with facilities located outside the Sixth Circuit would be at a relative competitive disadvantage to facilities located within Sixth Circuit states when it comes to air permitting. The court also found that the *Summit* Directive was final agency action because it compels the Regional Offices to apply different permitting standards in different areas. The court also found that the issue was ripe for review because the petition presented a purely legal question of whether EPA’s adoption of a non-uniform enforcement regime violates the CAA or EPA regulations.

On the merits, the court found, among other things, that the *Summit* Directive was inconsistent with EPA regulations ([40 C.F.R. Sections 56.1, 56.2, 56.3, 56.4 and 56.5](#)) which state that EPA will “assure fair and uniform application by all Regional Offices of the criteria, procedures and policies employed in implementing and enforcing” the CAA (40 C.F.R. 56.3(a)) and that the Regional Offices “shall assure that actions taken under the [CAA] . . . [a]re as consistent as reasonably possible with the activities of other Regional Offices” (40 C.F.R. 56.5(a)(2)). EPA countered that these regulations were merely general statements of policy and that they should not be taken to require EPA to “adopt the interpretation of the circuit court that first addresses a legal matter.” The court disagreed that NEDA/CAP’s position would require EPA to follow the *Summit Petroleum* decision in all regions of the country. The court found that EPA had at least three other alternative courses of action if it disagreed with the *Summit Petroleum* decision. First, EPA could revise its regulations regarding aggregating emissions from multiple facilities to explicitly adopt the “functional interrelationship” test that the Sixth Circuit found lacking; EPA has not done so. Second, EPA could appeal the *Summit Petroleum* decision to the

United States Supreme Court, which it did not. Third, EPA could revise its uniformity regulations in 40 C.F.R. Part 56 to allow for regional variances created by a judicial decision or circuit split.

Finally, EPA argued that the doctrine of inter-circuit nonacquiescence, in which an agency, after an adverse decision in one court, is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering in the hope that other courts will uphold the agency's position, allowed it to apply different policies in different areas of the country. The court found that the doctrine of inter-circuit nonacquiescence does not allow EPA to ignore the plain language of its own regulations calling for uniformity in the application of the CAA throughout the country. Because EPA's current regulations preclude EPA from relying on inter-circuit nonacquiescence in this instance, the court held that the *Summit* Directive is contrary to law.

National Environmental Development Association's Clean Air Project v. EPA, [752 F.3d 999](#) (D.C. Cir. May 30, 2014).

Wetland Mitigation in Michigan: Working Toward the Goal of No Net Loss of Wetlands

By Nathan Inks, Wayne State University Law School

I. Introduction

During his Seventh Annual Message to Congress, President Theodore Roosevelt said, "We are prone to speak of the resources of this country as inexhaustible; this is not so."¹ It is the duty of any society to protect the resources around it, and the wetlands across Michigan are one such resource. The state has lost approximately 75% of the estimated wetlands that it had before Europeans settled in the area.² Although the rate of wetland loss has slowed over recent years due to more protection of wetlands through legislation, destruction of this precious resource has still continued.³

One of the tools currently employed in Michigan to combat the wetland destruction problem is wetland mitigation. Wetland mitigation involves the restoration of old wetlands or creation of new wetlands as a replacement for destroyed wetlands.⁴ While wetland mitigation has played a role in slowing the net loss of wetlands in Michigan, the goal should be to reverse the loss—or at least stop it. Problems with the wetland mitigation program and its enforcement have kept the state from achieving this goal. In order to stop the loss of Michigan's wetlands, authorities must better enforce the laws and regulations on the books, and make changes to the laws and regulations that currently exist.

¹ Theodore Roosevelt, The American Presidency Project, [Seventh Annual Message](#) (accessed Jul 15, 2014).

² Michigan Department of Natural Resources, [Wetlands](#) (accessed July 15, 2014).

³ *Id.*

⁴ Michigan Department of Environmental Quality, [Wetland Mitigation](#) (accessed Jul 15, 2014).

II. Background

A. The Importance of Wetlands

Wetlands are a crucial part of our planet, including right here in Michigan, with benefits ranging from environmental to economic. Wetlands can absorb water, so they serve as a means of storm and flood control; they provide a habitat for wildlife; they replenish groundwater supplies; they are a natural mechanism of pollution treatment; they act as an erosion control mechanism; and they provide nutrients for wildlife.⁵ These benefits are not simply environmental; they also have an impact on recreation, tourism, and the economy across the state.⁶

B. Federal Law and Regulations

The federal law platform for wetland mitigation is contained in Section 404 of the Clean Water Act (CWA).⁷ While Section 404 is often described as a wetlands program, it applies to permitting for dredging and filling for all waters, not just wetlands. The Environmental Protection Agency (EPA) promulgated regulations in Title 40, Part 230 of the Code of Federal Regulations, including guidelines for the issuance of permits to discharge into wetlands.⁸ The regulations define the term “wetlands” as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”⁹ The guidelines also detail the general ways that destruction of, or damage to, wetlands can have further impacts on the environment, such as changes to local ecosystems, worsening of water quality, further wetland loss, and increased flooding and erosion.¹⁰

Section 404(a) of the CWA prohibits any “discharge of dredged or fill material into” waters of the United States, including wetlands, unless the Army Corps of Engineers (ACE) issues a permit or an approved State authorizes the discharge.¹¹ Every discharger must avoid or minimize, to the extent practicable, the adverse impacts to wetlands, streams, and other aquatic resources.¹² If some adverse impacts are unavoidable, the discharger is required to offset the impacts by utilizing a method of compensatory mitigation.¹³

The EPA and the ACE entered into a Memorandum of Agreement (MOA) in 1990 establishing a three-step permitting process under the CWA to help guide mitigation decisions and determine

⁵ Michigan Department of Environmental Quality, [What are wetlands and why are they important?](#) (accessed July 15, 2014).

⁶*Id.* See also Environmental Protection Agency, *Economic Benefits of Wetlands*, <http://water.epa.gov/type/wetlands/outreach/upload/EconomicBenefits.pdf> (accessed Jul 15, 2014) (detailing specific economic benefits of wetlands).

⁷ [33 U.S.C. § 1344](#).

⁸ [40 C.F.R. §§ 230.1-98](#).

⁹ [40 C.F.R. § 230.41\(a\)\(1\)](#).

¹⁰ [40 C.F.R. § 230.41\(b\)](#).

¹¹ [33 U.S.C. § 1344\(a\)](#).

¹² [40 C.F.R. § 230.10](#).

¹³ [40 C.F.R. § 230.91](#).

the type and level of mitigation required under the guidelines; this process is known as the “mitigation sequence.”¹⁴ The first step, avoidance, requires the party requesting the permit to show that there are no practicable alternatives that do not involve wetlands.¹⁵ The second step, minimization, requires the applicant to draft a plan showing that it will minimize potential adverse impacts to the wetlands.¹⁶ If the applicant shows that harm to a wetland is unavoidable, the third step, compensatory mitigation, is invoked, which requires the applicant to complete a “compensatory mitigation” that will offset any harm.¹⁷

The four types of compensatory mitigation include restoration, establishment, enhancement, and preservation.¹⁸ Restoration is the re-establishment or rehabilitation of a wetland or aquatic resource “with the goal of returning natural/historic functions to a former or degraded aquatic resource.”¹⁹ Re-establishment results in a net gain in wetland function and area, while rehabilitation only results in a net gain in wetland function.²⁰ Establishment is the creation of a previously non-existent wetland or aquatic resource, and it results in a net gain of wetland function and area.²¹ Enhancement involves activities that “heighten, intensify, or improve a specific aquatic resource function(s),” which result in a gain of wetland function, but not area.²² Preservation is “the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources,” and there is no net gain of wetland function or area.²³

C. State Law and Regulations

The CWA allows states to assume the administration of the Section 404 permit program themselves.²⁴ In 1994 Michigan received authorization from the federal government to administer Section 404 and is one of only two states to do so.²⁵ In order to receive this approval, a state’s program must ensure compliance with the federal program, and thus, must have laws or regulations that are at least as restrictive as Section 404 and the Section 404(b)(1) guidelines.²⁶ Notably, the EPA has been scrutinizing and evaluating Michigan’s wetland program to ensure it is consistent with the federal program, which led to recent changes to Michigan

¹⁴ Memorandum of Agreement between The Department of the Army and The Environmental Protection Agency, *The Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines*, February 6, 1990, available at <http://water.epa.gov/lawsregs/guidance/wetlands/mitigate.cfm> (1990 MOA)..

¹⁵ [40 C.F.R. § 230.10\(a\)\(2\),\(3\)](#); 1990 MOA.

¹⁶ [40 C.F.R. § 230.10\(d\)](#), 1990 MOA.

¹⁷ [40 C.F.R. § 230.91](#); 1990 MOA.

¹⁸ [40 C.F.R. § 230.92](#).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ [33 U.S.C. § 1344\(g\)](#).

²⁵ [40 C.F.R. § 233.70](#); Department of Environmental Quality, *State and Federal Wetland Regulations* (MDEQ Overview) (accessed Jul 15, 2014); Environmental Protection Agency, *State or Tribal Assumption of the Section 404 Permit Program* (accessed Jul 15, 2014). New Jersey is the other state that has assumed administration of Section 404. See [40 C.F.R. § 233.71](#)

²⁶ [33 U.S.C. § 1344\(h\)](#); [40 C.F.R. §§ 233.1-53](#).

law.²⁷ These changes, however, have been interpreted by the EPA to be in conflict with the CWA, which could lead to the revocation of Michigan's authority to regulate its wetlands.²⁸ For the time being, though, Michigan still retains its authority.²⁹

Under the current status of the law, for most wetland permits in Michigan, an application must be filed only with the Michigan Department of Environmental Quality (DEQ), whereas in other states a permit must be issued by both the EPA/ACE and the appropriate state agency.³⁰ Despite the approved program administration in Michigan, Section 10 of the Rivers and Harbors Act and Section 404(g) of the CWA provide that the ACE retains jurisdiction over navigable waters of the United States, which includes the Great Lakes, connecting channels, other connected waters, and wetlands directly adjacent to these waters.³¹ Permits dealing with these waters must be approved by both the ACE and the DEQ but can be obtained through a joint permit application.³² The EPA is still charged with oversight of the DEQ program and can review any application processed by the State.³³ The EPA is allowed to waive review of some categories of permits, but it cannot waive review of permits for projects that will impact "critical environmental areas" or which will fill large amounts of wetlands.³⁴ The EPA reviews approximately one percent of applications received by the DEQ.³⁵

The applicable Michigan law is contained in Part 303 of the Natural Resources and Environmental Protection Act (NREPA).³⁶ Some wetlands near the coasts of Michigan are also covered by Part 323 of the NREPA.³⁷ The prior version of Part 303 and its regulations governed any wetland connected to or within 1,000 feet of a Great Lake or Lake St. Clair, connected to or within 500 feet of an inland body of water, larger than 5 acres, or designated by the DEQ as "essential to the preservation of [Michigan's] natural resources."³⁸ In 2013, the state legislature passed [Public Act 98 of 2013](#), which amended [MCL 324.30321](#) to essentially narrow the areas governed by Part 303. The amendments conflict with the broad definition of "contiguous" in Michigan Administrative Code, [Rule 281.921\(1\)\(b\)](#) and exclude wetlands that are not in physical contact with, and lack surface water or groundwater connections to, a Great Lake or Lake St. Clair.³⁹ Agricultural drains are also no longer considered a way in which a wetland may be

²⁷ See Perry, [2013 Public Act 98 Significantly Changes Michigan's Wetlands Protection Program](#), 31 Michigan Environmental Law Journal (Summer 2013, at 32); Mikalonis, [EPA Hearing Will Give Public a Voice in Whether Michigan Should Retain Regulation of Wetlands](#), *Crain's Detroit Business* (Nov 12, 2013) <http://www.craigslist.com/article/20131112/BLOG103/131119985/epa-hearing-will-give-public-a-voice-in-whether-michigan-should>; see generally [2013 PA 98](#).

²⁸ *Id.*

²⁹ *Id.*

³⁰ MDEQ Overview, *supra*, n 25.

³¹ [33 U.S.C. § 403](#); MDEQ Overview, *supra*, n 25.

³² MDEQ Overview, *supra* n 25.

³³ [33 U.S.C. § 1344\(j\)](#).

³⁴ [40 C.F.R. § 233.51](#).

³⁵ MDEQ Overview, *supra* n 25.

³⁶ [MCL 324.30301-30328](#).

³⁷ [MCL 324.32301-32315](#).

³⁸ [MCL 324.30301\(1\)\(m\)](#) (defining "Wetland"); [MAC, R 281.921\(1\)\(b\)](#) (defining "Contiguous").

³⁹ [2013 PA 98](#).

contiguous with these bodies of water, and culverts, ditches, and channels are now excluded from being wetlands.⁴⁰

Similar to the federal regulations, Part 303 details the benefits of wetlands, including flood and erosion control, providing a habitat and resources for wildlife, pollution treatment, and a source of food.⁴¹ A permit is required to “[d]eposit or permit the placing of fill material in a wetland,” “[d]redge, remove, or permit the removal of soil or minerals from a wetland,” “[c]onstruct, operate, or maintain any use or development in a wetland,” or “[d]rain surface water from a wetland.”⁴² Part 303 outlines numerous exemptions when a permit is not required, including recreational activities, minor drainage activities, and, farming, lumbering, ranching, and food-harvesting activities that were established prior to October 1, 2013.⁴³ The DEQ can issue a permit only if it “determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful.”⁴⁴ Furthermore, there can be no unacceptable disruption to the aquatic resources, and the applicant must show that “[t]he proposed activity is primarily dependent upon being located in the wetland” or “[a] feasible and prudent alternative does not exist.”⁴⁵

Regulations in the Michigan Administrative Code provide the framework for the DEQ to require wetland mitigation for certain permits.⁴⁶ Where applicable, an applicant for a permit must “provide mitigation to assure that, upon completion, there will be no net loss of wetlands.”⁴⁷ The regulations provide for four methods of mitigation, including the restoration of previously existing wetlands, creation of new wetlands, acquisition of approved credits from a wetland mitigation bank, and, in certain circumstances, preservation of existing wetlands.⁴⁸ Mitigation must be “on-site” when practical, or otherwise, within the same watershed of the impacted wetland.⁴⁹ When practical and feasible, the mitigation must “be of a similar ecological type as the impacted wetland,”⁵⁰ using the following ratios:

- (i) Restoration or creation of 5.0 acres of mitigation for 1.0 acre of permitted impact on wetland types that are rare or imperiled on a statewide basis;
- (ii) Restoration or creation of 2.0 acres of mitigation for 1.0 acre of permitted impact on forested wetland types, coastal wetlands not included under (i) of this subdivision, and wetlands that border upon inland lakes;

⁴⁰ *Id.*

⁴¹ [MCL 324.30302\(1\)\(b\).](#)

⁴² [MCL 324.30304.](#)

⁴³ [MCL 324.30305.](#)

⁴⁴ [MCL 324.30311\(1\).](#)

⁴⁵ [MCL 324.30311\(4\).](#)

⁴⁶ [Mich Admin Code, R281.925.](#)

⁴⁷ *Id.* R 281.925(7).

⁴⁸ *Id.* R 281.925(4).

⁴⁹ *Id.* R 281.925(7).

⁵⁰ *Id.* R 281.925(7)(d).

- (iii) Restoration or creation of 1.5 acres of mitigation for 1.0 acre of permitted impact on all other wetland types; or
- (iv) 10 acres of mitigation for 1.0 acre of impact in situations where the mitigation is in the form of preservation of existing wetland.⁵¹

The DEQ can increase the ratio “if the replacement wetland is of a different ecological type than the impacted wetland,” and it can increase or decrease the required mitigation by up to 20% if it finds that such action “would be beneficial to the wetland resources due to factors specific to the mitigation site or the site of the proposed activity.”⁵²

III. Analysis

It has been decades since the CWA was passed, yet the country is still seeing a net loss of wetlands.⁵³ Enforcement problems and inadequacies in the laws and regulations are two key reasons that net wetland loss has not been stopped and reversed. In order to halt this net loss and eventually achieve a goal of net wetland gains, changes will have to be made in what the laws and regulations say and how they are enforced.

A. Problems with Enforcement and Administration

If regulatory agencies are not enforcing and ensuring compliance with the applicable laws and regulations, it is likely that those laws and regulations will not be properly followed, resulting in further loss of wetlands. A 2003 study of wetland mitigation compliance in 10 counties in the Upper Peninsula of Michigan found that 56% of county road commission permittees had violated at least one requirement of their respective permits, putting full compliance at 44%.⁵⁴ Meanwhile, full compliance with permit requirements among the “general public” was at 60%.⁵⁵ According to a 2001 report by the DEQ, an astounding 74% of permits went unchecked for compliance.⁵⁶ Lack of staff time and resources are two likely reasons for such low compliance.⁵⁷ The fact that government permittees had a lower compliance rate than the general public is not only surprising but also disappointing. Local government officials should be voluntarily complying with the law, not trying to avoid compliance because they know that they can get away with permit violations. The general public simply cannot be expected to voluntarily comply with state regulations when local government officials feel that they can be held to a lower standard.

Failure of wetland mitigation sites to meet permit goals is not something that is specific to Michigan. A 2007 study of wetland mitigation in Illinois enforced by the ACE found that there are also problems with compliance in states where the ACE administers the Section 404

⁵¹ *Id.* R 281.925(7)(e).

⁵² *Id.* R 281.925(7)(f).

⁵³ Hornyak & Halvorsen, *Wetland Mitigation Compliance in the Western Upper Peninsula of Michigan*, 32 *Environmental Management* 535, 535 (2003).

⁵⁴ *Id.* at 537.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 538-539.

program.⁵⁸ In that study, of the 72 sites where the goal was to create a wetland, only 81% of the sites met that goal.⁵⁹ The compliance with more detailed goals, specifically dealing with vegetation development in that study, was generally lower.⁶⁰ Other studies have shown similar results, with noncompliance varying from state to state.⁶¹ One thing that the states have in common is that this noncompliance is resulting in a net loss of wetlands, meaning the goals of Section 404 are not being accomplished.⁶²

B. Inadequacy of the Laws and Regulations

Even before the point of compliance with mitigation requirements becomes relevant, a problem arises with who exactly has to comply with the rules for mitigation. Current exemptions when a permit is not required, at both the federal and state level, are excessive. Michigan's former statutory exemptions were broader than those laid out in Section 404 of the CWA by containing exemptions specifically for iron and copper mining that had no federal equivalent.⁶³ While the amendments to Michigan law corrected these deficiencies, they introduced new inconsistencies and new exemptions that have no federal equivalent.⁶⁴ There are additional problems once it has been determined that a party is required to perform mitigation. While some permittees are certainly at fault for their noncompliance, the problem of noncompliance leading to net wetland loss is not always due to a deliberate choice to ignore permit requirements or a lack of enforcement. Sometimes noncompliance occurs because the goals set forth in the permit are unrealistic.⁶⁵ Often there are inconsistencies in permit goals even when the permits deal with similar wetlands, suggesting that some permit goals are arbitrarily made.⁶⁶ If the goals are set too high, noncompliance is likely to occur, and this is more the fault of regulators than it is the permit holders. On the other hand, if goals are set too low, while compliance may be achieved, the benefit that the local environment needs from the compensatory mitigation is not achieved.⁶⁷ Compliance with the permit itself is ultimately of little value if the environmental benefit from the restored or created wetland is too low due to a lenient permitting requirement.⁶⁸ Another problem is the way permits are issued. For on-site mitigation, applicants often only have to draft a mitigation plan and get it approved by the appropriate agency but do not have to perform any mitigation until after they complete the permitted development.⁶⁹ This results in a temporary net loss of wetland area, as well as overall wetland benefits, until the mitigation

⁵⁸ Matthews & Endress, *Performance Criteria, Compliance Success, and Vegetation Development in Compensatory Mitigation Wetlands*, 41 *Environmental Management* 130, 130 (2008).

⁵⁹ *Id.* at 135.

⁶⁰ *Id.*

⁶¹ Hornyak, *supra* n 53, at 535.

⁶² *Id.*

⁶³ Perry, *supra* n 27.

⁶⁴ *Id.*; Hyde, [Fwd ACTION: Michigan 404](#) (May 31, 2013).

⁶⁵ Matthews, *supra* n 58, at 131.

⁶⁶ *Id.*

⁶⁷ *Id.* at 137.

⁶⁸ *Id.* at 131.

⁶⁹ Booth, *Compensatory Mitigation: What is the Best Approach?*, 11 *U Balt J Env'tl L* 205, 211 (2004).

is completed.⁷⁰ This also assumes that the mitigation will be completed 100% to the specifications required, which has already been shown to be a faulty assumption, as permittees are often not held responsible if the mitigation does not meet the standards set out in the permit.⁷¹ Once the developer has completed the mitigation process, his responsibility is over; there is no requirement for a developer to continue to maintain the site once he has fulfilled the requirements of the permit.⁷² This means that a restored or established wetland can decrease in environmental benefit over time, leading to a net loss in wetland area and/or benefit, and there is nothing that the regulatory agency can do other than sit by and watch.⁷³ The potential for wetlands involved in a compensatory mitigation program to lose their environmental value over time is inherent in the compensatory mitigation process. All wetlands are not created equal, and restored and established wetlands often do not have the same benefits or resilience as natural wetlands.⁷⁴ One frequent problem with on-site mitigation is that newly created wetlands are isolated and small, giving them the nickname of “patch” wetlands.⁷⁵ These “patch” wetlands often degrade, because of their poor locations and small size.⁷⁶ Furthermore, their isolation means that they are not connected to other wetlands, which inhibits their environmental value, such as flood control and pollution treatment, rendering them essentially useless.⁷⁷ These problems are not necessarily intentionally caused by permittees, but rather, are a logical conclusion of a lack of understanding about what it takes to make an artificial wetland truly environmentally beneficial.⁷⁸ Because the current laws and regulations are too lenient in where and how wetlands can be created as a part of compensatory mitigation, and because there is no ongoing requirement to maintain these wetlands, many mitigation sites are doomed from the start.

C. Potential Solutions

The first step in achieving the no net loss goal of Section 404 of the CWA is to enforce the laws and regulations already on the books. To do this, the agencies responsible for enforcement and monitoring mitigation sites must have the resources that they need.⁷⁹ This means that the DEQ and the ACE need to be properly funded and staffed, so that money and manpower are not spread too thin. Local government bodies also need to understand and pursue the goals of Section 404; the general public cannot be expected to strictly abide by the requirements if local government bodies are held to a lower standard.

The next step is to improve the permitting process. Arbitrary goals in permits are inhibiting progress. Permit goals have to be achievable; an unachievable permit goal accomplishes little good for the environment and only causes developers and regulators unnecessary headaches,

⁷⁰ *Id.*

⁷¹ *Id.* at 211-212.

⁷² *Id.* at 212.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Neal, *Paving the Road to Wetlands Mitigation Banking*, 27 BC Env'tl Aff L Rev 161, 174 (1999).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Booth, *supra* n 69, at 211.

wasting further time and resources. Additionally, wetlands that are similar in the environment need to be treated similarly in the permitting process. This not only makes the process easier for the public to understand but also makes enforcement easier, as regulatory agency staff will have a better understanding of what needs to be done for different wetlands.⁸⁰

Changes also need to be made to the laws and regulations themselves. Not requiring mitigation to start until after development is finished may be good for businesses, but it leads to a temporary net loss of wetlands, which means that the environmental benefit from those wetlands decreases for a period of time, even if the mitigation is eventually completed as required. Changes to Section 404 and its accompanying rules need to be made so that wetlands are replaced as they are destroyed. Developers should also be required to maintain their mitigation sites for some period of time after completion. While it would be unreasonable (and impossible) to enforce indefinite maintenance of mitigation sites, some form of long-term responsibility needs to be placed on developers to ensure that their mitigation sites continue fulfilling their purpose as replacement wetlands.

Additionally, both the state and federal government should begin tightening exemptions. While certain industries are important to economic development, the party destroying wetlands is ultimately irrelevant from an environmental perspective. A destroyed wetland is a destroyed wetland, and excessive exemptions are not simply unfair; they are inherently counterproductive to the goal of no net loss of wetlands.

Reform to on-site mitigation must also take place. Fortunately, the DEQ has already begun taking action to solve the problem of “patch” wetland failure. In 1997 the DEQ adopted rules regarding wetland mitigation banks,⁸¹ which are “site[s] where wetlands are established, restored or, in exceptional circumstances, preserved in advance.”⁸² Mitigation banks are valued in “mitigation credits,” which can be used when a developer destroys a wetland.⁸³ While it is unclear whether the EPA will allow continued use of Michigan’s mitigation banking system as it currently exists,⁸⁴ wetland mitigation banks address many of the problems inherent in other mitigation methods. Wetland mitigation banks must be at least 10 acres,⁸⁵ which solves the problem of isolated “patch” wetland failure. Furthermore, to the extent possible, wetland mitigation banks must serve more than one “wetland function,” so artificial, low-quality wetlands cannot be counted toward a mitigation credit.⁸⁶ Mitigation credits can be bought and sold,⁸⁷ so developers can complete their compensatory mitigation requirements long in advance and not have to worry about this work going to waste.

Michigan and the EPA also need to continue working together to determine what needs to be done so that Michigan can retain administration of its wetland program. Part of the reason that

⁸⁰ Matthews, *supra* n 58, at 138.

⁸¹ [Mich Admin Code, R 281.951–961, 951\(f\)](#).

⁸² *Id.* R 281.951(f).

⁸³ *Id.* R 281.956. *see also* Dep’t of Environmental Quality, [Wetland Mitigation Banking](#), (accessed Jul 15, 2014).

⁸⁴ *See* Hyde, *supra* n 64.

⁸⁵ [Mich Admin Code R. 281.954\(7\)](#).

⁸⁶ *Id.* R. 281.954(2).

⁸⁷ *Id.* R. 281.951-961..

PA 98 of 2013 was passed was so that inconsistencies between Section 303 of NREPA and the CWA could be resolved;⁸⁸ however, while some problems were fixed, more were created.⁸⁹ Michigan should be proud of its unique ability to administer wetland regulation, and state lawmakers must do everything within their power to ensure that Michigan complies with the EPA regulations and interpretations as soon as possible to ensure that this ability is not lost.

IV. Conclusion

Getting to the point of no net loss of wetlands is not an unobtainable goal. Through proper reforms to enforcement, permitting procedures, laws, and regulations, Michigan can achieve this goal. Compliance with compensatory mitigation requirements will be more likely if the general public understands why wetlands are important, not just for the environment, but for the economy and people of Michigan. Wetland mitigation banking is one way that Michigan is on the right track to the no net loss point, but more can be done. Increased regulation is almost never popular in the business world, but if the value of Michigan's wetlands is understood by more people, support for their protection will rise. Reaching the equilibrium point of wetland loss and creation/restoration is only the first step toward bettering the environment; further strides must be taken to begin growing Michigan's aggregate wetland to its former size.

⁸⁸ Oosting, [Michigan Gov. Rick Snyder Signs Law](#) to Update Wetland Permits; Allow More Beer Growler Sales, MLive.com (Jul 3, 2013).

⁸⁹ See Mikalonis, *supra* n 27; Perry, *supra* n 27; Hyde, *supra* n 64.