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Message From Chair Bill Schikora



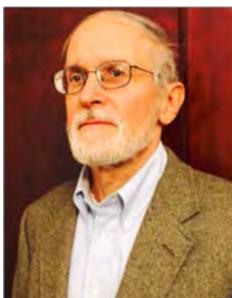
I've been involved with a few strategic planning initiatives in my life, and perhaps bizarrely, I actually enjoy them. The ELS Strategic Planning Committee is putting the finishing touches on a survey of our members, and I would like to take this opportunity to ask you to take the time to complete it when it is sent. We have approximately 600 members with extremely diverse backgrounds. In my experience, the ELS has focused its efforts on full-time environmental lawyers in private practice and while that has served many of us well, I think we can do better. So please, give us your

input so we can cater future events and publications to better serve you.

I had the pleasure of attending the Bar Leadership Forum on behalf of our section in early June. By far, the highlight of that event was the presentation on the 21st Century Law Practice. This has been a focus of the State Bar for the last year, and you can learn more about it [here](#). I suspect we have all seen competitive threats to our area of practice from environmental consultants, and I expect that to continue. Perhaps more interesting are the efforts of folks in Silicon Valley and similar places to reinvent the practice of law. If you happened to watch IBM's Watson computer play (and win) on Jeopardy a few years ago, you have a sense of what the 21st century may bring. I started my legal career using a Wang computer, and while I gave that up a long time ago, the practice of law has been relatively untouched by technology during my career. The 21st century changes will come sooner than you may think.

-Bill

Message From the Editor



This is the **one hundred first** issue of the *Journal*, a major milestone. The oldest issue in the Environmental Law Section's incomplete [collection](#) is Volume 18, No. 1, issue 57 from 2000. That volume number and date suggests that the first *Journal* appeared way back in 1983. If you have any *Journal* issue from the 20th Century, or any of the 21st Century issues missing from the Section's website, please send a copy to one of the section officers so we can add it to the Section's collection and make it available to everyone. We are missing issues Nos. 1–56 (1983 through

1999), and many issues from 2003 through 2008 (Nos. 65–80).

For the past four years the first issue in each calendar year has included a summary of Public Acts the Michigan legislature adopted during the preceding calendar year. In contrast with several recent years, legislative activity in 2015 on environmental issues was modest. Attorneys who practice pollution control law may be most interested in the significant changes to venerable Part 121 of NREPA, formerly called the Liquid Industrial Wastes Act, now given the upscale name Liquid Industrial By-Products. This year's summary of environmental legislation will acquaint you with those changes, including enhanced enforcement options. And remember not to take your unmanned aerial or submersible vehicle (UAV) with you when hunting this year. Don't take it with you even if you *oppose* hunting. In either case, you may find yourself in violation of new Michigan laws that prohibit using UAVs either to assist hunters *or* to harass them. Live falcons and electronic fish finders are apparently still okay.

This issue also features a trio of articles by active section members that discuss recent decisions by the Michigan Court of Appeals. Can an impersonal, cold-hearted corporate entity "enjoy" the natural environment, at least for legal purposes? Council member Becky Cassell explains [*Tennine Corp. v. Boardwalk Commercial, LLC*](#), in which the Court of Appeals held that a corporation is a "person" that can have legal standing to sue for injunctive relief under the citizens suit section of Part 201 when its "enjoyment" of the natural environment has been adversely affected by another party.

If the federal government wants to impose a monetary civil penalty for illegally filling a wetland, the individual has a right to a jury trial, doesn't he? That's what the United States Supreme Court held in [*Tull v. United States*](#), 481 U.S. 412 (1987). But does the Michigan Constitution guarantee the same right? Sue Sadler, chair of the Natural Resources, Energy, and Sustainability Committee, reports that our court of appeals said "no" in [*DEQ v. Morley*](#). Stay tuned; the losing defendant has asked the Michigan Supreme Court to review this one.

Finally, Doug McClure, chair of the Environmental Litigation and Administrative Practice Committee, considers how the modern administrative state and the doctrine of primary jurisdiction can affect the ancient common law right to sue your next door gasoline station for damages in nuisance. Gasoline vapors from leaking tanks can certainly unreasonably disrupt the operation of a health clinic. Why, then, should a court dismiss a nuisance action simply because the Department of Environmental Quality hasn't yet approved a corrective action plan for the offending gas station? Doug's discussion of [*Carson City Hospital v. Quick-Sav Food Stores*](#) explains why.

We would like to print several articles in each issue of the *Journal* and would warmly welcome an article from you. Your article doesn't have to be long; our readers prefer articles that are concise and of practical value. If you have an idea you'd like to write about, contact me at cdunsky@comcast.net or (313) 418-0913.

Christopher J. Dunsky
Editor, *Michigan Environmental Law Journal*

2015 Michigan Public Acts—Environment and Natural Resources

Christopher J. Dunsky, Christopher J. Dunsky, PLLC

Like 2014, 2015 was relatively quiet for legislation affecting the Michigan Natural Resources and Environmental Protection Act (NREPA). The most significant changes affected Part 121 (Liquid Industrial Waste) and the Renewable Operating Permit Program under Part 55 (Air Pollution Control) of NREPA.

The following summarizes Michigan Public Acts adopted in calendar year 2015 that pertain to environmental and natural resource issues.

I. Environmental Protection

A. Liquid Industrial Wastes (nka Liquid Industrial By-Products)

The legislature enacted three tie-barred bills regarding liquid industrial wastes.

PA 224 amended Part 121 (Liquid Industrial Wastes) of NREPA to do the following:

- Change the title of Part 121 to "Liquid Industrial By-Products," and refer to liquid industrial by-product rather than liquid industrial waste throughout Part 121.
- Exclude from classification as a liquid industrial by-product a material that is used or reused as an ingredient to make a product and meets certain other criteria.
- Eliminate requirements that a generator of liquid industrial by-product use a site identification number when arranging for transportation of the by-product and pay the Department of Environmental Quality (DEQ) a \$50 fee for each number the generator uses.
- Require a generator to mark containers and tanks of by-product to identify their contents.
- Refer to a shipping document rather than a manifest in record-keeping requirements for shipments of liquid industrial by-product, and revise the requirements.
- Allow certain required records to be maintained in an electronic format.
- Allow a transporter to dispose of septage waste or liquid industrial by-product on land if authorized by the DEQ.
- Require the owner or operator of a disposal, treatment, storage, or reclamation facility to maintain a plan to respond to and minimize hazards from unplanned releases of liquid industrial by-product, document that employees responsible for managing by-product were trained in proper handling and emergency procedures, and report annually to the DEQ.

- Authorize the Attorney General to bring a civil action against a person for violating Part 121, and allow a court to impose a maximum civil fine of \$10,000 per violation.
- Include the costs of surveillance and enforcement by the state among the amounts that may be recovered from a violator who has damaged or destroyed natural resources.

([MCL 324.12101](#) *et seq.*) (effective date March 16, 2016).

PA 225 amended the Hazardous Materials Transportation Act (HMTA), [MCL 29.471](#) *et seq.*, to do the following:

- Revise references to certain government entities responsible for oversight of motor carriers transporting hazardous materials.
- Refer to liquid industrial by-product rather than liquid industrial waste in a provision that exempts certain motor carriers from the HMTA's registration and permitting requirements, but specifies that these motor carriers remain subject to Part 121 of NREPA and any other applicable law.

([MCL 29.472](#) and [.473](#)) (effective date March 16, 2016).

PA 226 amended the sentencing guidelines in the Code of Criminal Procedure to reflect the changes made by Public Act 224 and to revise references to other sections of NREPA involving hazardous material violations. ([MCL 777.13c](#)) (effective date March 16, 2016).

B. Renewable Operating Permit program for air emissions is continued; fees for major sources are increased.

PA 60 amended Part 55 (Air Pollution Control) of NREPA to delay the sunset on fees for the Renewable Operating Permit (ROP) program by four years from October 1, 2015, to October 1, 2019. Approximately 800 large Michigan facilities pay fees under the ROP program. Additionally, 740 smaller facilities, mostly dry cleaners and parts degreasing shops, pay a flat \$250 fee. The act increases total revenue received by the DEQ under the ROP program by approximately \$1.2 million annually as a result of increased fees for major facilities. Fees for smaller facilities are not changed. ([MCL 324.5522](#)) (effective date October 1, 2015).

C. Fees for groundwater discharge permits are increased.

PA 247 amends Part 31 (Water Resources Protection) of NREPA to: (1) create a new category of facilities for the purpose of issuing groundwater discharge permits; (2) delay the sunset date for groundwater discharge permit fees from December 31, 2015, to September 30, 2019; and (3) adjust the fee schedule for annual groundwater discharge permits.

DEQ rules define three categories of groundwater discharge permits delineated by size and type. Group 1 facilities are the largest, followed by Groups 2 and 3.

Public Act 247 reclassifies certain types of facilities currently classified as Group 2 into a new Group 2a. These facilities are:

- Coin operate laundromats.
- Public car washes or vehicle washes.
- Subsurface sanitary discharges of fewer than 10,000 gallons per day that do not meet the terms for authorization under Rule 323.2211(a). (Rule 323.2211(a) authorizes the discharge of sanitary sewage not exceeding a daily flow of 10,000 gallons if particular requirements are met.)
- Seasonal sanitary discharges from a recreational vehicle park or campground, recreational or vacation camp, or public park.

Finally, the act adjusts the annual groundwater discharge fees for all four discharge categories. Beginning October 1, 2016, fees increase to \$3,910, \$1,607, \$260, and \$248 for Groups 1, 2, 2a, and 3, respectively. Municipalities with a population of 1,000 or fewer pay a \$1,607 fee. These fees will sunset on September 30, 2019. ([MCL 324.3101](#) and [324.3122](#)) (effective date December 22, 2015).

D. Fees are continued for projects in inland lakes and streams.

PA 76 amends various parts of NREPA to delay the sunset on five types of permit fees collected by DEQ's Water Resources Division. Each of the fees would have sunset on October 1, 2015. PA 76 delays the sunset date until October 1, 2019.

- Any project requiring a permit under Part 301 (Inland Lakes and Streams) is subject to an application fee of \$50 to \$2,000, depending on the type and scope of the project.
- A person who wishes to engage in a pre-application meeting with the DEQ regarding a proposed permit or permit application in process under Part 301 is subject to a fee ranging from \$100 to \$1,000, depending on the size and scope of the project.
- A \$500 service fee is charged to any person who wishes to establish the ordinary high water mark for his or her property.
- Under Part 323 (Shorelands Protection and Management), if rules require a permit in certain types of high-risk or flood risk areas, an application fee of \$50 to \$500 is charged, depending on the type of project.
- Any project requiring a permit under Part 325 (Great Lakes Submerged Lands) is subject to an application fee of \$50 to \$2,000, depending on the type and scope of the project.

([MCL 324.30101](#) *et al.*) (effective date October 1, 2015).

E. Fees are continued for water pollution, solid waste, recycling, and expedited sewerage review process.

PA 82 amends the NREPA to delay the sunset on eight types of DEQ permit fees that were to have sunset on October 1, 2015. The act generally delays the sunset until October 1, 2019,

except that the sunset date for groundwater discharge permit fees is extended until October 1, 2016.

The eight types of fees affected by the act are:

- Floodplain Permit Fees
- Storm Water Discharge Permit Fees
- Surface Water Discharge Permit Fees
- Groundwater Discharge Permit Fees
- Expedited Sewer Permit Fees
- Solid Waste Surcharge (Tipping Fees)
- Electronic Device Manufacturer Registration Fees
- Electronic Device Recycler Registration Fees

([MCL 324.30104](#) *et al.*) (effective date October 1, 2015).

II. Natural Resources

A. The use of unmanned vehicles or devices to interfere with hunting or fishing by others, or to take game or fish, is now prohibited.

PA 12 and PA 13 address concerns that some people may use unmanned aerial vehicles (UAVs) or unmanned submersible vehicles to disrupt lawful hunting and fishing. Although there have been no documented cases of this activity in Michigan, an animal protection group reportedly began encouraging users to use drones to monitor potentially illegal activity. Some believe that these devices could be used to interfere with lawful hunting or fishing. There is also concern that hunters or anglers could use UAVs or unmanned submersible vehicles to aid in taking game or fish. Many hunters believe that this would violate fair-chase principles and take away from the spirit and tradition of ethical hunting and fishing.

Public Act 12 amends Part 401 (Wildlife Conservation) of NREPA to prohibit the use of unmanned vehicles, unmanned flying devices, and unmanned vehicles that operate on the surface of the water or underwater, to interfere with or harass an individual who is lawfully taking an animal or fish.

Public Act 13 amends Part 401 to prohibit the taking of game using unmanned vehicles, unmanned flying devices, and unmanned vehicles that operate on the surface of the water or underwater.

An individual who violates either prohibition is subject to misdemeanor penalties. ([MCL 324.40112](#) and [48703a](#)) (effective date July 13, 2015); ([MCL 324.40111c](#)) (effective date July 13, 2015).

B. Hunting from personal assistive mobility devices is permitted; transporting crossbows in vehicles is restricted.

PA 185 amends Part 401 (Wildlife Conservation) of NREPA to allow an individual who holds a valid permit to hunt from a standing vehicle to transport or possess an uncased firearm with a loaded magazine on a “personal assistive mobility device” if the action is open. PA 185 defines "personal assistive mobility device" as any device that is designed solely for use by an individual with mobility impairment for locomotion and is considered an extension of the individual. The Department of Natural Resources already had authority to permit an individual who is a paraplegic or amputee, or is otherwise permanently disabled, to hunt from a standing vehicle.

An individual with a valid permit to hunt from a standing vehicle may also possess a loaded firearm, and may discharge that firearm to take game from a personal assistive mobility device if: a) the device is not moving, and b) the individual holds a valid base license, holds any other necessary license, and complies with all other laws and rules for the taking of game.

Part 401 prohibits a person from transporting or possessing a bow in or upon a vehicle, unless the bow is unstrung, enclosed in a case, or carried in the trunk of a vehicle. The prohibition applies while the vehicle is operated on public land or on a highway, road, or street. PA 185 extends this restriction to include crossbows.

Part 401 prohibits an individual from hunting within 150 yards of an occupied building, dwelling, house, or building used in connection with a farm operation, without the written permission of the owner or occupant of the property. PA 185 clarifies that this prohibition applies to hunting with a firearm. ([MCL 324.40111](#)) (effective date January 1, 2016).

C. Restitution amounts and penalties for illegally killing or possessing certain game are increased.

PA 187 and PA 188: Potential sanctions for illegal hunting include payment of restitution to the state for an animal that is illegally killed, possessed, purchased, or sold, as well as prohibitions against holding a hunting license. Before Public Act 187, in most cases, the amount of restitution ranged from \$100 to \$1,500 per animal, and the violator was subject to a license prohibition of three years. Some people believe that those restitution amount and the license sanction did not adequately penalize violators or provide an adequate deterrent.

Public Act 187 amends Part 401 (Wildlife Conservation) of NREPA to increase the restitution amount that an individual must pay to the state if he is convicted of illegally killing, possessing, purchasing, or selling elk, moose, bear, eagle, turkey or waterfowl. The new restitution amounts are as high as \$5,000 for an elk or moose and \$3,500 for a bear.

Public Act 188 amends Part 401 to:

- Increase the number of years an individual is prohibited from securing or possessing a hunting license if he or she is convicted of illegally killing, possessing, purchasing, or selling a bear or turkey, or possessing or taking an elk or moose. The ban for a first offense affecting an elk or a moose is extended from 3 years to 15 years; the ban for a second such offense is extended from 3 years to life.

- Allow a court, at its discretion, to issue a longer hunting license ban for a person convicted of using artificial light to take game.
- Provide that an individual who willfully used an illegally constructed snare or cable restraint would be guilty of a misdemeanor.

([MCL 324.40104](#)) (effective date February 14, 2016); ([MCL 324.40119](#), [324.40118](#), [777.13e](#), [324.40104](#)) (effective date February 14, 2016).

D. NRC's authority to issue orders regulating feeding of elk and deer is continued.

PA 265: In response to the threat of bovine tuberculosis, Public Act 66 of 1999 added Section 40111a to Part 401 of NREPA to require the Natural Resources Commission (NRC) to issue an order pertaining to deer and elk feeding. The section was originally scheduled to sunset on December 31, 2004, but the sunset date was postponed until January 1, 2010 to address bovine tuberculosis and chronic wasting disease in deer. Public Act 199 of 2009 later delayed the sunset date to January 1, 2016. At least three additional cases of chronic wasting disease have been confirmed in Michigan since 2009.

Some believe that the spread of chronic wasting disease is due in part to feeding of deer and elk. The current order prohibits a person from engaging in deer and elk feeding within certain areas. It has been suggested that the sunset be eliminated to authorize NRC to continue regulating feeding practices that may facilitate the spread of these diseases.

Public Act 265 amends Part 401 to eliminate the sunset on the requirement that the NRC issue an order concerning deer and elk feeding. ([MCL 324.40111a](#)) (effective date January 1, 2016).

Corporations are “Persons” under NREPA’s Citizens’ Suits Provision

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The Michigan Court of Appeals recently held that a corporation has standing to bring a citizen suit under the Michigan Natural Resources and Environmental Protection Act (NREPA), [MCL 324.101](#) *et seq.* This decision reverses a long-held understanding among environmental practitioners that a corporation has no standing to bring such an action based upon the holding in *Flanders Indus. v. Michigan*, 203 Mich App 15, 34; 512 NW2d 328 (1993).

In [Tennine Corp. v. Boardwalk Commercial, LLC](#)¹, the defendant Central Michigan Railway Company ceased using its railroad right-of-way (ROW) in 2004. The company then began the process of abandoning the ROW and converting it into a recreational trail. A work crew began demolishing the tracks and rails on the ROW and, in so doing, allegedly stacked railroad ties and tracked contaminated soil onto the plaintiff’s property. Plaintiff, a corporation, gave notice of its intent to file a claim under Part 201 of NREPA and then commenced litigation.

¹ [Tennine Corp. v. Boardwalk Commercial, LLC](#), ___ Mich App ___ (2016) (Docket No. 323257)

The trial court dismissed plaintiff's claim relying on *Flanders*, holding that because plaintiff was a corporation, it was not a person whose health or enjoyment of the environment could be adversely affected by a release of hazardous chemicals under NREPA. The *Flanders* plaintiff, also a corporation, had filed suit seeking recovery of costs and expenses and seeking injunctive relief under former MCL 200.615 (the Michigan Environmental Response Act (MERA), the predecessor statute to Part 201 of NREPA), claiming it was a person whose health or enjoyment of the environment was adversely affected by a release.² The *Flanders* Court found that plaintiff was not a person whose health may be affected because plaintiff was seeking relief only from the monetary costs associated with the release.³ Therefore, *Flanders* was found not to be within the class of persons who may seek relief under the provisions of former MCL 299.615.⁴

The Court of Appeals panel in *Tennine* reversed the trial court decision, finding that the circumstances and allegations in the case were different from those in *Flanders*. The holding confirmed that a corporation has a right to enjoyment of its property that can be adversely affected by an environmental release or threatened release. The *Tennine* Court found that the plaintiff's claim for injunctive relief was based on sufficient allegations of adverse effect to its health and enjoyment of the environment to create standing, clarifying as follows:

The *Flanders* Court did not hold that a corporation lacked standing under the NREPA simply because of its corporate status. Rather, it held that the plaintiff lacked standing because it brought suit under the former MERA to obtain relief for the costs of *remediation* ordered by the DNR. The plaintiff did not bring suit in the capacity of a person *whose health or enjoyment of the environment was adversely affected*; therefore, it lacked standing under the statute.⁵

In contrast, the *Tennine* plaintiff alleged that the defendant's removal activity released or threatened to release hazardous substances that would endanger the health of people on plaintiff's property and reduce the value of plaintiff's property. Accordingly, the *Tennine* Court found that plaintiff sufficiently alleged that the release adversely affected its health or enjoyment of the environment.

The court of appeals then considered whether a corporation has standing to sue as a "person" for purposes of a citizen suit under [MCL 324.20135](#). The Court initially noted that a corporation has the power to sue and be sued and "participate in actions and proceedings, judicial, administrative, arbitative, or otherwise, in the same manner as natural persons."⁶ Next, the

² *Flanders*, 203 Mich App 15.

³ *Id.* at 34.

⁴ *Id.*

⁵ *Tennine*, ___ Mich App at ___; slip op at *12-13, citing *Flanders*, 203 Mich App at 34.

⁶ *Tennine*, ___ Mich App at ___ *7, quoting [MCL 450.1261\(b\)](#).

Court noted that the statutory definition of “person” in NREPA was unambiguous in its inclusion of a corporation in the definition.⁷

The *Tennine* Court next revisited the limitation in NREPA that not all “persons” have standing to bring suit, but only those persons “whose health or enjoyment of the environment is or may be adversely affected by a release from a facility or threat of a release from a facility.”⁸ Since the plaintiff did not present any evidence that the health of its employees was compromised as a result of the removal activity in the ROW, the Court focused on whether Tennine, as a corporation, may suffer from the loss of the enjoyment of the environment as a result of any release.⁹ Since NREPA does not define “enjoyment,” the Court considered common dictionary definitions, which focused on “possession and use” with respect to property, and held that “a corporation may exercise the right to use its land or water—in other words, a corporation may enjoy the environment.”¹⁰ The Court noted that this interpretation was in line with the Michigan Supreme Court’s historic holding that a corporation may “enjoy” its real property.¹¹ The *Tennine* Court extended this analysis by finding that a corporation’s “enjoyment” of the environment and use of its land or water may be adversely affected by the release or threat of release of hazardous substances.

Finally, the *Tennine* Court noted that the legislative intent and purpose of Part 201 of NREPA did not divest corporations of standing simply because of their corporate status: “[T]he purpose of Part 201 of the NREPA is ‘to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, welfare, or to the environmental contamination at facilities within the state.’”¹² Additionally, “Part 201 ‘is intended to foster the redevelopment and reuse of vacant manufacturing facilities and abandoned industrial sites that have economic development potential, if that redevelopment or reuse assures the protection of the public health, safety, welfare, and the environment.’”¹³ The *Tennine* decision provides important precedent for corporations contemplating a citizen suits under Part 201 of NREPA as long as the corporation properly alleges that its health or enjoyment of the environment has been adversely affected by a release or threat of release from a facility and the suit does not merely seek monetary, remediation damages.

While the *Tennine* case is certainly of interest to environmental law practitioners, it also included an important ruling for all civil litigants involving offer of judgment sanctions. Tennine’s suit included claims against the Boardwalk defendants, who asserted in response to

⁷ *Id.* at *15, citing [MCL 324.301\(h\)](#).

⁸ *Id.*

⁹ *Id.*, citing [MCL 324.20135\(1\)](#).

¹⁰ *Id.* at *16 (emphasis added).

¹¹ *Id.*, citing *Grand Rapids N & LSR Co. v. Grand Rapids & IR Co.*, 35 Mich 265, 271 (1998) (a corporation’s right to “enjoy” its land and property is “sacredly guarded and protected under our constitution”).

¹² *Id.* at *17, citing [MCL 324.20102\(c\)](#).

¹³ *Id.* at *17-18, citing [MCL 324.20102\(l\)](#).

the suit that they did not have an ownership interest in the property and that the criteria for reversion of the ROW had not been satisfied. Those defendants each submitted an offer of judgment of \$500. Plaintiff did not accept the offers, but requested additional information regarding their ownership. Plaintiff failed to pursue the request through a motion to compel or otherwise, and the trial court granted the defendants' motion for summary disposition. The trial court then awarded offer of judgment sanctions of approximately \$21,000.

The plaintiff appealed this ruling, arguing that the trial court failed to apply the interest of justice exception included in MCR 2.405(D)(3). The Court of Appeals upheld the award, concluding that the interest of justice provision is the exception to the general rule that should only be applied in unusual circumstances.¹⁴ The Court noted the factors to be considered, as set forth in [Derderian v. Genesys Health Care Sys.](#), 263 Mich App 364, 381 (2004), and concluded that defendants' failure to respond to informal requests for plaintiff regarding documentation of ownership did not constitute gamesmanship or otherwise establish an unusual circumstance.¹⁵ Moreover, the trial court argued that since plaintiff made no counteroffer under MCR 2.405 and did not include a specific amount of monetary damages in its complaint, and since there was no case evaluation award, the trial court did not have any other monetary amount to consider in determining whether the Boardwalk defendants' offers of judgment were *de minimis*. Therefore, the Court upheld the trial court's ruling that the interest of justice exception did not bar an award of costs and fees under MCR 2.405.¹⁶

The *Tennine* decision is not surprising given the current climate of courts recognizing the expanding rights of corporations. While the defense was unique—and persuasive enough to convince the trial court—the Court of Appeals' ruling does not appear to deviate from the historic practice of business entities bringing environmental claims. The *Tennine* ruling does, however, form another layer in establishing standing for corporate litigants, which adds to the volatility surrounding the type of “harm” required to grant standing for citizen suits in Michigan.¹⁷

The time period for the *Tennine* defendants to appeal to the Supreme Court recently expired, so its holding is good law at least for the time being. Apparently a corporation does have standing to bring a citizen suit, as long as the corporation properly alleges its health and enjoyment of the environment is being adversely affected. Corporate “persons” considering a

¹⁴ *Id.* at *22.

¹⁵ *Tennine*, ___ Mich App ___, at *24-25.

¹⁶ *Id.*

¹⁷ See [Nat'l Wildlife Federation v. Cleveland Cliffs Iron Co.](#), 471 Mich 608 (2004); [Michigan Citizens for Water Conservation v. Nestle Waters of N America Inc.](#), 479 Mich 280 (2007); [Lansing Sch. Ed. Ass'n v. Lansing Bd. of Ed.](#), 487 Mich 349 (2010); [Anglers of the AuSable Inc. v. Dep't of Environmental Quality](#), 488 Mich 69 (2010); [Anglers of the AuSable Inc. v. Dep't of Environmental Quality](#), 489 Mich 884 (2011); and [Duncan v. Michigan](#), 300 Mich App 176 (2013).

citizen suit under NREPA will need to review this case carefully prior to filing a complaint to ensure that it frames its potential injury properly to achieve standing. Any defendant receiving notice of a potential lawsuit under NREPA should also carefully analyze whether the standing analysis in *Tennine* could be useful for their response.

DEQ v. Morley—A Wetland Enforcement Action the Issue of the Right to a Jury Trial, Penalties, Evidentiary Challenges, and Takings

Susan J. Sadler, Dawda Mann Mulcahy & Sadler PLC

In [*Department of Environmental Quality v. Morley*](#), ___ Mich App ___; ___ NW2d ___, 2015 WL 8972991 approved for publication February 9, 2016 (Docket No. 323019), the Michigan Court of Appeals reviewed the final order of the Ingham Circuit Court which granted judgment in favor of the plaintiff, the Michigan Department of Quality (MDEQ), against the defendant, Morley.¹

Background

The case was brought by MDEQ against Morley for the dredging, filling, and draining of a wetland. Morley had planned to turn 30 acres of undeveloped land into a subdivision near the Kawkawlin River in Bangor Township. Originally, Morley had plans to create a subdivision with approximately 260 homes with waterfront near the Kawkawlin River, which would be created by excavation and digging of a well.² Beginning in 2007, Morley also pursued farming on the property.

MDEQ alleged that the area was a regulated wetland and that Morley should first complete a wetland assessment and then apply for a wetland permit requesting the right to dredge soil, remove the spoils, and deposit fill in certain permitted areas. Morley rejected MDEQ's assertion that a wetland permit was required and argued that MDEQ's position was contrary to his private property rights.

When Morley refused MDEQ's attempts to inspect the land, MDEQ pursued inspection of the property pursuant to an administrative inspection warrant, which was granted by the Bay County District Court. This dispute between Morley and MDEQ continued until December 2012, when MDEQ filed a civil action for an injunction and civil fines against Morley in the Ingham County Circuit Court.

¹ Originally, the Michigan Court of Appeals initially issued the opinion unpublished, then subsequently granted the motion for publication.

² In 2009, following a dispute with the local town over placement of access roads and the Township's demand for installation of a bridge, Morley advised the public he had decided to not pursue the subdivision but instead decided to focus on farming the land.

Trial Court Proceedings

The trial court conducted a bench trial and remedy hearing. It ruled that Morley had violated Part 303 of the Natural Resources Protection Act, [MCL 324.101](#) *et. seq.* The trial court held that 92.3 acres of Morley's 106.5 acres was wetland and the court entered a Final Judgment finding that Morley had illegally placed fill material and had drained surface waters from that regulated wetland. The trial court concluded that these violations were actually committed for purposes of building a housing development on the property and not for agriculture. The court ruled that Morley had improperly begun farming the property after the violations had been committed and after MDEQ had notified him of having violated Part 303.

The circuit court ruled that Morley must remove approximately 4.1 acres of fill material in the area delineated as a wetland by MDEQ and restore the area to the conditions that existed prior to the unauthorized placement of fill material. Morley was also required to remove any and all drain tiles and pipes from the properties that were identified by MDEQ. Morley was required to retain the services of an environmental consultant to prepare a plan of restoration for review by MDEQ. Morley was also required to pay a civil fine of \$30,000 and cease farming.

Appellate Court Action—Right to Jury Trial

Following entry of the Final Judgment by the trial court, Morley appealed the ruling. The Court of Appeals reviewed the various procedural and evidentiary rulings that the trial court made and Morley's demand for a jury trial. On appeal, the appellate court concluded that the relief sought by MDEQ was equitable in nature; therefore, Morley was not entitled to a jury trial.

The appellate court noted that a Part 303 cause of action did not exist when Michigan passed the State's Constitution and that wetland protection is not a cause of action known in common law. The appellate court stated that Part 303 is a new cause of action created by statute and that the relief requested is equitable in nature; therefore, there is no state constitutional right to a jury trial. The appellate court also concluded that Morley was not entitled to a jury trial because MDEQ brought the action as a civil lawsuit and not as a criminal proceeding.

Morley argued that Federal law should govern and this supports his right to a jury trial. The appellate court reviewed the matter of [Tull v. United States](#), 481 US 412; 107 S Ct 1831; 25 L Ed 2d 1857 (1987) and rejected Morley's argument that *Tull* formed a basis for a right to a jury in this state matter. In the *Tull* case, the Supreme Court of the United States held that the Constitution provides a right to a jury trial in actions brought pursuant to the Federal Clean Water Act where monetary fines are an element of the relief requested.³

³ In [Tull](#), the United States brought suit against Tull for illegal discharging fill material into a wetland, in violation of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The U.S. District Court for the Eastern District of Virginia had denied Tull's demand for a jury trial. After a bench trial, the court held that Tull had illegally filled a wetland area and

By contrast to the *Tull* opinion, the appellate court pointed out that this matter was a civil action brought pursuant to Part 303, which is a state law that does not specifically provide for a jury trial in civil cases for violations.

Appellate Court—Evidentiary Challenges

The appellate court also reviewed multiple evidentiary challenges brought by Morley, which argued that certain evidence and testimony were admitted in error by the trial court. The appellate court rejected Morley's arguments.

The appellate court ruled that it would review only those evidentiary issues that had merit, were due to plain error, affected the substantial rights of a party, and were preserved in the trial court by an objection. The appellate court agreed that the trial court has a "basic gatekeeping obligations" with respect to the admission of expert witness testimony. Morley argued that MDEQ's expert witnesses were erroneously allowed to testify regarding wetland jurisdiction and boundaries without MDEQ's having laid a proper foundation. The appellate court noted that the conclusion by the MDEQ's experts that a portion of the property was marsh and a portion was swamp was properly admitted because it had been based on sufficient facts or data using applied principles and methods, which were reliably applied to the facts of the case. The appellate court held that there was "foundation to establish that 92.3 acres of [Morley's] property was wetland," that evidence to support this conclusion was properly admitted, and the expert testimony met the standard of reliability.

Morley argued that the admission of other evidence produced by MDEQ witnesses was improper because the witnesses had failed to establish proper foundation for admission. The appellate court concluded that the evidence was properly admitted even though it was done

imposed civil penalties. The Court of Appeals for the Fourth Circuit affirmed the District Court's decision. Tull appealed and the Supreme Court of the United States reversed and remanded the case for a jury determination of Tull's liability. The Supreme Court held that an action by the government seeking civil penalties and injunctive relief is analogous to a nuisance lawsuit that punishes culpable individuals in common law. This type of action does implicate the Seventh Amendment right to trial by jury. The Seventh Amendment states "[i]n suits at common law, where the value and controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." The Supreme Court construed this language to require a jury trial in those actions that are analogous to "suits at common law." The Supreme Court noted that this right to a jury trial applies to not only common law forms of action, but also causes of actions created by a congressional enactment. The Supreme Court held that actions brought by the government for civil penalties are considered a type of action in debt and requires a trial by jury. The Supreme Court noted that "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Id.* at 422. The Court also noted that if a legal claim is joined with an equitable claim, the right to jury trial remains intact. *Id.* at 425. The right to a jury trial remains even where an equitable claim is joined with a legal claim. The Supreme Court concluded that the Seventh Amendment required that petitioner's demand for jury trial be granted with respect to a determination of liability, but that a demand for jury trial with respect to determining the amount of a penalty was not applicable. The trial court could determine the penalty, if any.

without testimony by the creator of the document because the documents at issue were not offered to prove that the property was a wetland and, therefore, were not hearsay.

Morley argued that MDEQ had acted improperly and relied upon the existence of an agriculture drain to determine that Morley's property is a regulated wetland. The appellate court noted that the defendant had failed to raise this issue at the trial court level; therefore, it was considered forfeited.

The appellate court rejected Morley's objections to several other MDEQ exhibits admitted in the trial court proceedings. In each instance, the appellate court concluded that the trial court had not abused its discretion and that the evidence was admissible and/or did not constitute a plain error that affected Morley's substantial rights in the proceeding.

Judicial Takings & Payment of Penalty

Morley next challenged the trial court's order requiring Morley to cease all actions on the delineated 92.3 acres of wetlands and argued this ruling constituted a judicial taking. The appellate court concluded that the taking issue was raised for the first time in a motion for reconsideration; therefore, the argument was not preserved for appellate review.

The appellate court noted that in other prior opinions it had concluded that when individuals buy property that contains a wetland and they are unable to obtain a permit to fill, it is not considered a taking. The appellate court pointed out that there was evidence that Army Corps of Engineers, as early as 1994, had advised Morley that this property contained a wetland. The appellate court noted that Morley had failed to introduce any evidence into the record that he had no other economically viable use for the property as a result of MDEQ's injunction. The appellate court concluded that "a decrease in value is insufficient to establish a compensable taking."

Morley had asserted that his payment of the \$30,000 penalty should allow him to again farm his land. The appellate court concluded that the trial court had not conditioned any relief from the judgement on Morley's payment of a fine and that payment of the fine did not then give Morley the right to relief by undertaking farming without first obtaining a wetland permit.

Post Appellate Court Activity

Morley has filed an Application for Leave to Appeal with the Michigan Supreme Court on the issue of his right to a jury trial and judicial takings. The case has Michigan Supreme Court Docket No. 153072. The appellate docket is available [online](#).

Court of Appeals Invokes Doctrine of Primary Jurisdiction to Dismiss Environmental Tort Claims “Entangled by Administrative Law”

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Liable parties remediating groundwater contamination are required by the Natural Resources and Environmental Protection Act (NREPA) to provide notice to offsite property owners when the contamination migrates to below their properties.¹ Sending a notice of offsite migration of contamination can sometimes lead the recipient to sue, alleging that the contamination resulted from negligence, or constitutes a nuisance condition, or a trespass. Such lawsuits can include allegations that the contamination has reduced the fair market value of the noticed party’s property, and may also include claims for statutory relief under Part 201 or Part 213 of NREPA. There are high hurdles to environmental tort claims in Michigan. In 1992, the Michigan Supreme Court held that an alleged diminution in fair market value is not a legally significant interference with use and enjoyment of property to support a nuisance claim.² In 2005, the Supreme Court held that “mere” exposure to a hazardous substance is not a legally cognizable tort injury, and that a plaintiff must allege and prove a “present physical injury” in order to have a legally cognizable claim in tort.³ In 2013, the Supreme Court held that damages for emotional distress were not recoverable in cases of environmental contamination of property.⁴

In [*Carson City Hospital v. Quick-Sav Food Stores, Ltd.*](#)⁵, decided on April 28, 2016, the Michigan Court of Appeals used a different and potentially broader rationale for dismissing environmental tort claims—the doctrine of primary jurisdiction.

Drawing on the precedents set in two non-environmental cases, [*Attorney General v. Blue Cross Blue Shield of MI*](#)⁶ and [*Travelers Ins. Co. v. Detroit Edison Co.*](#)⁷, the Court of Appeals held that it was “compelled to conclude that the trial court properly invoked the doctrine of primary jurisdiction” and upheld the dismissal of plaintiff’s complaint, including claims for negligence, trespass, and nuisance, because the Michigan Department of Environmental Quality (MDEQ) had not yet issued or approved a final corrective action plan to address the contamination complained of by the plaintiff.

The facts underlying plaintiff’s tort claims were relatively strong. The plaintiff’s property operated as a family health clinic, often considered to be a risk-sensitive use by MDEQ. The migrating contamination was detected not only in groundwater below plaintiff’s clinic, but also

¹ See, e.g., MCL 324.20114(1)(b); 324.21309a(3).

² *Adkins v. Thomas Solvent*, 440 Mich 293 (1992).

³ [*Henry v. Dow Chemical Co.*](#), 473 Mich 63 (2005).

⁴ [*Price v. High Pointe Oil*](#), 493 Mich 238 (2013).

⁵ [*Carson City Hospital v. Quick-Sav Food Stores, Ltd.*](#), decided on April 28, 2016, Docket No. 325187 (unpublished).

⁶ [*Attorney General v. Blue Cross Blue Shield of MI*](#), 291 Mich App 64; 810 NW 2d 603 (2010).

⁷ [*Travelers Ins. Co. v. Detroit Edison Co.*](#), 465 Mich 185; 631 NW 2d 733 (2001).

in the soil below the clinic and the air inside the clinic, above cleanup levels. The clinic was located directly adjacent to the defendant's property, which operated a gas station and store, at which hundreds of gallons of gasoline had been released into soil and groundwater. During soil testing activities below the clinic's building, the plaintiff's expert detected a strong and clearly discernible odor of gasoline. In addition, gasoline vapor odors in indoor air were reported to the City of Ithaca by several homes and businesses in the vicinity of the defendant's site. An indoor air mitigation system had been installed at the plaintiff clinic's property, and elevated concentrations remained in soil and groundwater below the clinic's property. The contamination in Carson City Hospital was, at the time of the dismissal, being overseen by the MDEQ pursuant to Part 213, but there was no administrative order in place. The cleanup plan submitted by the defendant to MDEQ was untimely under Part 213, and had been rejected for substantive reasons by MDEQ. At the time of the dismissal, a revised plan had still not been submitted to MDEQ.

Nonetheless, the Court of Appeals agreed with the trial court that the case should be dismissed on the ground of primary jurisdiction. The court held that "The doctrine of primary jurisdiction reflects a recognition by the courts that legislatively-created administrative agencies are intended to be repositories of expertise and special competence uniquely equipped to examine facts and develop public policy within a particular field."⁸ The court ruled that "primary jurisdiction *must* be considered by courts of general jurisdiction whenever concurrent original subject matter jurisdiction relative to a disputed issue exists in both a court and administrative agency."⁹ The court held that, considering the stage of the MDEQ's involvement at the time of summary disposition, "litigation entailing a potential award of damages to compensate the clinic for response costs, lost business, or diminution in property value, as well as equitable or declaratory relief with respect to remediation and corrective actions, was simply premature and could have undermined and conflicted with the determinations yet to be made by the MDEQ."¹⁰

If, for example, the final corrective measures would eliminate exposure pathways between the residual contamination and the plaintiff property's occupants, or would reliably restrict exposure through an institutional control, then this might affect whether and to what extent the plaintiff could prove the remaining contamination had any legally significant interference with the future use and enjoyment of plaintiff's property.

It is not hard to see that the reasoning of this decision is easily adapted to other cleanups overseen by MDEQ or EPA under Part 201, Part 111, RCRA, and CERCLA.

⁸ [*Carson City Hospital v. Quick-Sav Food Stores, Ltd.*](#), p. 8.

⁹ *Id.* at p. 9 (emphasis added).

¹⁰ *Id.* at 11.