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ADMINISTRATIVE LIMITATIONS OF ARMY CORPS OF ENGINEERS' AUTHORITY OVER UPLAND AREAS

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When dealing with the United States Army Corps of Engineers (ACE), a wetland fill applicant may think that it has finally met the proverbial 800-pound gorilla. ACE often seeks to exercise its jurisdiction to activities in areas beyond waters and wetlands to upland portions of a permit applicant's property. Given the vast resources of the federal government to support ACE's assertion of jurisdiction, many landowners acquiesce rather than challenge ACE.

Some courts, however, do not share ACE's broad view of its jurisdiction. Recent decisions by federal courts have placed into question how far ACE can go to regulate wetlands.¹ Nonetheless, ACE often attempts to exercise control over activity in upland areas.

ACE's exercise of authority is most in question when ACE attempts to constrain activity on upland areas because the developer requires a permit to fill or dredge. Because of the proximity of a development to a wetland area and the need of a developer to impact wetlands, ACE often considers the environmental effects of upland development in addition to its review of fill or dredging in wetland areas. At this point, ACE may have overstepped its congressionally delegated authority.

This article reviews the basis for the exercise of ACE authority and what happens when ACE attempts to consider environmental effects of upland development, instead of the area over which ACE has direct authority. It is the author's position that without congressional approval to regulate development on upland areas, ACE's attempts to do so exceed its jurisdiction.

The Army Corps' General Jurisdictional Authority

The Clean Water Act (CWA) is the vehicle that provides ACE with its authority to regulate discharges into wetlands. Section 404 of the CWA provides that the Secretary of the Army, acting through ACE, may issue permits for the discharge of dredged or fill material into the navigable waters of the United States. 33 USC 1344(a).² CWA defines "navigable waters" as "the waters

of the United States, including the territorial seas." 33 USC 1362(7). ACE regulations define "waters of the United States" to include wetlands. 33 CFR 328.3. The Supreme Court has upheld ACE's exercise of jurisdiction over wetlands. **United States v Riverside Bayview Homes, Inc.**, 474 US 121; 106 S Ct 455; 88 L Ed 2d 419 (1985). However, even where Congress has acted to regulate certain environmental matters, this does not mean that all environmental matters are subject to federal regulation. **Save Barton Creek Ass'n v Federal Highway Administration**, 950 F2d 1129, 1144, *reh'g den* 957 F2d 869 (CA 5), *cert den* 505 US 1220; 112 S Ct 3029; 120 L Ed 2d 900 (1992).

When reviewing applications for fill or dredge permits, ACE regulations provide that ACE conduct a review of various factors in making its decision. 33 CFR 320.4. The items for ACE consideration include an assortment of factors.³ The "public interest" aspect of ACE's review is especially broad, as is demonstrated by the following:

All factors which may be relevant to the proposal must be considered, including the cumulative effects thereof: among them are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, considerations of property ownership and, in general, the needs and welfare of the people. 33 CFR 320.4(a).

It appears that this review authorizes ACE to exercise broad discretion to do what it thinks is in "the public interest." The question is, however, does the underlying enabling legislation allow such discretion?

Limiting An Agency's Jurisdiction To Congressionally Delegated Functions

It almost seems intuitive that under our federal form of government, an agency, as an arm of the executive

branch, can only exercise the authority granted to it by the legislative branch. One commentator put it this way:

The role of the administrative process should be one of fair and effective procedures by which citizens deal with their government and the government deals with its citizens. The broad policy planning is the ultimate responsibility of the President and Congress. The agency properly should continually investigate and evaluate policy within the defined scope of its authority. But it must act pragmatically and not as a messiah.

Williams, J.S., **Securing Fairness and Regularity in Administrative Proceedings**, 29 Ad.L.Rev. 1, 33-34 (1977). This restrictive view of administrative authority is found in the Administrative Procedures Act (APA), which describes the fundamental principle that a federal agency may regulate only in areas that Congress has delegated to it:

A sanction may not be imposed or a substantive rule or order issued except within the jurisdiction delegated to the agency and as authorized by law. 5 USC 558(b).

Agency activity beyond that which Congress delegated to it is improper.⁴

In 1999, the United States Court of Appeals for the Fourth Circuit considered the issue of when a federal agency overreaches and steps beyond its statutory authority granted to it by Congress and begins affecting areas over which it has no authority. In **FDA v Brown & Williamson Tobacco Corp.**, 153 F3d 155 (CA DC), *cert granted*, ___ US ___, 119 S Ct 1495; 143 L Ed 2d 650 (1999), the Court of Appeals ruled that the Food and Drug Administration (FDA) exceeded its authority when it attempted to regulate the sale and distribution of cigarettes and smokeless tobacco, finding that the Federal Food, Drug, and Cosmetic Act did not authorize the FDA to regulate tobacco either as a drug or as drug-delivering devices. In its initial discussion concerning its jurisdictional analysis, the Court of Appeals made the following observations concerning the limits on agency jurisdiction:

We begin with the basic proposition that agency power is “not the power to make law. Rather it is the ‘power to adopt regulations to carry into effect

the will of Congress as expressed by the statute.” **Ernst & Ernst v Hochfelder**, 425 U.S. 185, 213-14, 47 L.Ed.2d 668, 96 S.Ct. 1372 (1976) (quoting **Manhattan Gen. Equip. Co. v. Commission**, 297 U.S. 129, 134, 80 L.Ed. 528, 56 S.Ct. 397 (1936)). Thus our initial inquiry is whether Congress intended to delegate to the FDA authority to regulate tobacco products as “customarily marketed.” **Coyne Beahm[, Inc. v. FDA]**, 966 F.Supp. [1060,] 1380 [(M.D.N.C. 1997)]. However, we are of opinion that the issue is correctly framed as whether Congress intended to delegate such jurisdiction to the FDA. See **Bowen v. Georgetown Univ. Hosp.**, 488 U.S. 204, 208, 102 L.Ed.2d 493, 109 S.Ct. 468 (1988) (stating that “it is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress”); **INS v. Chadha**, 462 U.S. 919, 953 n.16, 955 n.19, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983) (providing that agency action “is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review” and “Congress ultimately controls administrative agencies in the legislation that creates them”). **Id.**, 153 F3d at 159 (footnotes omitted).

The basic premise of administrative law is that an agency acts within the power delegated to it. If the agency acts outside the powers delegated to it, the agency’s decision is improper and must be reversed. See **South Carolina Public Service Authority v FERC**, 850 F2d 788 (CA DC, 1988).

Limitations On The Army Corps’ Authority

With respect to ACE and its authority of wetlands, it may regulate filling of wetlands pursuant to section 404 of the Clean Water Act and it may regulate dredging pursuant to section 10 of the Rivers and Harbors Act. Neither of these statutes conveys to ACE the express authority to regulate the actual development of upland properties. Instead, each focuses on the actual filling and dredging of wetlands and the effects of those activities.

The position that ACE’s jurisdiction is limited to the actual fill or dredging is not a novel one. In fact, ACE has in the past acknowledged the limits of its jurisdiction in refusing to consider the impacts of overall projects when it had authority only over one discrete portion of the

project. For example, in **Water Works & Sewer Bd of the City of Birmingham v United States Department of Army**, 983 F Supp 1052 (ND Ala, 1997), the City of Birmingham challenged the proposed development of a water supply, treatment and distribution system by a neighboring locality. The City of Birmingham based its challenge, in part, on the alleged failure of ACE's public interest review under 33 CFR 320.4(a)(1). The City of Birmingham complained that ACE failed to consider the broader effects of the construction and maintenance of the entire intake facility or "the structures that help fulfill the purposes of the project" in its public interest review. According to the City of Birmingham, ACE could not focus solely on the one aspect of the development that required ACE approval, *i.e.*, the construction of the intake structure and pipeline that provided water to the facility. 983 F Supp at 1067. The Court disagreed with the City of Birmingham, finding that ACE could not review the "totality of all activities", but, rather, could consider only the direct, indirect, and cumulative impacts of the proposed activity." **Id.**

According to the District Court, "[i]n conducting the public interest review, the Corps is limited in the aspects of the entire project on which it may focus." 983 F Supp at 1066. The District Court found support for its position in ACE's regulations:

First, the language of the regulation defining the focus of the public interest review limits that focus to the effects of the "proposed activity":

The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the *proposed activity* and its intended use on the public interest. . . . *The decision whether to authorize a proposal*, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process.

33 C.F.R. § 320.4. The above makes clear that what is meant by "proposal" is that which the Corps has capacity to authorize. However, only the portion of an overall project that occurs in the navigable waters of the United States can be authorized by the Corps. The Corps has no authority to permit or even regulate any other activity, although it may consider the direct, indirect and cumulative impacts of the proposed

activity. The Corps' public interest review is not to cover the totality of all activities, however. 983 F Supp at 1067 (emphasis in original).

The District Court continued its analysis on the limits of ACE's public interest review by looking at other cases. For example, it cited **Save the Bay, Inc v United States Corps of Engineers**, 610 F2d 322, 327 (CA 5, 1980), for the proposition "that the Corps' regulations limited its public interest review in certain cases to the federal aspects of a project and that the Corps was not required to consider the entire proposed project in conducting its review." 983 F Supp at 1068. The District Court also looked to **Winnebago Tribe of Nebraska v Ray**, 621 F2d 269 (CA 8, 1980), which elucidated a three part test to assist in a determination of whether ACE would have jurisdiction over an entire project based on its ability to issue a permit for a portion of a project:

(1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government has given any direct financial aid to the project; and (3) whether "the overall federal involvement with the project (is) sufficient to turn essentially private action into federal action." 983 F Supp at 1069 (quoting **Winnebago Tribe of Nebraska v Ray**, 621 F2d 269, 272 (CA 8, 1980), quoting **NAACP v Medical Center**, 584 F2d 619, 629 (CA 3, 1978)).

As noted by the District Court, ACE essentially adopted this test in its Appendix B to 33 CFR Part 325. 983 F Supp at 1069-1070.⁵

ACE's attempt to exert jurisdiction over an entire project fails when the project is not sufficiently "federal" so that ACE can extend its long arm over the length and breadth of the proposed development. For example, if an applicant requires a permit solely for the filling of wetlands for road and utility crossings, there is no additional federal involvement. If the development is being conducted with no federal funding and occurs predominantly in unregulated upland areas, it is not sufficiently federal to invoke ACE's jurisdiction over an entire project.⁶ Therefore, it could not be considered of federal concern as to invoke federal jurisdiction over the entire project.

ACE thus, may exceed its authority when it focuses its review on harm far removed from the actual fill or

dredging that Congress authorized it to regulate. In some cases, ACE takes a different view, arguing that federal regulations require that it examine secondary impacts that would not occur “but for” regulated activities. But to contend so would misstate ACE’s authority. As noted above, its regulatory authority is limited to fill and dredging activities.⁷

Other Possible Bases For Army Corps’ Authority Over Uplands

If Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act do not provide ACE with authority over upland properties, what other basis would ACE possess for exercising jurisdiction over uplands? The likely answer from ACE might be that the National Environmental Protection Act (NEPA), 42 USC 4321 – 4370, provides the authority for it to consider secondary effects beyond those pertaining to actual fill or dredging proposed by an applicant. However, NEPA provides no additional authority beyond that already provided to ACE by the enabling statutes.

The Supreme Court has determined that while NEPA “set[s] forth substantive goals for the Nation, . . . its mandate to the agencies is essentially procedural.” **Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council, Inc.**, 435 US 519, 558; 98 S Ct 1197; 55 L Ed 2d 460 (1978). Similarly, the Supreme Court determined that “other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.” **Robertson v Methow Valley Citizens**, 490 US 332, 351; 109 S Ct 1835; 104 LEd2d 351 (1989)(footnote omitted).⁸ The Supreme Court seems to have already decided that the provisions of NEPA add only procedures, but no extra authority to regulate beyond that already delegated by Congress to the executive branch.

In **Cape May Greene, Inc v Warren**, 698 F2d 179 (CA 3, 1982), the Court of Appeals determined that the United States Environmental Protection Agency (USEPA) acted arbitrarily when it conditioned a grant of funds for the creation of a sewage treatment center on the prohibition of any hookups by a proposed seaside development. The developer of the housing expected to hookup to sewers serviced by a sewage plant for which a local community sought matching funds from USEPA. USEPA, however, conditioned the receipt of the funds on the prohibition of hookups from the coastal development.

The developer argued that the restrictive condition went beyond USEPA’s authority.

The Court of Appeals first found that NEPA “does not expand the jurisdiction of an agency beyond that set forth in its organic statute . . . ” **Id.** at 188 (citations omitted). “Thus, [NEPA] provides little, if any, support for an agency taking substantive action beyond that set forth in its enabling act.” **Id.** When an agency goes beyond its authority, the court made the following observations:

If an agency’s action is clearly within its statutory authority, then the arbitrary and capricious standard focuses on the factual issues. When, however, there is some doubt about the agency’s compliance with statutory constraints, that factor may throw a somewhat different light on the factual evaluation. As agency action moves toward the gray area at the outer limits of statutory authority, the arbitrary and capricious nature of the action may be more evident. For that reason, we have discussed the agency’s asserted sources of power. Another shadow is cast when agency action, not clearly mandated by the agency’s statute, begins to encroach on congressional policies expressed elsewhere. **Id.** at 190 (footnote omitted).

The court also determined that “when federal assistance is provided for what is essentially a state or local activity, the congressional preference for having policies initiated at the state level must be respected.” **Id.** at 191.

In **Metropolitan Edison Co v People Against Nuclear Energy**, 460 US 766; 103 S Ct 1556; 75 L Ed 2d 534 (1983), the Supreme Court addressed what a federal agency must consider when it analyzes a federal action under NEPA. A group of opponents to the siting of a nuclear facility argued that NEPA required the federal agency to consider the effects of psychological health damage resulting from the concern about the risk of nuclear accident. However, the Supreme Court determined that some effects are so attenuated they do not warrant study:

Some effects are “caused by” a change in the physical environment in the sense of “but for” causation, will nonetheless not fall within [NEPA] § 102 because the causal chain is too attenuated. 460 US at 774.

The case demonstrates that NEPA does not authorize consideration of things too far afield from what is in fact regulated. NEPA grants no independent authority for ACE to regulate uplands, and the **Metropolitan Edison** case underscores the fact that NEPA has its limits along the causal chain.

Conclusion

The focus of the authority given to ACE under the section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act is not on the development that will occur as a result of the proposed permit. Congress limited ACE's jurisdiction to the proposed fill and dredging. If the fill and dredging does not directly involve any of the resources on the upland portions of an applicant's property, ACE's insistence that it review an applicant's entire development goes well beyond the authority given to it by Congress. As such, ACE's actions in denying a permit based on potential negative secondary effects that are far removed from what is actually regulated is arbitrary and capricious.

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¹See, e.g., **United States v Wilson**, 133 F3d 251 (CA 4, 1997) (ACE could not regulate wetlands that had no direct or indirect surface connection to either navigable or interstate waters because of limitations placed on federal regulations by the Commerce Clause); **American Mining Congress v US Army Corps of Engineers**, 145 F3d 251 (CA 4, 1997) (redeposit of dredged material does not qualify as regulated filling activities); **Save Our Community v EPA**, 971 F2d 1155 (CA DC, 1992) (draining of wetlands did not require Section 404 permit).

²Section 10 of the Rivers and Harbors Act, 33 USC 403, provides that the ACE may issue permits for the excavation of, or the placement of fill into, the navigable waters of the United States.

³ACE regulations also provide for review of the applicant's effect on the following: public interest; wetlands; fish and wildlife; water quality; historic, cultural, scenic and recreational values; limits of the territorial sea; property ownership; coastal zones, marine sanctuaries; other federal, state or local requirements; safety of impoundment structures; water supply and conservation; energy conservation and development; environmental benefits; economics; and mitigation. 33 CFR 320.4.

⁴Note, however, that courts give some deference to administrative interpretation of statutes when done within the limits of congressional delegation. **Chevron USA v Natural Resources Defense Council**, 467 US 837, 865-66; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

⁵"[T]he NEPA review would be extended to the entire project, including portions outside waters of the United States, **only if sufficient Federal control and responsibility over the entire project is determined to exist**; that is, if the regulated activities, and those activities involving regulation, funding, etc. by other Federal agencies, comprise a substantial portion of the overall project." 33 CFR Part 325, App B § 7b (emphasis added).

⁶See **Macht v Skinner**, 916 F2d 13, 19 (CA DC, 1990), in which the court determined that ACE's jurisdiction solely over wetland permits with no other federal requirements was insignificant when compared to the rest of the project and did not sufficiently "federalize" a project.

⁷The **City of Birmingham** court also found that the "necessity" of the work that requires ACE authorization to the viability of the project "did not permit the Corps to consider the entire project." 983 F Supp at 1073.

⁸In **Robertson**, the Supreme Court determined that NEPA did not require a substantive requirement that a mitigation plan be formulated and adopted, only that mitigation be discussed. 490 US at 352.

THE STATE OF TRESPASS-NUISANCE LAW IN MICHIGAN

By Donnelly W. Hadden, Ernest P. Chiodo and Steven H. Huff*

Introduction

Currently, there is a movement afoot to eliminate the trespass-nuisance exception to governmental immunity. If the exception is not completely eliminated, the hope is to at least convert trespass-nuisance from a “no fault” cause of action to one requiring a showing of at least negligence.

Most significantly, the case of **CS&P v Midland**, 229 Mich App 141; 580 NW2d 468 (1998), is on appeal before the Michigan Supreme Court. That case involves a trespass-nuisance claim with respect to sewage intrusions. The defendant/appellant municipality is asking the Court to reverse the Michigan Court of Appeals’ decision. Meanwhile, in several state trial court cases involving claims of trespass-nuisance, the defendants have filed motions to stay their cases pending the outcome of the **CS&P** appeal. In some cases, they have been successful.

In addition, the Michigan legislature is contemplating its next move with respect to trespass-nuisance. The movement concerns itself with the “financial burden” that the **CS&P** decision places on municipalities and disregards the serious environmental and public health implications of eliminating the exception. If this movement is successful, the implications for environmental litigation against municipalities and other governmental entities could be devastating.

This article has been prepared in the hope of focusing the attention of the relevant legal community on public health and environmental concerns in the context of sewer back-ups. Specifically, it discusses whether public policy requires that local governments be liable without fault for sewage intrusions. This issue could be broadened, of course, to include any number of environmental cases involving pollution and contamination,¹ which are all ultimately matters of public health.

The Pending Appeal

In **CS&P**, broken risers in the sewer caused a blockage which, in turn, diverted water and sewage into a nearby commercial building. Plaintiffs CS&P and 3-S Construction occupied suites in the lower level of the building. The flooding caused extensive damage to the building and its contents. For several weeks, the tenants

could not occupy the lower level. Plaintiffs filed a one-count complaint against the City of Midland, claiming that it was liable for damages to the building and its contents under a trespass-nuisance theory. Defendant admitted that it owned the sewer system; that it had the responsibility to maintain, install and repair the sanitary sewers; and that the section of the sewer that failed had previously been cleaned and inspected. At the summary disposition stage, the trial court held that plaintiffs had properly pled trespass-nuisance causes of action, that a genuine issue of material fact remained as to plaintiffs’ claims and that governmental immunity would not be a defense for Midland. It also explicitly ruled that negligence was not an element that plaintiffs would need to prove at trial to establish liability under a trespass-nuisance theory. Following the trial, the jury returned verdicts for the plaintiffs.

Defendant/Appellant Midland’s sole issue on appeal was that the trial court erred in ruling that the plaintiffs did not need to prove negligence as a predicate to establishing liability under the trespass-nuisance exception to governmental liability. On March 31, 1998, the Michigan Court of Appeals affirmed the trial court. The Court of Appeals explained that it was obligated to follow **Peterman v Dep’t of Natural Resources**, 446 Mich 177; 521 NW2d 499 (1994), and reiterated that plaintiffs need not prove negligence as a predicate to establishing liability under the trespass-nuisance exception to governmental immunity. Subsequently, the Michigan Supreme Court granted leave to the appellant/defendant to appeal.

To date, briefs filed by the appellant and its *amici curiae* ignore the public health issue discussed below. Instead, they speak to the economic costs. There is not a single word about the public health aspects of raw sewage intrusions from their “sewerage” (i.e., sewer systems) into peoples’ homes and businesses.

Raw Sewage Intrusions Create A Public Health Risk.

Exposure to raw sewage can cause a large number of highly undesirable health effects. Adverse health effects of exposure to sanitary waste include serious viral, bacterial and parasitic diseases, poliomyelitis, diarrhea and other

intestinal disease, cholera, hepatitis, diseases from coliform bacteria, escheria coli, streptococci, yersina, salmonella and camphylobacter. These harmful effects are all established in the peer-reviewed medical and public health literature.

The reason local governments have sewerage is to take control of wastes and move them to a treatment plant for proper disposal. This is done to protect the public health.

Sewer systems have been a public priority since the time of the Roman Republic.² A failure to address the need for proper sewage disposal lead to great waves of sewage related epidemics that afflicted urban England in the 19th century beginning with the cholera epidemic of 1832.³ The death of Prince Albert, consort to Queen Victoria, in 1861 due to typhoid served as a warning that disease arising from poorly controlled sewage systems could kill the highborn as well as the low.⁴ The scourge of sewage-born disease did not leave London until commitment was made to build and maintain government-owned sewage disposal systems. This plan was completed by Sir Joseph Bazalgette in 1875.⁵ The failure of Hamburg, Germany, to properly manage sewage caused an epidemic of cholera to occur as late as 1892.⁶

It is a job of the government to protect the public's health to the maximum extent possible. Laws have been made to accomplish that, and the law of trespass-nuisance is part of the scheme. The Michigan Constitution of 1963, Art. 4, §51 says,

The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

Sewage disposal is work which involves public health and safety and a municipality has express authority to establish and maintain a sewage disposal system because it is necessary to avoid exposing people to raw sewage. **Young v Ann Arbor**, 267 Mich 241; 255 NW2d 579 (1934). "Public sanitary sewer systems are essential to the health, safety and welfare of the people of the state." Michigan Public Health Code, MCL 333.12752; MSA 14.14(12752). The code mandates that structures within a municipality that has sanitary sewerage available shall be connected to it. MCL 333.12753(1); MSA 14.15(12753)[1].

This history and the laws enacted to prevent its recurrence show the extreme importance of capturing sanitary wastes and conveying them away from people for safe disposal. The government has a paramount duty to protect the public health and vex the pale horse of the apocalypse.

When the sewer system fails to fulfill its function and instead disgorges its contents into private property instead of the treatment facility, i.e. when it runs backwards, the municipality should be liable for injuries and damages, without regard to fault. This is because the severity of liability should always be compared to the hazard involved, **Rylands v Fletcher**, LR 1 Ex 265, LR 3 HL (1868). It is well known that certain high-risk activities, such as blasting with explosives, have strict liability imposed upon them. Trespass-nuisance as declared in **Hadfield v Oakland County Drain Commissioner**, 430 Mich 139; 422 NW2d 205 (1988), and by the court below in **CS&P**, is not "strict" liability, but it is a form of "no-fault" liability (there being affirmative defenses), and it should be. There is no good reason why government should be immune from liability when its sanitary sewers spew back raw sewage into homes, schools, restaurants, medical facilities or any place where there can be contact by humans who could become diseased by it. To hold governments liable in trespass-nuisance without fault when their sewerage directs its contents in reverse is protective of the state's paramount concern for public health and is sound public policy.

The concept of "no-fault" liability is being successfully used in this state in other contexts. It facilitates settlement of disputes without recriminations, and where litigation is necessary it is made much less expensive.

Trespass-Nuisance Is Not Bottomed Upon Tort Law, But Upon Constitutional Law, And To Graft A Negligence Concept Onto "Taking" Law Would Be Very Bad Policy

Justice Brickley made it clear in **Hadfield**, *supra*, that the rule of trespass-nuisance as an exception to governmental immunity is founded upon the constitutional prohibition against the taking of private property without just compensation. See 430 Mich 155,165-169. A thorough historical analysis of traditional, conservative common-law principles is provided in **Hadfield** to support that foundation.

Trespass-nuisance as we know it now has a lineage in this state going back at least 122 years. **Ashley v Port Huron**, 35 Mich 296; 1877 Mich LEXIS 9 (1877). In **Attorney General v Grand Rapids**, 175 Mich 503; 141 NW 890 (1913) where the city discharged “night soil” that it had collected in its sewers into the river where it became a nuisance to downstream riparian owners, it was held that such riparian rights are as much protected by the constitution as other property and cannot be taken except by eminent domain or other due process of law. Citizens who have “night soil” invading their property from municipal sewer discharges have likewise experienced a constitutional affront.

If the Supreme Court decides that a plaintiff in trespass-nuisance must prove negligence, is it not saying that negligence is an element in a “taking” action? It is permissible then, for the government to appropriate private property without compensation provided it does not do so negligently! Unanticipated consequences are a pitfall of judicial activism. It is better to adhere to the settled, no-fault law of trespass-nuisance.

The Unpublished Court Of Appeals Cases Do Not Support The Municipalities’ Proposed Shift.

There are two, unpublished opinions from the Court of Appeals which were entered *before CS&P* was decided and one which was decided two months later. See **Seventh Day Adventists v City of Fremont**, No. 200633 (Mich App, May 29, 1998); **Adams v Charter Township of Van Buren**, No. 186800 (Mich App, June 27, 1997); **Bithell v Bloomfield Township**, No. 185106 (Mich App, March 7, 1997). Because they were not published, they have no precedential value, but governmental entities are fond of quoting from two of them. They don’t mention the third.

That “third” case, **Bithell**, involved raw sewage leaking from the government’s sewer into plaintiff’s basement. A summary dismissal of the suit was reversed because there was a fact question about whether the township exercised sufficient control over the sewer to fit within the trespass-nuisance rule, and also because the plaintiffs had stated a viable “taking” claim. This opinion, by Judges Gribbs, Young and Caprathe, correctly follows the trespass-nuisance rule and leaves the question of the element of “control” in the trespass-nuisance doctrine open for the trier of fact where there is evidence to support a finding of government control. See 16 *Mich Env L J*, No 4, pp 22-23 (1997).

In **Seventh Day Adventists v City of Fremont**, No. 200633 (Mich App, May 29, 1998), there was another fact question. In that case, the Court of Appeals held there was an “intervening cause” for the sewage intrusion: an unprecedented combination of precipitation events. According to the records and briefs in that case, what the Court of Appeals panel called an “intervening cause” was actually the Act of God or *force majeure* defense. There the city invoked the Act of God defense as an affirmative defense to the trespass-nuisance claim. It was pleaded and proved in a proper manner and defeated plaintiff’s trespass-nuisance claim with respect to the causation or control element. There is nothing precedential about that. That affirmative defense is available. That is one reason why trespass-nuisance is “no-fault”, but not “strict”, liability. Overall, this case fits within the current trespass-nuisance doctrine set forth in **Hadfield, Peterman and CS&P**. It is a good example of how well the checks and balances within the trespass-nuisance exception already work.

Adams v Charter Township of Van Buren, No. 186800 (Mich App, June 27, 1997), on the other hand, is just plain bad law. The dissent was correct. According to the Court of Appeals, the key issues were what constituted the nuisance and whether the governmental entity controlled that nuisance. See 16 *Mich Env L J*, No 4, pp 22 (1997). The Court considered the nuisance to be the sewage itself because that is what the plaintiffs claimed.⁶ The majority held that although the township owned the sewer system, it did not own or create the sewage and thus was not liable for it when it entered plaintiffs’ basement. That was ludicrous logic. Although the township did not create the sewage, it owned it under the principle of abandoned property.⁷

Abandonment consists of an intention to relinquish and an act by which such intention is carried out. MLP Abandonment §1. It is quite obvious that the generators of the sewage or “night soil” intended to abandon it. They are required to do so by the law that requires them to be connected to the municipal sewerage. The act of flushing is the act of abandonment. Abandoned property becomes owned by whoever takes possession of it. 1 Am Jur 2d 21, *Abandoned, Lost etc. Property* §16. Once it is in the local government’s sewerage, it is possessed, and therefore “owned” by that government. It is not owned by anyone else anymore.

This “abandonment” aspect can be seen in other contexts. For example, the U.S. Congress, in the federal Clean Water Act, has provided for grants to Publicly Owned Treatment Works (POTWs) to eliminate the discharge of pollutants into the navigable waters, to utilize recycling techniques and new and improved methods of waste treatment management for municipal waste so that pollutants will not migrate to cause water or other environmental pollution. 33 USC 1281(g)(5). Recycling of municipal waste by de-toxification and sanitization could make it into a commercially viable fertilizer. It would most likely be a surprise to operators of POTWs to discover that they do not own the material they are processing.

Finally, it was unreasonable for the **Adams** Court to conclude that there was no evidence showing that the defendant owned or controlled the property from which the raw sewage itself arose. If **Adams** is correct on this point, then only if a plaintiff could show that the raw sewage in his or her home originated from a toilet in a municipality-owned building, could he or she prevail on a trespass-nuisance claim. Obviously, that is an outrageous result. No one is able to point to the particular raw sewage which backs up into someone’s home and say it originally came from property A, B and/or C. From what property did the nuisance arise? There is only one reasonable answer: the municipality’s sewer system.

Conclusion

Governmental entities are urging the Michigan Supreme Court to reverse the Court of Appeals, to reverse prior sound decisions of its own and to reverse a long common-law tradition which is founded upon the constitution and public policy. At a minimum, they are asking the Supreme Court to relax the standard of conduct for a governmental entity such that it could cause severe damage to the public health of the citizens of this state with limited or no civil liability for doing so. Public policy requires that local governments must be liable for sewage intrusions, as well as other pollution and contamination, without regard to fault, as long as all elements of a trespass-nuisance claim are met.

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¹*Sewage has been held to be a “pollutant” within the meaning of an insurance policies’ pollution exclusion. **Hydrodynamics, Inc v Auto-Owners Ins Co**, No 193389 (Mich App, July 11, 1997) (unpublished per curium decision).*

²*Rosen, George, A History of Public Health, Johns Hopkins University Press, 1958, pp 17-18.*

³*McNeil, William H., Plagues and Peoples, Anchor Books, Garden City, NY 1976, pg 240*

⁴*Kiple, Kenneth F., Plague, Pox & Pestilence, Disease in History, Barnes & Noble, Inc., 1997, pg 16.*

⁵*Hunter, Donald, The Diseases of Occupations, 6th Ed. 1978, Hodder & Stoughton. Ltd., London, pg 102.*

⁶*McNeil, supra at pg 242.*

⁷*Part of the problem for plaintiffs is that the Court of Appeals accepted its allegation that the nuisance was the raw sewage itself, viewing the evidence in the light most favorable to plaintiffs. Defendant, on the other hand, contested that the nuisance was a grease blockage (allegedly caused by a third party). For whatever reason, the Court did not consider the reality of the situation, which was that the nuisance condition was the sewer system (including the blockage aspect), together with the sewage and the threat of future sewage back-ups.*

⁸*Of course whether or not the municipality actually owned the sewage itself was not the only relevant inquiry. The Court of Appeals should have been looking at the creation and/or control of the municipality with respect to the entire nuisance condition at issue. See footnote 7 above.*

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COMMITTEE REPORTS

ENVIRONMENTAL LITIGATION COMMITTEE

By Steven H. Huff, Chairperson

STATE OF THE LAW: EXPERT WITNESS TESTIMONY

Back in 1993, the U.S. Supreme Court declared that a trial court is the gatekeeper for insuring that expert testimony not only is relevant to the task at hand but also rests on a reliable foundation. **Daubert v Merrell Dow Pharmaceuticals, Inc.**, 509 US 579; 113 S Ct 2786; 124 L Ed 2d 469 (1993). The **Daubert** opinion looked to FRE 702¹ and dealt with expert opinion in the *scientific* setting. It suggested four factors for consideration by a court in attempting to determine the reliability of an expert's testimony, but declined to make a definitive list. The factors are:

- a. whether the theory or technique can be and has been tested;
- b. whether the theory or technique has been subjected to peer review and publication;
- c. the known or potential rate of error in the technique, and the existence and maintenance of standards controlling the technique's operation; and
- d. the degree of acceptance in the scientific community. **Daubert**, at 593; see also 12 *Mich Env L J*, No 3, p 25 (1993).

At the federal court level, the Sixth Circuit applied **Daubert** in a *nonscientific* setting in **Berry v Detroit**, 25 F3d 1342 (CA 6, 1994). It explained at 1350:

Although, as indicated, **Daubert** dealt with scientific experts, its language relative to the ‘gatekeeper’ function of federal judges is applicable to all expert testimony offered under Rule 702. ‘[U]nder the Rules the trial judge must ensure that any and all . . . testimony or evidence admitted is not only relevant, but reliable. . . .

Id. at 1350 (quoting **Daubert**, 509 US at 589).

On March 23, 1999, the U.S. Supreme Court extended **Daubert** to settings involving technical or other specialized knowledge in **Kumho Tire Co Ltd v Carmichael**, 119 S Ct 1167 (1999). Significantly, however, the Court explained that the specific **Daubert** factors may NOT be useful in evaluating other proposed expert testimony (or even all scientific testimony) and that trial judges may use “reasonable measures” to evaluate a proposed expert’s testimony. In addition, the Court explained that decisions about how to evaluate proposed expert testimony, as well as decisions about whether to admit the testimony, can only be overturned on appeal if they constitute an abuse of discretion. See also **General Electric Co v Joiner**, 552 US 136; 118 S Ct 512; 139 L Ed 2d 508 (1997); **Anton v State Farm Mutual Auto Ins Co**, No. 203260; 1999 Mich App LEXIS 318 (Mich App, Dec 3, 1999).

Interestingly, it should not be assumed that **Daubert/Kumho** would clearly be applied in Michigan federal courts. In a **Daubert** footnote, the Court did not address an argument that applying the “general acceptance” rule in **Frye v United States**, 293 F1013 (DC Cir, 1923) to a diversity case would constitute the application of a judge-made rule which affected substantive rights and thereby violated the Erie doctrine.

At the state court level, MRE 702 controls. It states:

If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (emphasis added)

Of note is that the bold language is missing from FRE 702. See **People v Haywood**, 209 Mich App 217, 221; 530 NW2d 497 (1995). This allows for MRE 702 to be

distinguished from FRE 702, and has meant that the application of the **Daubert** approach to Michigan state court cases was not a foregone conclusion.

Post-**Daubert**, Michigan state courts have continued to apply the old “general acceptance” test for the admissibility of expert testimony which was set forth in **Frye v United States**, 293 F1013 (DC Cir, 1923) and adopted by Michigan in **People v Davis**, 343 Mich 348; 72 NW2d 269 (1955). See also **People v Marsh**, 177 Mich App 161; 441 NW2d 33 (1989); **Anton v State Farm Mutual Auto Ins Co**, No. 203260; 1999 Mich App LEXIS 318 (Mich App, Dec 3, 1999). The **Davis-Frye** approach requires the court to find that the scientific evidence at issue has been generally accepted in the field to which it belongs before it is admissible under MRE 702. The Court of Appeals has explained on a few occasions that the **Davis-Frye** standard will control until the Michigan Supreme Court says otherwise. See, e.g., **People v McMillan**, 213 Mich App 134; 539 NW2d 553 (1995); **People v Lee**, 212 Mich App 228; 537 NW2d 233 (1995).

Although not doing away with the **Davis-Frye** approach, a year or so after the **McMillan** and **Lee** decisions, the Michigan Supreme Court remanded a case and advised the Court of Appeals that it must make its decision pursuant to MRE 702. **Nelson v American Stabilizer**, 453 Mich 946 (1996). It also explained that if the court determined the evidence was admissible, it had to provide a summary of the “recognized scientific principles supporting the testimony.” **Id.** In **Nelson v American Sterilizer (On Rem)**, 223 Mich App 485; 566 NW2d 671 (1997), the Michigan Court of Appeals stated that a trial court must

determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert’s testimony before that testimony may be admitted. To determine whether the requisite standard of reliability has been met, the court must determine whether the proposed testimony is derived from recognized scientific knowledge.

It defined “recognized” to mean “a general acknowledgment of the existence, validity or authority or genuineness of a fact, claim or concept” and held the proffered evidence inadmissible under MRE 702. **Id.** at 490.

In 1996, however, after the **Daubert** decision, the Michigan legislature adopted statutory amendments which essentially combine **Daubert's** admissibility factors with the **Davis-Frye** "general acceptance" test. Thus, in determining whether or not expert witness testimony should be admitted, a state court judge is to consider seven factors:

a. Whether the opinion and its basis have been subjected to scientific testing and replication.

b. Whether the opinion and its basis have been subjected to peer review publication.

c. The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

d. The known or potential error rate of the opinion and its basis.

e. The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

f. Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

g. Whether the opinion or methodology is relied upon by experts outside the context of litigation. MCL 600.2955(1); MSA 27A.2955(1).²

As for novel methodologies or forms of scientific evidence, it may only be admitted "if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field." MCL 600.2955(2); MSA 27A.2955(2).³

At the state court level, there has not yet been any application of a **Daubert**-type standard to *nonscientific* expert testimony. The title of the relevant statutory section is "Expert scientific opinion, admissibility..." MCL 600.2955.⁴ The statute begins: "In an action for the death of a person or for injury to a person or property, a

scientific opinion . . ." MCL 600.2955(1); MSA 27A.2955(1)(emphasis added). Thus, on its face, the statute itself does not apply to nonscientific opinion testimony. This is further borne out by the factors themselves, many of which relate specifically to scientific methodology and the scientific community, and would not be relevant or applicable to a nonscientific approach.

In any event, in a toxic tort or other environmental case where a plaintiff is relying on a novel methodology or form of *scientific* evidence, the plaintiff may want to file in federal court. This is because such testimony is more likely to be admitted under **Daubert/Kumho** than under a **Davis-Frye** "general acceptance" approach. If the reliance on a novel methodology is not discovered until after the case is filed in state court, a plaintiff may want to seek a change of venue to federal court. A defendant in such a case would probably prefer to keep the case in state court.

¹*FRE 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.*

²*Some attorneys have inquired as to the constitutionality of this provision. Although not determinative of the issue, a parallel statutory rule of evidence regarding the admissibility of expert testimony in a medical malpractice action was found to be constitutional last year. See **McDougall v Schanz**, 461 Mich 15; 597 NW2d 148 (1999).*

³*As to novel methodologies, the **Nelson** Court had stated: "As long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible, no matter how novel." 566 NW2d at 674.*

⁴*Interestingly, the title of this section in the MSA version is "Scientific or expert opinion or evidence; admissibility" implying that it may apply to nonscientific evidence. MSA 27A.2955(emphasis added).*

PROGRAM COMMITTEE

A meeting of the Program Committee was held on February 15, 2000. In attendance in person were John Tatum, Kurt Brauer and Tom Wilczak, with Charlie Denton, William Burton, Susan Topp, John Byl, and Joan Tisdale participating by telephone conference.

1. Committee Reports

A. **Water Committee** (Ken Gold) - no report.

B. **Environmental Litigation Committee** - Charlie Denton will follow up with Jeff Magid regarding a possible Committee program on the soon to be issued contested case rules, with the possibility of undertaking a joint program with the Administrative Law Section.

C. **Superfund Committee** - John Tatum reported that the Committee is discussing the possibility of a program concerning legislative efforts to overturn the Shell decision. (A bill was introduced by Rep. DeVuyst on Bill No. 5418 which would amend Part 201.) Depending upon the timing of the issuance of a public comment draft of the Part 201 General Rules packet, the Superfund Committee may consider a program on the proposed rules. Alternatively, this may be a topic for the September 2000 Annual Meeting in Detroit.

D. **Air Committee** (Ken Gold) - no report. Tom Wilczak contacted Lee Johnson after the meeting. The Air Committee will meet 3/11/00 to discuss possible programs.

E. **Ethics Committee** - Sharon Newlon reported by e-mail that the Ethics Committee has been newly reformulated, and that a meeting is scheduled for March 6 at 5:30 p.m. at the Detroit office of Dickinson Wright.

F. **Solid & Hazardous Waste Committee** - John Byl reported that approximately 15 people attended the last meeting on January 29, 2000 and that the Committee is looking at a possible program focusing on the various environmental insurance policy options currently available. This program tentatively will take place in April.

G. **Wetlands Committee** - Tom Wilczak reported that Paul Bohn is exploring the possibility of a repeat program in September at Crosswinds on wetland issues.

He further reported that he will be speaking with Saulius Mikalonis regarding co-sponsorship of this program by the Real Estate Section.

2. Local Bars/DEQ Regional Roundtables

Bill Burton provided a memo that summarized his discussions with DEQ staff concerning possible topics for the roundtables (see attached). As indicated by the attachment, there were several possible topics of discussion that cut across various program divisions, including Air Quality, Waste Management, Surface Water Quality, and Land and Water Management. Specific topics of particular interest for the Traverse City Program were also noted. It was further suggested that there might also be pertinent topics involving the Environment Response Division, especially a new model AOC for Part 201 sites that utilize institutional controls.

It was tentatively decided that the first program will take place in Traverse City in mid-May with the program being a one to two hour morning program, or possibly lunch program. Sue Topp has volunteered to head up this effort and will attempt to enlist the assistance of other practitioners in the Traverse City area, including Joe Quandt, and Chris Bzdok. Kurt Brauer volunteered to assist Sue Topp in obtaining Chris Bzdok's participation. Sue Topp indicated that she would solicit the participation of Local Bar Associations in several surrounding counties.

John Byl stated that he would undertake similar efforts in the Grand Rapids area with the aim of organizing a roundtable for sometime in early June. He too will solicit the participation of the Local Bar Associations in the surrounding counties. He further stated that he will speak with Mike Ortega to see if it made logistical sense to have a combined program for both the Grand Rapids and Kalamazoo areas.

John Tatum indicated that all 1,100 members of the environmental law section are now on the list serve and that they can be sorted by county. John further volunteered to send both Sue Topp and John Byl copies of the membership list for the target counties in each area. A limited mailing can then be undertaken in addition to posting the roundtable announcements on the list serve. Tom Wilczak stated that he will coordinate the Livonia/

Detroit program with Sue Johnson. It also was noted that Lavonda Jackson and Jim O'Brien have volunteered to assist with this meeting.

3. Planning 2000 Programs

A. **Higgins Lake - June 9, 2000** Al Howard has been confirmed as a speaker for the Friday afternoon program which, weather permitting, will take place on the beach.

B. **See MDEQ Guidebook** - Tom Wilczak has volunteered to continue contacts with MDEQ regarding the status of the book's publication and release, with the possibility of undertaking some joint program with MDEQ.

C. **Environmental Economic/Financial Incentives** - John Byl stated that he will contact Bob Schroder to see if Bob is interested in putting a program together around this general topic.

4. Survey of Membership

It was decided that the Program Committee will utilize the list serve to conduct a brief survey of the members of the Environmental Law Section regarding areas of interest for possible programs. A draft brief survey was circulated and comments were solicited. Any comments received will be incorporated and the survey finalized and sent in the near future.

SURFACE WATER/GROUNDWATER COMMITTEE

By Scott D. Hubbard, Chair

The Surface Water/Groundwater Committee met by conference telephone call on Wednesday, February 16, 2000, for the purpose of planning an educational program for Section members. Suggested program topics include total maximum daily loads, groundwater permit funding, the recently issued federal stormwater permit regulations, water quality trading, citizen suit standing, and other topics of current interest. The Committee is in the process of confirming the availability of proposed member and guest speakers. The Committee hopes to present the program in late April or May 2000.

FEDERAL ADMINISTRATIVE DEVELOPMENTS

Revised Regulations for Class V Injection Wells

On December 7, 1999, EPA promulgated amendments to its underground injection control (UIC) regulations. 64 FR 68546 (12/7/99). The rule bans new motor vehicle waste disposal wells and new and existing large-capacity cesspools nationwide. The rule also requires a phase-out of existing cesspools by April 2005, and imposes conditions for certain existing motor vehicle waste wells.

Phase II Stormwater Regulations

On December 8, 1999, EPA promulgated a final "Phase II" stormwater permit rule package. The regulation became effective on February 7, 2000. 64 FR 68721 (12/8/99). The rules extend the coverage of the federal stormwater permit program to small municipal storm sewer systems (serving less than 100,000 persons) and construction sites that disturb less than five acres. For industrial facilities, the new rules exclude stormwater discharges from facilities that have "no exposure" of industrial activities or materials to stormwater. The rules also extend permit deadlines for certain types of facilities.

Ammonia Criteria

On December 22, 1999, EPA announced the publication of its 1999 Update of Ambient Water Quality Criteria for Ammonia. 64 FR 71973 (12/22/99). The update contains EPA's water quality standard recommendations to states for ammonia.

Categorical Standards for Landfills

On January 19, 2000, EPA promulgated categorical effluent limitations and guidelines for existing hazardous and nonhazardous landfills that discharge process effluent (*i.e.*, leachate) pursuant to NPDES permits. 65 FR 3007 (1/19/00). The rules do not affect landfill operations that discharge leachate to publicly owned treatment works.

Categorical Standards for Hazardous Waste Combustors

On January 27, 2000, EPA promulgated categorical effluent limitations and guidelines for the commercial hazardous waste combustor segment of the waste combustion industry. 65 FR 4360 (2/28/00). The rule applies to hazardous waste combustion facilities, except cement kilns, regulated as "incinerators" or "boilers and industrial furnaces" under the Resource Conservation and Recovery Act. The regulation includes limits on the discharge of pollutants into navigable waters of the United States and to publicly owned treatment works by existing and new stand-alone commercial hazardous waste combustors that incinerate waste received from off-site. The regulation became effective February 28, 2000.

Dioxins in Sewage Sludge

On December 23, 1999, EPA proposed to amend the federal management standards for sewage sludge by adding concentration limits for dioxins and dioxin-like compounds in sewage sludge that is applied to land. 64 FR 72045 (12/23/99). Certain facilities would be exempt under the proposal, including treatment works with a flow rate of one million gallons per day or less.

Proposed Suspension of Impaired Waters Submittal

On February 2, 2000, EPA proposed to suspend the requirement under the agency's water quality planning and management regulation that states, territories, and authorized tribes submit lists of impaired and threatened water bodies by April 1, 2000. 65 FR 4919 (2/2/00). The impaired waters list is required by federal Clean Water Act Section 303(d). The comment deadline on the proposal was March 3, 2000. Under the proposal, the submittal requirement would resume on April 1, 2002,

and on April 1 of subsequent even numbered years. The proposal would not apply to any action required under a court order, consent decree, or settlement agreement dated prior to January 1, 2000. The proposal is based in part on the currently proposed sweeping amendments to EPA's TMDL regulations.

STATE ADMINISTRATIVE DEVELOPMENTS

Water Quality Trading Rules

MDEQ has proposed a package of regulations that would allow point and nonpoint sources on the same watershed to generate, use, and trade effluent credits. Under the proposal, nutrient trading among and between point and nonpoint sources may be accomplished by rule. Trading for other pollutants may occur on a case-by-case basis. The rule contains its own system of penalties and sanctions, including a provision for treble damages in some cases. A public hearing on the proposal is scheduled for March 15, 2000, and MDEQ has stated that it will accept public comments on the proposal until at least March 22.

Part 5 Rules Status Report

MDEQ continues to prepare the long-awaited Part 5 rules under NREPA Part 31 for formal rulemaking. The rules establish spill prevention, planning, and reporting requirements for oil and polluting materials, and substantially overhaul the existing Part 5 rules. MDEQ had hoped to proceed to public notice and formal rulemaking in April 2000. The agency now hopes to initiate rulemaking in May or June 2000.

WETLANDS AND NATURAL RESOURCES COMMITTEE

By Paul F. Bohn, Chair
and Richard Patterson, Co-Chair

As a part of this report Mr. Richard Patterson of the Michigan Department of Environmental Quality/Office discusses the new rules effective April 19, 2000 pertaining to wetland mitigation and the ubiquitous "feasible and prudent alternative" analysis under the Wetlands Act. In addition to these new rules, practitioners should expect that a rules package governing the procedures to be followed in contested case proceedings will be forthcoming from the MDEQ shortly. The Michigan Administrative Procedures Act gives little detail and provides even less formal procedure to follow in a contested case proceeding. Historically, the lack of such guidelines has hampered the process, forcing the ALJ's office to create pseudo-court rules on a per case basis.

It is believed that the new rules will provide needed structure to contested case proceedings. In the last several years, the Office of Administrative Hearings has made a number of changes which have greatly streamlined the contested case process, and reduced the waiting period for a case to be heard from approximately 18 months to 6 months. New voluntary mediation/facilitation guidelines have also been implemented.

Enforcement actions for violation of the Inland Lakes and Streams and Wetlands Act are on the rise. Mark Richardson, the Macomb County Special Prosecutor charged with enforcing environmental crimes, has gone on record that his office will be actively pursuing violators in Macomb County. After the critical review the MDEQ's wetland program received in the September 24, 1998 Public Employees for Environmental Responsibility (P.E.E.R.) Report, this is not surprising. A copy of P.E.E.R.'s Report can be found at <http://www.peer.org/action/news>. Practitioners in Southeastern Michigan have seen a rise in enforcement activity in both Macomb, Wayne, Livingston and Washtenaw Counties. I am sure Committee members would be interested in hearing from members in the Western and Northern portions of the state concerning their experiences as well.

April 1999 was American Wetlands Month. The Michigan Sea Grant Communications Project (phone 734-764-2421, or <http://www.engin.umich.edu/seagrant/wetlands.html>) is adding Great Lakes costal wetlands

maps to their website. The maps are a wonderful resource for anyone involved in permitting issues along the Great Lakes shoreline.

The Committee has met for the last two years in September at Crosswinds Marsh, located in Sumpter Township. Crosswinds Marsh is the 900 acre plus wetlands mitigation complex created as a result of the expansion of the Detroit Metropolitan Airport. Sumpter Township is approximately twenty minutes south of the Livonia, Michigan MDEQ offices. Apart from the beautiful locale, both meetings have been well attended by members of the Committee and guest speakers. Last September, Mr. Richard Lacasse, Chief Administrative Law Judge of the MDEQ and his administrative assistant, Mr. Dennis Mack, attended. Additionally, Ms. Diana Klemans and Ms. Amy Lounds of MDEQ's Inland Lakes and Wetlands Unit attended to discuss mitigation banking. Ms. Klemans will be heading up the wetland banking program for MDEQ.

Membership Update

In keeping with the many housekeeping chores of the new millennium, it is time to update (and hopefully expand) the Committee's membership list. My e-mail address is FTBENV@AOL.COM. I would greatly appreciate all active Committee members, and anyone interested in joining the Committee, to e-mail me their name, address, phone/fax, and e-mail address.

NEW WETLANDS REGULATIONS

On January 18, 2000 the ORR certified a substantial amendment to the existing Rule 5 governing wetland mitigation (1988 AACS, R 281.925) and a new rule specifically addressing permit application review criteria under Part 303 (R 281.922a), the rules are effective as of April 19, 2000.

Wetland Mitigation

The prior rule provided that the department may impose conditions mitigating impacts and "consider" a mitigation plan if submitted by the applicant. Under

the amendment, mitigation will be required as a condition of all wetland permits except if it is waived by the department when less than one third of an acre is impacted and no reasonable opportunity for mitigation exists or the basic purpose of the activity is to create or restore a wetland or increase wetland habitat. The existing blanket exemption for activities permitted under a general permit is applicable only if approved mitigation credits cannot be acquired from an established mitigation bank.

The amendment retains the requirements that mitigation be considered only after the impacts of the project are otherwise permissible, no feasible and prudent alternatives exist and all practical means to minimize impacts have been utilized.

The new rule provides three ways to accomplish mitigation:

1. A restoration or preservation of existing wetlands.
2. Creation of new wetlands.
3. Acquisition of approved credits from a wetland mitigation bank.

Preservation of existing wetlands may be considered as mitigation only if the department determines that:

1. The wetland to be preserved performs “exceptional physical or biological functions that are essential to the preservation of the natural resources of the state” or are rare or endangered.
2. Are under a demonstrable threat of loss or substantial degradation due to human activities not under the control of the applicant and not otherwise restricted by law.
3. Preservation as mitigation will serve to protect wetlands that would otherwise be lost or substantially degraded.

Restoration of previously existing wetlands is stated to be preferred over creation of new wetlands. Additionally, enhancement of existing wetlands is specifically stated not to be considered mitigation.

The rule also contains eight specific requirements for a mitigation plan and provides that the department may

incorporate all parts of the proposed plan as permit conditions. In order to insure no net loss of wetlands upon completion, the rules on the existing criteria have been tightened. Mitigation on site is still preferred where “practical and beneficial” and, if not, in the immediate vicinity (the same watershed and municipality) and elsewhere only where the above are “infeasible” as opposed to the existing “inappropriate and impractical” standard.

Mitigation will be required to be of “similar physical/biological type” as the impacted wetland where feasible and practical. Specific mitigation ratios have been added as follows:

1. 5 to 1 for rare or imperiled wetland on “a statewide or global basis”.
2. 2 to 1 on forested wetlands.
3. 1.5 to 1 on all others
4. 10 to 1 for preservation of existing wetlands

Ratios may be increased if the replacement wetland is a different type than the one impacted and shall be increased if activities were undertaken without a permit. Mitigation for wetland dependent activities (see new definition in added permit review rule) will be determined by the department on a site specific basis. Finally, the rule provides that the department may require financial assurances for completion and that the mitigation area be protected by a permanent conservation easement or similar document.

Permit Review

The new rule refers to the criteria of section 30311(4) and reaffirms the applicant’s burden of demonstrating that an unacceptable disruption will not occur. The applicant also has the burden of showing that the project is primarily dependent upon being located in the wetland and that no feasible and prudent alternatives exist. It is required that the applicant provide “adequate information, including documentation as required by the department” which the department will “independently evaluate”. It further requires a “complete definition” of the project purpose and associated activities and prohibits a definition so narrow as to “limit complete analysis of wetland dependency and feasible and prudent alternatives”.

Dependency is restrictively defined as:

A proposed activity shall be considered primarily dependent upon being located in the wetland only if that activity is of the type that requires a location within a wetland and wetland conditions in order to fulfill its basic purpose; that is, it is wetland dependent. An activity which can be undertaken in a non-wetland location is not wetland dependent. By way of example, but not of limitation, a residential development does not require a location in a wetland and wetland conditions in order to fulfill its basic purpose of sheltering people and, therefore, is not wetland dependent.

An alternative is feasible and prudent if it is available and capable of being done after taking into consideration cost, existing technology and logistics, and it has less adverse impact on aquatic resources. A feasible alternative may include "use of a location other than the proposed

location and/or a different configuration, size, or method which will accomplish the purpose." There is a presumption that if the activity is wetland dependent, as defined, that a feasible and prudent alternative exists and that a non-wetland location will have less adverse impact, unless the applicant "clearly demonstrates otherwise".

Lastly, feasible and prudent alternative locations are considered to include:

1. An area not presently owned by the applicant which could be reasonably obtained, utilized, expanded or managed to fulfill the basic purpose.
2. An alternative that does not accommodate components of a proposed activity that are incidental to or severable from the basic purpose.
3. An alternative even if it does not maximize profit or if it involves higher costs which are not exorbitant.

MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from July 1, 1999 through January 2000.

United States v Tennessee Air Pollution Control Board, 185 F3d 529 (CA 6, 1999)

The Technical Secretary of the Tennessee Air Pollution Control Board imposed a civil penalty against the United States Army for violations of the Tennessee Air Quality Act. The United States did not dispute the violations, which included failure to give notice of asbestos removal and improper handling of asbestos. However, the United States asserted a sovereign immunity defense. The Tennessee Air Pollution Control Board, after an administrative appeal by the United States, rejected the sovereign immunity defense.

The United States sought judicial review claiming that while sovereign immunity had been expressly waived in the Clean Air Act (CAA), 42 USC 7418(a) and 7604(e), for injunctive relief, civil penalties may not be

imposed under the CAA. The Sixth Circuit Court of Appeals held that the CAA, 42 USC 7418(a) and 7604(e), contains a waiver of sovereign immunity broad enough to encompass the imposition of a state administrative civil penalty in the form of a \$2500 fine levied against the United States Army for violations of a state air quality act.

The United States argued the close relationship between the CAA and the Clean Water Act. *See* 33 USC 1323. The court held, however, that the Clean Water Act contains an express limitation on the ability of the states to bring suit against the federal government that the CAA does not contain.

Rowlands v Point Mouille Shooting Club, 182 F3d 918 (CA 6, 1999)

Point Mouille Shooting Club ("PMSC") operated a shooting range in Monroe County, Michigan. The range soil had accumulated lead from the high use of lead pellets and target debris. The Michigan Department of Natural

Resources (“MDNR”) identified PMSC as an environmentally impacted site. The plaintiff had lived close to PMSC but moved away to avoid the hazards of the range. Thereafter, he continued to use the land and water, which were within a 100-mile radius around the safety zone, to fish, hunt, boat, hike, photograph, and drive.

Plaintiff contended that the State had lost its sovereign immunity against this claim. The court held that the state only waived its sovereign immunity through express consent. The court held that the state’s participation as a plaintiff in a federal statutory citizen’s suit was not express consent to be sued.

Plaintiff also contended that his claim was identical to a *qui tam* claim, giving him authorization as a surrogate EPA to sue the state. The court found that a person filing a *qui tam* claim must notify the government upon which the attestations are based prior to disclosure to the public by filing suit. Since plaintiff did not make the allegations in his complaint that PMSC or MDNR had behaved fraudulently or submitted false claims, he could not use *qui tam* as a basis for this suit. Therefore, the appellate court affirmed the lower court’s opinion holding that the plaintiff’s claim lacked subject matter jurisdiction.

In re: Bay County Middlegrounds Landfill Site, 171 F3d 1044 (CA 6, 1999)

Kuhlman Electric Company (“Kuhlman”), appealed the district court’s ruling that allowed General Motors (“GM”), a potentially responsible party (“PRP”), to depose a landfill employee. The district court had decided that the testimony may be relevant against other PRPs in the event the Environmental Protection Agency (“EPA”) filed suit against GM. On appeal, the defendant claimed that the requirements of Rule 27(a) were not met because the petitioner must prove:

- 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought,
- 2, the subject matter of the expected action and the petitioner’s interest therein,
- 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it,
- 4, the names or description of the persons the petitioner expects will be adverse parties and their addresses so far

as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which petitioner expects to elicit from each . . . **In re: Bay County Middlegrounds Landfill Site**, 171 F3d at 1045.

The Court of Appeals held that it was up to the individual judge’s discretion as to what quality and nature of evidence would be required. The Sixth Circuit reasoned that the deposition testimony must be “testimony that can not easily be accommodated by other . . . witnesses, and [the] information . . . unique”. *Id.* at 1047 (citation omitted). The court also stated that a proper reading of Rule 27(a)(3) shows that the language is somewhat flexible, requiring only that the testimony could possibly “prevent a failure or delay of justice.” *Id.* Because the determination “that the testimony be relevant, not simply cumulative, and likely to provide material distinctly useful to a finder of fact” is at the discretion of the district court, there was no abuse of discretion. *Id.*

Ramik v Darling International Inc, 1999 WL 623322 (ED Mich, July 30, 1999)

Darling International, Inc. (“Darling”) owned and operated a “rendering” plant. In rendering, dead animals and inedible animal parts were recycled using heat and pressure to make medical and industrial products. Two separate actions were filed against Darling. The first action was filed by residents of the City of Melvindale alleging that Darling’s plant emitted noxious odors and pollutants. The residents sought damages and injunctive relief based on trespass, nuisance, and negligence. The City of Melvindale (“City”) brought the second action. The City’s claims are nearly identical to those of the residents, and it asserted a violation of a city ordinance. In both cases, Darling filed motions for partial dismissal or summary disposition.

In reviewing the motions, the court held that odor alone, without actual damage to the property, did not constitute sufficient interference for a trespass claim, but additional discovery may reveal information that may provide sufficient grounds for a trespass claim. Therefore, the court dismissed the residents’ claim for trespass without prejudice. The court also reasoned that the residents’ negligence count was not the same as their nuisance count, and it denied Darling’s motion. The court granted Darling’s motion for partial summary disposition based on the statute of limitations. However,

recovery was only partially barred because there was a continuing wrong. Therefore, the court would allow a partial recovery.

In considering Darling's motions against the City, the court used the same reasoning. Further, the City conceded in oral argument that it would not assert any claims on behalf of its citizens in this matter. Thus, the court denied Darling's motion on this basis as moot.

Freeport-McMoran Resource Partners Ltd v B-B Paint Corp, 1999 WL 521760 (ED Mich, July 16, 1999)

Plaintiff sought contribution for environmental clean up costs pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and Michigan's Natural Resources and Environmental Protection Act ("NREPA"), for costs incurred at a hazardous waste site known as the "Forest Waste Site." The Forest Waste Site allegedly received and accepted numerous drums of waste from Berlin and Farro Liquid Incinerators.

Plaintiff filed motions for partial summary disposition against the 15 defendants. In response, 12 of the defendants filed cross motions to exclude expert testimony and for partial summary disposition. In evaluating defendants' motions, the court reasoned that the plaintiff's proposed expert testimony must satisfy the Daubert factors necessary to be admissible, which it did not. Thus the court granted defendants' motion to exclude the expert testimony .

In considering the other motions, the court held that because plaintiff was a potentially responsible party ("PRP"), it could only bring a claim under CERCLA §113(f), and not under §107(a). In this case, to prevail under §113(f), plaintiff had to prove that the defendants were PRPs under 42 USC 9607(a). Further, the court held that this must be established through expert testimony. The court concluded that since the proposed expert testimony had been excluded, plaintiff could not establish that each defendant's waste was deposited at the site. Thus, there was no genuine issue of material fact and defendants' motions for summary disposition were granted.

Organic Chemical Site PRP Group v Total Petroleum Inc, 1999 WL 587780 (WD Mich, July 12, 1999)

Organic Chemical Site PRP Group ("PRP Group") claimed that Total Petroleum Incorporated ("Total") was liable for all or a portion of the costs of remediating a Superfund-listed twenty-acre parcel of industrial property ("site"). In 1983, the Environmental Protection Agency ("EPA") had found that the groundwater under the entire site was contaminated with organic solvents. The PRP Group was formed to respond to EPA actions regarding the site. Total participated in the meetings, but did not contribute financially. The EPA issued a Unilateral Administrative Order ("UAO"), ordering the identified potentially responsible parties ("PRPs") to take specific clean-up action.

The PRP Group claimed that Total owned or operated a five-acre portion of the site when releases of hazardous materials occurred and was jointly and severally liable, or alternatively was liable for contribution for costs incurred in remediating the site. Total filed motions for summary disposition and partial summary disposition. In considering the motions, the court stated that under CERCLA, the current owner or operator of a facility and the owner or operator of a facility at the time of the release of hazardous waste are both liable for remediation, unless exempted. 42 USC 9601(20)(A). To be exempt, a "party must prove both that [it] holds indicia of ownership primarily to protect its security interest in the [subject property] and that it did not participate in the management of the [property]." **Kemp Industries, Inc v Safety Light Corp**, 857 F Supp 373, 384 (D NJ, 1994). The court found that Total held title to the OCI Site only as a land contract vendor, and under Michigan law, a land contract vendor only holds title as a security interest to ensure payment. Therefore, Total was entitled to summary disposition under CERCLA for any release occurring after the land was sold on land contract. Because the NREPA contains a similar security interest exception, the court also granted summary disposition on the NREPA- based claims.

Pierson Sand & Gravel Inc v Keeler Brass Co, 460 Mich 372; 596 NW2d 153 (1999)

Plaintiff sued defendants in federal court to recover environmental clean-up costs of the Central Sanitary Landfill ("landfill") which was owned by plaintiffs. The plaintiffs sued under the Comprehensive Environmental

Response, Compensation, and Liability Act (“CERCLA”), 42 USC 9607. The plaintiffs did not seek recovery under the Michigan Environmental Response Act (“MERA”), MCL 691.1201; MSA 14.528(201), now known as Part 201 of the Michigan Natural Resources and Environmental Protection Act, MCL 324.20101 et seq.

The district court granted defendants’ motion for summary disposition on the CERCLA claim because plaintiffs had not complied with the requirements of the National Contingency Plan (“NCP”). On appeal, the Sixth Circuit affirmed the trial court’s decision. Plaintiffs then filed suit in state court seeking relief under MERA. Defendants moved for summary disposition claiming that *res judicata* barred the state action. The Michigan Supreme Court held that

. . . where the district court [has] dismissed [plaintiffs’] federal claims in advance of trial, and there are no exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim, then it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state claims. Accordingly, . . . *res judicata* will not act to bar plaintiffs’ [state] claim. **Pierson Sand & Gravel**, 460 Mich at 387.

The court reasoned that *res judicata* is not a constitutional right but a judicially created doctrine that “must be carefully construed to maintain its integrity. . . .” **Id.** at 382. The court also asserted that where all federal claims are resolved before trial, federal courts will decline to exercise supplemental jurisdiction over remaining state law claims, preferring to dismiss them without prejudice for resolution in the state courts.

Adams v Cleveland-Cliffs Iron Co & Empire Mining Partnership, 237 Mich App 51; 602 NW2d 215 (1999)

The defendants, operators of one of the nation’s largest iron mines, appealed a jury verdict awarding damages to plaintiffs under the theory of trespass, based on the intrusion of dust, noise, and vibrations. The court of appeals held that recovery for trespass to land in Michigan is available only upon proof of an unauthorized, direct or immediate, intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. Although acknowledging dust particles to be tangible objects, the court of appeals agreed with other

authorities that dust, along with other forms of airborne particulate, does not normally present a significant physical intrusion. Because the law of trespass does not cover intangibles, such as vibrations, the court of appeals stated that this action should have been pursued under a theory of nuisance. In addition, the court stated that to permit recovery under the theory of trespass under these facts would lead to uncertainty and ambiguity and possible dual liability resulting from the same conduct. Holding that Michigan does not recognize a cause of action in trespass for airborne particulate, noise, or vibrations, the court of appeals vacated the jury verdict and remanded the case to the trial court for further proceedings consistent with this opinion.

Michigan ex rel Michigan Dep’t of Natural Resources v Chalet du Paw Paw, No 205384 (Mich App, Aug 3, 1999)

In 1994, the Michigan Department of Natural Resources (“MDNR”) filed suit against Chalet du Paw Paw Condominium Association (“Chalet”) for allegedly promoting a commercial marina on Paw Paw Lake. The MDNR claimed that Chalet never applied for or received a permit to establish the marina. The trial court concluded that Chalet was operating a marina without a permit, but denied plaintiff’s request for a civil penalty. Chalet appealed.

On appeal, the Court of Appeals reversed, based on MCL 324.30101(f); MSA 13a.30101(f), which states: “Marina means a facility that is owned or operated by a person, extends into or over an inland lake or stream, and offers service to the public or members of the marina for docking, loading or servicing of recreational watercraft.” The court held that this statute was only applicable to business entities, such as commercial marinas and yacht clubs, and did not “include docks like those located in front of Chalet that belong to individual condominium owners with the riparian rights to the property and that exist for the owners’ private, noncommercial, recreational use.” **Chalet du Paw Paw**, No 205384, slip op at 2. The court reasoned that because Chalet did not have ownership in the common areas of the condominiums or in the owners’ property within that common area, and it did not conduct maintenance of the docks or regulate the owners’ use of docking facilities, it was not operating a marina. Therefore, the Court of Appeals reversed the trial court’s holding and found that Chalet was not operating a marina in violation of Michigan law.

Sassman v Estes, No 205552 (Mich App, July 16, 1999)

This is a legal malpractice case. The plaintiffs claim that defendant, an attorney hired by plaintiffs to conduct a commercial property transaction, committed legal malpractice in handling this transaction. The plaintiffs complained that the defendant “failed, neglected, or refused to perform a property history or environmental assessment of the property to be purchased.” *Sassman*, No 205552, slip op at 1. The trial court granted summary disposition to defendant and awarded attorney fees on defendant’s counterclaim. Summary disposition was granted because the plaintiffs “failed to establish that the standard of care required Estes to conduct a property history or obtain an environmental assessment.” *Id.* at 2.

The plaintiffs called two attorneys to testify on the standard of care required for a property transaction. The trial court refused to certify the first expert because it was not established that the expert “was qualified to give an expert opinion on the applicable standard of care (i.e., that [the expert] was familiar with the reasonable skill, care, discretion, and judgment that an attorney for a purchaser of commercial property would use in 1986 in the conduct and management thereof).” *Id.* The second expert was deemed qualified, but the court held that his testimony did not establish that the standard of care required an attorney to actually conduct the property history or environmental assessment.

The Court of Appeals refused to consider plaintiff’s further challenges to the property transaction because, in both cases, the issues lacked proper citation and, thus, were not properly before the court. The court affirmed the summary disposition and award of attorney fees.

United States v Williams, 195 F3d 823 (6 CA, 1999)

Williams operated a company that reconditioned metal drums. He was convicted of illegal storage of hazardous waste and illegal disposal of hazardous waste, in violation of the Resource Conservation Recovery Act (“RCRA”), 42 USC 6928(d)(2)(A). Williams appealed his conviction. First, he alleged there was insufficient evidence to find that he knew the waste was potentially harmful, as required by RCRA. At trial, however there was testimony that defendant was told there were noxious fumes at the facility and that there was a discolored runoff from the drums. The court held there was sufficient evidence presented for a jury to conclude that Williams

knew the waste stored at his facility had the potential to be harmful to others or the environment.

Williams also claimed that he should have been granted a new trial when the judge discovered that one of the jurors was familiar with his business. The trial judge was informed of the juror’s knowledge on the first day of deliberations, but the juror contended that she could maintain her impartiality. The appellate court found that there was no abuse of discretion by the trial judge.

Finally, he alleged there was a violation of his due process rights when the trial court enhanced his sentence. According to § 2Q1.2(b)(3) of the United States Sentencing Guidelines, a court can increase a sentence if the cost of the cleanup is substantial. The court stated that the Sixth Circuit had previously held that a cleanup cost in excess of \$100,000 was a substantial expenditure. The cost of the present cleanup was \$1.5 million. Williams argued that if he had been able to pay the cleanup costs his sentence would not have been increased. In response, the court stated that the sentence enhancement does not depend on who pays for the cleanup costs and that the cost itself justified the sentencing enhancement. The court affirmed Williams’ convictions.

United States v Meyer, ___ F Supp 2d ___ (WD Mich, 1999)

R.W. Meyer, Inc. leased property to Northernair Plating Company (“Northernair”). Defendant Meyer, who was an officer and shareholder of R.W. Meyer, Inc., supervised construction of the Northernair building and construction of a private sewer line around the building’s perimeter, which connected to the municipal sewer system. Northernair used the drains and the sewer line to dispose of wastewater from its electroplating business. In 1975 or 1976, the contaminant levels in the effluent from Northernair increased to unacceptable levels. Northernair eventually went out of business in 1986. Shortly thereafter, the Michigan Department of Environment Quality (“MDEQ”) and the Environmental Protection Agency (“EPA”) began to investigate the property and found significant contamination in the soil. In 1983, the EPA placed the property on the National Priorities List (“NPL”) and began removal and cleanup actions. The United States subsequently brought a cost recovery action under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) against R.W. Meyer, Inc. and Meyer individually.

To be held liable under CERCLA, it must be shown that Meyer released or threatened to release a hazardous substance from a facility, that costs were incurred cleaning up the site, and that Meyer was a potentially responsible party. The court held that the release from the sewer lines was a release from a facility under CERCLA. Further, under CERCLA, liability extends to any person who manages the facility. Meyer argued the innocent or third-party defense, but the court held that the releases were foreseeable and that Meyer did not use due care to stop them. Therefore, the court found Meyer personally liable under CERCLA.

American Special Risks Ins Co v City of Centerline, 69 F Supp 2d 944 (ED Mich, Sept 30, 1999)

Plaintiff, an insurance company, provided coverage to South Macomb Disposal Authority (“SMDA”), which is a municipal corporation formed by the defendant cities for collecting and disposing of garbage. A board of directors governs SMDA, and each defendant has the right to appoint a member to this board. Plaintiff filed a complaint against the defendant cities on behalf of SMDA, for indemnification and contribution for costs incurred by SMDA in cleaning up hazardous materials under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). Defendants moved to dismiss for failure to state a claim and SMDA moved to intervene as a defendant.

The court held that a potentially responsible party (“PRP”) is precluded from asserting any claims for indemnification under CERCLA and that SMDA was clearly a PRP. Therefore, defendants’ motion to dismiss the indemnification claim was granted. On the issue of contribution, defendants contended that since they exercised the same control over SMDA as stockholders exercise over for-profit corporations, they were covered under plaintiff’s insurance policy. Plaintiff contended that defendants were generators and transporters of the bulk of municipal waste and were, therefore, liable for contribution. The court ultimately held that plaintiff had set forth a cause of action for claims for contribution, only to the extent that such claims are strictly based on defendants’ acts as arrangers, generators, and transporters of hazardous waste and not their control over SMDA and its board of directors. The court denied SMDA’s motion to intervene.

Shields v Shell Oil Co, 237 Mich App 682; 604 NW2d 719 (1999)

In this case the plaintiff, Shields, purchased a gasoline station from Shell in 1987. In 1991, Shields later sold the gas station to a third party, Singh, and arranged to test the soil for pollution. Gasoline contamination was found. It was determined that the contamination was caused by Shell’s old tanks that were removed and replaced when Shields bought the station. In 1994, Singh sued Shields seeking damages for a breach of contract and remediation of the contamination. Singh was awarded a \$38,500 credit towards the purchase of the station. Shields brought a third party action against Shell to recover this loss. The trial court found that the statute of limitations had passed and awarded Shell summary disposition. On appeal, the court held that Subsection (2) of § 20140 of Michigan’s Natural Resources and Environmental Protection Act (“NREPA”), MCL 324.20101; MSA 13A.20101, et seq., was a statute of repose absolutely barring any further action and not a statute of limitations. The court of appeals reasoned that subsection (2) was a statute of repose because it barred all suits filed after July 1, 1994, if the claim accrued before July 1, 1991, and because it did not attempt to establish a time within which an action must be filed if a claim accrued at another time. Therefore, Shields’ claim accrued when he purchased the property in 1987 and the 1996 filing was beyond the deadline set forth in the statute. Further, the court found that the fact that the contamination was discovered in 1991 was irrelevant because the discovery rule does not apply to statutes of repose. The court of appeals affirmed the trial court’s grant of summary disposition.

City of Romulus v Environmental Disposal Systems Inc, No 207850 (Ct App, Oct 15, 1999) (unpublished)

The defendant, Environmental Disposal Systems, Inc. (“EDS”) bought land in the City of Romulus and planned to build a deep injection hazardous waste well on the property. EDS obtained permission to drill the well from federal and state agencies. The City of Romulus filed suit against EDS to enjoin it from using the well to dispose of hazardous waste. Plaintiff claimed that EDS violated various local ordinances when it drilled the well without submitting a site plan to the planning commission or securing the proper local permits. EDS contended that plaintiff’s local ordinances were preempted by state and federal law and that plaintiff’s claim was barred by laches.

The trial court granted plaintiff's motion for injunctive relief, holding that plaintiff's local ordinances were not preempted by state law. EDS appealed. On appeal, the Court of Appeals held that "[w]here state law expressly provides that the state's authority to regulate in a specific area is exclusive, municipal regulation in the same specified area is preempted." *Id.* at 2.

The court of appeals found that when EDS drilled its well, the disposal of hazardous waste in Michigan was regulated by the Hazardous Waste Management Act ("HWMA"). Accordingly, Section 21 of the HWMA expressly preempted local ordinances. Therefore, the court of appeals held that the trial court's ruling that state law did not preempt plaintiff's local ordinances was erroneous. The court of appeals reversed and remanded the case for entry of an order granting summary disposition in favor of defendant.

Board of Trustees of Painesville Twp v City of Painesville, 200 F3d 396 (CA 6, Oct 28 1999)

In 1971, defendant issued a \$2.5 million bond to improve and expand its wastewater treatment facilities. In 1974, the city submitted a plan to the Environmental Protection Agency ("EPA") detailing the proposed expansion of Painesville's wastewater treatment facilities. The EPA agreed to subsidize the plan, which included extending service to the plaintiffs. However, the city refused to extend the service outside of its boundaries. Subsequently, plaintiffs sued defendant claiming it had violated the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 ("CWA"), by failing to provide them with wastewater treatment.

The district court dismissed plaintiffs' claim for lack of subject matter jurisdiction. The Sixth Circuit Court affirmed. The court found that the CWA did not allow persons who planned to receive services from a federally-funded waste treatment facility to enforce the plan in federal court. Additionally, the court reasoned that the case was properly dismissed because plaintiffs failed to give notice, a jurisdictional prerequisite to recovery under the CWA. The court went on to say that neither the CWA's legislative history nor its elaborate enforcement provisions recognize an implied private right of action except under §1365. Because plaintiffs conceded that their claim did not arise out of §1365, the plaintiffs' suit was properly dismissed.

Hirt v Richardson, 1999 LEXIS 19403 (WD Mich, Dec 17, 1999)

This case involved plutonium used for weapons in the United States and Russia. Both countries implemented programs to dispose of the plutonium, including incineration of some of the plutonium as a mixed oxide ("MOX"). The Parallax Project was created from the U.S. and Russian programs. The project would combine MOX from both countries to fuel an experimental reactor at Chalk River Laboratories in Canada. The U.S. was to ship nine MOX rods to Chalk River Labs. The Department of Energy ("DOE") issued an Environmental Assessment ("EA") and made a finding of no significant impact. The plaintiffs argued that the DOE had violated the National Environmental Policy Act ("NEPA") and requested a temporary restraining order and a preliminary injunction.

Plaintiffs first argued that the EA's conclusion was arbitrary and capricious and an abuse of discretion because the EA did not consider all the environmental risks and alternatives. The court held the EA was reasonable and not arbitrary and capricious. Plaintiffs next argued the DOE's EA was done in bad faith. The court held plaintiffs would likely succeed on this claim because the DOE prepared the MOX rods before the EA was started. Plaintiffs then argued the DOE improperly segmented the Parallax project from a larger program to dispose of the MOX and improperly segmented the Parallax project by not analyzing the Russian shipment. The court said that this argument was unlikely to succeed. The court held that because of broader US foreign policy and nuclear non-proliferation concerns, an injunction was not proper.

City of Albion v Guaranty National Ins Co, 73 F Supp 2d 846 (WD Mich, Oct 15, 1999)

The City of Albion ("city") filed a complaint against its prior insurers, seeking a declaration that they were liable under various comprehensive general liability insurance policies to indemnify the city and pay its defense costs in connection with an action brought by the Environmental Protection Agency ("EPA"). The EPA had investigated the city's landfill and found significant amounts of toxic chemical wastes and metallic sludge had been deposited there. A settlement was reached, and a consent decree was entered.

Defendants had insured the landfill from 1979 to 1985. All policies excluded coverage for damages arising

from the release of pollutants into the environment, except where the release was sudden and accidental. Based on this exclusion, the insurers denied coverage and the city initiated this lawsuit to recover the costs and expenses paid in the EPA suit.

In the current action, the city made two motions. First, the city claimed that a subjective standard should be used to determine whether the releases of pollutants from the landfill were sudden and accidental. The court held that under current case law an objective standard was appropriate and denied the motion. Second, the city asked the court to determine whether the pollution exclusion should be applied to the initial disposal of waste into the landfill or to the subsequent release of hazardous material into the environment. The court held the issue of whether the release was sudden and accidental should be determined by the release from the landfill into the environment, as long as the landfill was licensed by the State of Michigan and designed and constructed in accordance with then-contemporary standards. The city must also present evidence of isolated discharges apart from the overall continuous leaking of the landfill to fall within the sudden and accidental exception. The court denied the city's motion without prejudice.

Michigan United Conservation Clubs v Dept of Treasury & State Treasurer, 239 Mich App 70; 608 NW2d 141 (1999)

In this case, \$33,903,483.46 in tax credits were earned pursuant to 26 USC 29 by Motor City Four, L.L.P., on a promissory note between it and the State of Michigan. In the trial court, the issue was whether this amount was subject to the provisions of the Natural Resources Trust Fund, created under Article 9, §35 of the Michigan Constitution, or whether this amount was subject to the provisions of the Natural Resources and Environmental Protection Act (NREPA), §§ 503(4)(a) and 1902(1)(d). The trial court found that these provisions of NREPA were in conflict with Article 9, §35 of the Michigan Constitution and thus, were unconstitutional and unenforceable. Defendants appealed.

The Court of Appeals held that tax credits, under the unambiguous, plain language of the constitution, did not fall within the intent of the drafters of the constitution. Noting that a statute enjoys a presumption of constitutionality, the court construed the pertinent

provisions of NREPA so that it would not violate the constitution, and so that the Trust Fund would comport with the statute.

The Court of Appeals stated that the Trust Fund did not lose any money as a result of the deal between Motor City and the state. The tax credits, and the promissory note underlying the credits, were an added feature to the bargain, and were not contemplated by the drafters of the Trust Fund constitutional provision. The court also noted that the state, the people, and the environment were still being protected by NREPA as well as the Trust Fund.

Michigan Dept of Natural Resources v Delene, No 204086 (Ct App, Nov 30, 1999, unpublished)

Defendants ("Delenes") appeal from a 1997 decision of the trial court issuing a permanent injunction. The injunction required them to pay civil fines and conduct extensive restoration of wetlands on their property, which they had dredged and filled without obtaining required state and federal permits. The Delenes failed to appear and a default judgment was entered against them. Richard Delene was found in contempt for repeated violations of the trial court's orders.

The Delenes filed three motions to set aside the default, but failed to brief them. Despite this, the court considered the motions. The Court of Appeals denied the motions because defendants had failed to present good cause for the delay and had failed to state a reasonable excuse or meritorious defense.

The Court of Appeals also heard argument on the Delenes' motion for summary disposition, even though a default was entered against them. The Delenes claimed that Congress intended the Swamp Land Act ("SLA"), 43 USC 928, to preempt state environmental laws. The court reasoned, however, that the SLA did not provide for express preemption, and it found no implied preemption. Therefore, the court held that the SLA was not in conflict with Michigan laws governing wetlands, and that Congress did not intend to preempt state regulation of the field of wetlands protection as a result of the land transfer process described in the SLA. Because there was no preemption, and all other arguments raised on appeal were without merit, the Court of Appeals affirmed the trial court's ruling.

Friends of the Earth Inc v Laidlaw Environmental Services Inc, ___ US ___; 120 S Ct 693; 145 L Ed 610 (2000)

In the Clean Water Act (“CWA”), Congress authorized federal district courts to hear “citizen suits.” Citizen suits are those brought by individuals or associations that allege harm to themselves or their members under the CWA. In 1986, Laidlaw Environmental Services, Inc. (“Laidlaw”) bought a hazardous waste incineration complex which also housed a wastewater treatment plant. Shortly thereafter, the South Carolina Department of Health and Environmental Control (“DHEC”) granted Laidlaw a National Pollutant Discharge Elimination System (“NPDES”) permit to discharge to the North Tyger River.

Laidlaw’s discharges regularly exceeded permit levels. On April 10, 1992, Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and the Sierra Club (collectively “FOE”), took the preliminary step for filing a citizen suit by giving Laidlaw notice of their intent. Laidlaw sought to block this suit by convincing DHEC to file its own suit against Laidlaw. Laidlaw actually drafted DHEC’s complaint. This “suit” resulted in a settlement of \$100,000 and a promise to try not to violate the permit again. FOE continued with the citizen suit and Laidlaw continued to violate the permit.

The district court found that FOE had standing and denied Laidlaw’s motion for summary judgment, holding that FOE’s suit was not barred by prior action because the case by DHEC had not been pursued diligently. The district court assessed a penalty of \$405,800, awarded costs and attorneys’ fees to FOE, but denied FOE’s request for an injunction. FOE and Laidlaw appealed.

The Fourth Circuit Court of Appeals dismissed the case, holding it was moot because FOE could no longer meet all the requirements for standing. The Supreme Court granted certiorari to resolve a conflict among the circuits regarding whether after-the-fact compliance creates mootness.

To have standing, a plaintiff must show: (1) it has suffered an injury in fact, (2) that is fairly traceable to the defendant, and (3) that is likely to be redressed by a favorable decision. Organizations have standing when their members could bring suit in their own right, the interests affected are related to the organization’s purpose,

and the individuals are not required to participate in the suit.

Laidlaw first contended that FOE lacked standing because there was no showing of harm to the environment. However, the relevant standard is injury to the plaintiff; to require injury to the environment is too high a hurdle. Injury to the plaintiff is shown by impaired use of the impacted areas. Laidlaw then tried to argue that FOE lacked standing to seek civil penalties. The Supreme Court held that Laidlaw was correct in that a plaintiff must show standing for each form of relief sought, but incorrect in arguing that citizen plaintiffs can never seek civil penalties, which provide redress to plaintiffs by encouraging defendants to discontinue ongoing violations and deter future violations.

Once the Supreme Court found standing it turned to mootness. A case may be moot if it is clear that the claimed wrongful behavior is not reasonably expected to recur. The Court found that since Laidlaw still had its NPDES permit, it was reasonable to believe the violations could occur again, even though at this time the plant was closed. The Supreme Court reversed the circuit court’s decision and remanded the case for further proceedings consistent with its opinion.

US v 150 Acres of Land, ___ F3d ___(CA 6, 2000)

For at least three generations, the Bohatys owned 150 contiguous acres of property in Medina County, Ohio. The Bohatys operated a farm-equipment repair business on the western edge of the property. In 1987, the local fire department discovered numerous 55-gallon drums on the Bohatys’ property. The federal Environmental Protection Agency (“EPA”) sued various members of the Bohaty family under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) for the costs incurred with cleanup of toxic wastes found on the Bohatys’ land. The EPA removed approximately 1000 drums, and spent \$854,426.87 cleaning up the site. The district court granted summary judgment for the government and the Bohatys appealed the judgment.

On appeal, the Bohatys claimed the innocent landowner defense. The court stated that the defense was potentially applicable here. The court held that the government had failed to establish that the Bohatys had disposed of hazardous substances because the only evidence the government presented was photographs

showing what might be hazardous substances on the ground near rusted drums and an inspector's statements. The court also held that the Bohatys raised a genuine issue of material fact as to due care. Therefore, the Bohatys were entitled to proceed to trial.

The Bohatys also argued that the EPA was seeking reimbursement for unnecessary costs because the empty drums and storage tank were not environmental threats. The court held that the evidence presented did not raise genuine issues of material fact to support the claim that these costs were unnecessary and affirmed the removal cost amount. The court of appeals remanded the case to the district court.

Meridian Mutual Ins Co v Kellman, 197 F3d 1178 (CA 6, 1999)

Kopliku Painting Company ("Kopliku") contracted with the Detroit, Michigan, Board of Education to perform construction work at Cass Technical High School in November of 1994. Roslyn Kellman ("Kellman") was a teacher at the high school. In February 1997, Kellman brought a personal injury suit against Kopliku, alleging that the chemicals Kopliku used to seal the floor in the room above her class room caused her to suffer severe disabling respiratory injuries.

Kopliku was insured by Meridian Mutual Insurance Company ("Meridian"). The policy required Meridian to defend and indemnify Kopliku for bodily injuries caused by Kopliku in the course of its business; however, the policy also contained a total pollution exclusion clause. The clause stated the policy would not cover any bodily injury or property damage that occurred as a result of "any actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants at any time." This clause was designed to protect the insurer from liability in any action that sought to enforce an environmental law.

Kopliku tendered defense to Meridian, which denied coverage. Meridian then instituted a declaratory judgment action, seeking a judgment that it did not have a duty to indemnify or defend Kopliku in the suit brought by Kellman. The trial court granted a motion for summary judgment in Kopliku's favor. Meridian appealed.

On appeal, the court of appeals considered whether the migration of toxic fumes from a chemical used by the insured in the course of its business, that caused a personal injury to a person working in a room directly below the one where the chemical was used, falls within the insurer's total pollution exclusion clause. The court stated that no policy should deny coverage for injuries that were suffered by a person who was legitimately in the immediate vicinity of the chemicals that caused the injury. The court of appeals affirmed the trial court's grant of summary judgment to Kopliku, holding that the exclusion did not prevent coverage for Kellman's injuries.

Jackson v Thompson-McCully Co, 239 Mich App 482; ___ NW2d ___ (2000)

In 1987, Thompson-McCully purchased property in Blackman Township to build an asphalt plant. The township rezoned the property in 1988 and issued a permit for the plant in 1995, after giving notice to nearby township property owners and residents. It did not give notice to property owners in the City of Jackson. The company built the asphalt plant in 1997 and 1998. The city sought injunctive relief based on claims of violations of the Michigan Environmental Protection Act ("MEPA"), nuisance, and improper enactment of a zoning ordinance. Although it denied all three claims, the circuit court granted the city relief based on the Natural Resources and Environmental Protection Act ("NREPA"), which governs appeals of air pollution control permits. The case was remanded to the Michigan Department of Environmental Quality for modifications before the permit was reinstated.

On appeal, the appellate court held that relief was not available under NREPA because a MEPA action is independent of an action to review a permit, and NREPA was not central to the issues raised in the city's claim for relief. The court held that to establish a MEPA claim, courts are to determine the existence of a potential for pollution, as well as the existence of actual pollution, and take appropriate action. Because the determination is fact-driven, the trial court must set forth the factual findings for its decision. In this case, the trial court did not specify the findings of fact used to make its decision. The court of appeals remanded on this issue and affirmed the lower court's holding on all other issues.

South Macomb Disposal Authority v Westchester Fire Insurance Co, 239 Mich App 344; ___ NW2d ___ (2000)

The South Macomb Disposal Authority (“SMDA”) operated four landfill sites. This case arose from the contamination of groundwater under two of those sites (9 & 9A) from leakage of leachate. Leachate is a hazardous liquid that forms when water is filtered through compacted garbage, like the kind found in landfills. During the expansion of landfill operations, SMDA was informed by the Department of Natural Resources (now the Department of Environmental Quality) of foreseeable water table contamination problems. A license was issued to SMDA, which required SMDA to make certain modifications to prevent contamination. Later, it was discovered that leachate had contaminated the groundwater. SMDA’s insurers denied coverage for the claims presented based, in part, on policy pollution exclusions. SMDA alleged separate leachate outbreaks in 1971, 1976 and 1980.

During a prior appeal, the court of appeals held that the 1976 and the 1980 leakage could not be considered “sudden and accidental” such that any resulting damage was excluded from coverage. The court of appeals had remanded for a factual determination regarding the nature of the 1971 release. On remand, the trial court ruled that the 1971 release was “sudden and accidental” as a matter of law such the SMDA was entitled to summary disposition. On appeal, the court of appeals reversed the trial court, ruling that the 1971 release of leachate through an underdrain was merely secondary migration of an initial non-sudden release of leachate from the bottom of the landfill such that the pollution exclusion precluded coverage.

B & B Associates v Amoco Oil Co, No. 208588 (Ct App, Jan 4, 2000) (Unpublished per curiam)

In this case, defendant, Amoco Oil Co. (“Amoco”), owned property that was used to operate a gas station between 1967-1983. The gas station had underground storage tanks. In 1983, Amoco sold the property to Dawn Donuts. Dawn Donuts conducted no business at the location and, instead, leased the property back to Amoco until 1985. In 1985, Dawn Donuts sold the property to plaintiff, B & B Associates, who operated a restaurant on the property until 1990. Later that year, as a result of environmental testing performed in connection with a

possible sale, gasoline contamination was found on the property.

At trial, plaintiff was awarded \$250,000 in a private recovery action under the Michigan Environmental Response Act (“MERA”). Plaintiff was allowed to recover future costs to clean up the site. Defendant appealed.

First, defendant claimed that plaintiff could not recover for costs not yet incurred. The appellate court agreed, stating that the statute only permitted recovery of costs already incurred. Further, the court reasoned that this was consistent with the intent of MERA. Second, defendant claimed the land could have been contaminated in 1986 when the plaintiff’s contractor removed the storage tanks and backfilled the openings. The court found this unconvincing and held the defendant liable under MERA for costs incurred.

Plaintiff also appealed the lower court’s grant of summary disposition to defendant, based on a claim of interference with a contract. The court found that defendant had produced sufficient evidence to show that it terminated the agreement for reasons independent of the contamination. The court affirmed the trial court’s grant of summary disposition on this issue.

The following Thomas M. Cooley Law School students were involved in preparing these Casenotes:

Scott Bacalja, Cory Johnson, Julie Pollock, Helen Haessley, Roger Stark, Tiffany Harris, Vera Jordan, Kathryn Periso, John Stergiou, Troy Tipton, Scott Sachs, Joshua Penrod, Atisa Shirvani, Jeffrey Totty and Samer Yahyawi.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL ANNUAL MEETING

Wednesday, September 15, 1999

Council Members Present:

Blais, Dickinson, Dunn, Gotthelf, Holmes, Levine, Robinson, Tatum, Wilson, Ortega, Wilczak

Council Members Absent:

Bohn, Calloway, Fink, Mikalonis, Phillips, Posa, Rast, Trigger

Ex-Officio Members Present:

Baron

Committee Chairs and Vice Chairs Present:

S. Lee Johnson, Susan Johnson

Liaisons Present:

None

Minutes

The minutes of the previous meeting were presented and approved.

Secretary/Treasurer Report

Secretary/Treasurer Gotthelf stated that the Section is in the black. We have approximately \$36K in the bank.

Committee Reports

Program Committee: John Tatum

1) The videotapes and materials from the June 29 Due Care program will be made available through the Video Tape lending library at Member Services at the State Bar. Apparently this was the first time a section had asked the State Bar to do this, and it was enthusiastically received.

2) The joint program with the Standing Committee on Oil & Gas has been developed and will be presented on Friday, October 15, 1999. The program will cover Due Care and BEA rules specific to the development and re-development of Oil & Gas properties in Michigan. A brochure has been mailed to all members of the section plus all members of the Standing Committee.

Nominating Committee: Mike Robinson

The Nominating Committee met in June and nominated the following: Chair: Beth Gotthelf; Vice Chair: Charlie Toy; Secretary/Treasurer: John Tatum; Council Members: John Byl, Susan Johnson, Sharon Newlon, Susan Topp and A. Michael Lefler. The notice was published in the Journal. The slate was nominated and elected.

Chairperson's Report

Mike Robinson presented plaques to Joan Tisdale and Barry Levine thanking them for their service on the Council. Plaques will be presented to Chere Calloway, Claudia Rast and MaryLou Posa for their service on the Council. Mike then presented the gavel and turned the meeting over to Beth Gotthelf. Beth thanked Mike for his service to the Section.

The meeting adjourned at 2:20 p.m.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, December 11, 1999

Council Members Present:

(By phone Byl, Newlon, Wilczak) Dickinson, Gotthelf, Holmes, Johnson, Leffler, Ortega, Tatum, Topp, Toy, Trigger.

Council Members Absent:

Blais, Bohn, Dunn, Fink, Mikalonis, Wilson

Ex-Officio Members Present:

Robinson (by phone), Tripp

Liaison Members Present:

Feldman (AdLaw)

Committee Chairs and Vice Chairs Present:

Johnson, Patterson, Lozen (by phone), Barbieri

Others Invited and Present:

William T. Burton, Jr. (Executive Asst to the Director MDEQ)

Minutes

The minutes of the meeting on September 15, 1999 were presented and approved.

Secretary/Treasurer's Report

Tatum reported that the Section had an \$23K carry-over balance from the prior fiscal year and had received approximately \$11K in dues for a balance of \$34K in the section treasury.

Committee Reports:

Program Committee Report

Wilczak reported that there had been three successful programs since the last report:

1) The annual meeting program chaired by Charlie Denton and Lee Johnson was well received.

2) The Wetlands committee had presented a program at Crosswinds Marsh, about 10 people attended, Topp

commented that it was a high quality program and a very informative tour through the marsh.

3) The joint program with the Standing Committee on Oil & Gas Law was presented in October at Hawk Hollow Golf Club and was chaired by Joe Quandt. About 35 people attended and the program was well received. Lisa Boettcher, and Lynelle Marolf from MDEQ spoke as well as Larry Elkus from Oil & Gas, and Bill Horn from the Section.

Wilczak and Gotthelf then raised a programming idea discussed at the last Program Committee Meeting: Round Table discussions with local Bar associations, MDEQ district offices, and perhaps others including EPA. Considerable discussion ensued including suggestions for specific agenda items, collaboration with the Environmental Assistance Division of MDEQ, discussions of the roles of the multi-media coordinators and coordination in each district through members of the Council. The Program Committee was given the responsibility to carry the planning forward.

Other program items discussed were: 1) the Annual Meeting is Sept 21 & 22 in Detroit in 2000, the day for the Section meeting has not been determined. 2) The Higgins lake meeting is June 10, Mike Leffler agreed to coordinate an open discussion afternoon at Higgins on June 9 with people from DEQ, the AG's office and section council. Enforcement was suggested as a likely topic.

Journal Report

None from the committee. Gotthelf and Tatum reported that the on-line journal and on-line and distributed case notes were of great interest to other state Bar Associations at the ABA. The Michigan Bar may be leading this member service area. Gotthelf reported that Saulius Mikalonis was authoring an article for the next issue, that the Michigan Lawyers and Judges Assistance Program director would be contributing a column regularly to the journal and that a schedule for articles had not been issued to the subject matter committees.

Technology Committee Report

Dickinson reported that he had begun working on the listserv and that there were now 580 members, out of 1,100 total, with e-mail ID's. Those not yet on the listserv will soon be added.

Membership Committee Report

None

Air Committee

Johnson reported the annual meeting program received several favorable comments. He also reported that there had been no decision on the Nox SIP call and that EPA had proposed to disapprove the entire Michigan New Source Review SIP.

Ethics Committee

Newlon reported that she and Reilly Wilson were scheduling a meeting soon and would publish a notice on the listserv <envirolaw@lists.michbar.org> inviting interested section members.

Natural Resources/Wetlands Committee

Patterson reported that the Crosswinds program had been well received and that they had not yet scheduled another meeting.

Real Estate Committee

Lozen reported that the Real Estate committee has scheduled a "brown bag" lunch meeting at Jaffe Raitt on Jan 19, 2000 from 12 to 1:30. Saulius Mikalonis will talk about wetlands development and permitting focusing on the Humbug island project. The meeting will be announced on the listserv.

Solid & Haz Waste Committee

Johnson reported that a meeting was tentatively scheduled for January 29 in Lansing for a review of current developments with Jim Sygo of MDEQ. Chuck Barbieri volunteered to host the meeting.

Superfund Committee

Trigger reported that the video of the BEA/Due Care meeting was available from the State Bar video library along with the materials from the program. Future meetings to cover anticipated Brownfields legislation and Part 201 rules packages are under consideration for next year. Another meeting of the committee was scheduled immediately following the Council meeting to discuss the Shields v. Shell case with Bob Reichel of the AG's office.

Surface Water/Groundwater Committee

No report. Discussion indicated that the new test methods for mercury might have a significant impact on NPDES permits, pollution minimization plans and POTW permits.

Toxic Torts/Environmental Litigation Committee

No report.

Desk Book

Haynes reported that he and Smary were developing an outline of the topics to be covered in the significantly revised single volume, and potentially CD, book.

Chairperson's Report

a) Election of new council members. Tom Phillips and Bob Schroeder, former council members, had indicated their willingness to serve a second term on Council. They, and those positions, were inadvertently overlooked by the nominating committee. The Bylaws allow the Council to elect persons to fill vacancies. Upon motion and second, both were elected to the council. Bob Schroeder will take the 3 year position, and Tom Phillips the one year position.

b) Gotthelf noted that vice chair positions on both membership and technology were vacant and suggested that the council look to recruit people for those positions.

c) Gotthelf asked the committees to send in their membership lists. Discussion indicated that what lists were available were so old and outdated that they were not useful. Support from the Bar member services organization for these efforts has been less than satisfactory.

d) Committees were encouraged to use the listserv <envirolaw@lists.michbar.org> to publicize their meetings to the membership.

e) Outreach to Local Bar Associations - see above

f) Annual meeting coordinating. Toy will attend the meeting next week to learn the date, theme, and any CLE that the section might want to participate in.

g) Gotthelf has a pro bono services manual available for those who might be interested.

h) Assistance program - column to be written for the Journal.

New Business

Toy reported that he had attended the beginning meetings of sections on the Multi-Disciplinary Practice issues, that there was a copy of the ABA proposal available on the michbar.org site, and that there are a significant number of issues coming in this area which will impact the Section. He will report as the discussion continues. For detail see <http://www.michbar.org/committees/multidisciplinary/multidisciplinary.html>

The meeting was adjourned at 11:00.

Submitted for approval at the Feb 5, 2000 meeting of the Council.

John Tatum
Secretary/Treasurer

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, February 5, 2000

Council Members Present:

Bohn, Byl, Dickinson, Dunn, Gotthelf, Johnson, Ortega, Phillips, Schroder, Tatum, Toy, Wilczak, Wilson

Council Members Absent:

Blais, Fink, Holmes, Leffler, Mikalonis, Newlon, Topp, Trigger

Committee Chairs Present:

Barbieri, Domzal, Hubbard, Johnson, Magid, Patterson

Minutes

The minutes of the meeting of December 11, 1999, distributed on the listserv were approved as modified. Jeff Haynes was present and reported at the meeting but had not been noted as present.

Secretary/Treasurers Report

Tatum reported that the section's balance as of 12/31/99 was \$37,275.23

Committee Reports:

Program Committee Report

Wilczak reported that the committee had met on 1/13 to review plans for the local bar assn. / regional round tables and had received substantial encouragement from Bill Burton of MDEQ. Programs under development are in Wayne County/Detroit, Kalamazoo, Lansing, Grand Rapids, and Traverse City. Other programs are under consideration by most of the other committees and planning meetings are being announced over the listserv.

Higgins Lake: Al Howard has agreed to visit with the council and committee chairs at the lake on Friday afternoon. The new AOC, Covenants, and institutional controls are possible subjects of discussion.

Annual meeting: Charles Toy reported that the Section's annual meeting and program will be at 9:00 on Wednesday, September 21, 2000 in Detroit. Possible programs discussed were 201 rules, MDP & Ethics. The Real Estate Section will alternate mornings and afternoons with the Environmental Section for this and future annual meetings.

Two additional program / event ideas were discussed: this year as the 20th anniversary of the Environmental Section, and a program focused on environmental financing - sources, programs, requirements.

Journal Report

None

Technology Committee Report

Dickinson reported that the committee was planning a meeting for Feb 19 in Grand Rapids to visit Greatland Printing and discuss publishing options for the Environmental Law Deskbook (the Green Book). Also under discussion was researching a standard cost effective phone conferencing alternative for the section.

Membership Committee Report

Gotthelf asked each committee chair to email a copy of their committee description to Marylou and to Todd for placement on the website.

Air Committee Report

S. Lee Johnson reported that the committee had a very successful meeting in January with a presentation led by Rich VanderVeen on emissions trading, and much discussion on the "new" CERCLA permitted release exemption. The Committee is planning a program for this spring.

Ethics Committee

No report

Wetlands Committee

Bohn/Patterson reported that they were planning another program at Crosswinds. Participation from the MDEQ and from the section continues to grow.

Real Estate Committee

Domzal reported that the committee's program on wetlands development with Saulius Mikalonis in January was a success. There were 12 people at Jaffe Raitt in Detroit plus more on the phone. They are planning another program in March on environmental insurance as an assist to transactions and also as an help to brownfields development. The Committee will coordinate with the Solid / Haz Waste & Insurance Committee. Jim Olson of Traverse City offered to speak on the Crystal River and Minden Bog cases at a future program.

Solid & Hazardous Waste Committee

Susan Johnson reported that their program with Jim Sygo from the MDEQ, was well attended. It was held in the Foster Swift offices in Lansing. Subjects discussed included the solid waste plans and developments in the hazardous waste regulations. Potential future meeting topics included the Governor's Task Force on out-of-state-waste, and the differences between then MDEQ approved county waste management plans and waste management ordinances.

Superfund Committee

S. Lee Johnson reported, for Trigger, that a motion for leave to appeal the Shields v. Shell case has been filed. The AG is expected to file a motion to appear as amicus. There also appears to be a move for a legislative correction. Either or both alternatives might be the subject of a meeting of the committee. A program on the 201 rules is also planned.

Surface Water/Groundwater Committee

Hubbard reported that the committee has a conference call planned to set an agenda for the year.

Environmental Litigation/Toxic Torts

Magid reported that they are quite interested in a program on the contested case rules.

Publications

Included with the Tech Committee report.

Chairperson's Report

Gotthelf reported that per the approval of the Council to elect Schroder and Phillips to the two vacancies on the Council, Schroder has elected to take the 3 year term and Phillips the 1 year term. Phillips will be eligible for an additional term on the Council.

HB 4998 on Seepage waste was referred to the Council by the Representative Assembly. The Council, following it's historical practice, took no position on the legislation.

Posting of openings and resumes on the website was discussed. The consensus was that other alternatives existed and that there was more effort involved than was available.

State of the Law: Jeff Woolstrum will be asked to prepare the State of the Law again for the Section. ICLE may publish a consolidated document this year, but the Section will continue to post and publish the Environmental State of the Law.

Next Meeting

The next meeting was moved per general agreement to April 15 at Charles Toy's offices in East Lansing.

Submitted by
John Tatum

SEMINARS AND COURSES

Toward 2001-An Environmental Odyssey, a spring conference sponsored by the Air & Waste Management Association (A&WMA), to be held on May 24, 2000 at Laurel Manor in Livonia, Michigan. The Keynote Speaker will be Bharat Mathur, EPA Region V Air and Radiation Division Director. Topics will include EPA Headquarters and Region V Enforcement and Compliance Priorities, EPA Guidance on CERCLA Continuous Release Reporting, and other current air and waste topics impacting the regulated and environmental communities. There will also be a panel discussion on key environmental issues from agency, industry and environmental perspectives. The registration fee is \$130 for A&WMA members and \$140 for non-members. Student and non-profit group rates available. For more information or to register contact John Baguzis at (313) 845-1920 or visit the A&WMA website at www.emawma.org.

Symposium on Second Generation Environmental Policy and the Law, sponsored by Capital University Law School, at the Sullivan Lecture and Symposium, Capital University Law School, Columbus, Ohio, on Friday, April 14, 2000. There is no cost to attend this symposium. The symposium will explore emerging environmental protection strategies. For more information, contact Helen Schinagl at (614) 236-6377 or via email to hschinagl@law.capital.edu.

Environmental Litigation, sponsored by ALI and ABA with the cooperation of the University of Colorado School of Law at Boulder, Colorado, from June 26-30, 2000. Tuition for the course is \$995. Core issues inherent in all environmental litigation are examined in both their procedural and substantive context. For information or to register, call (800) CLE-NEWS. Other ALI-ABA seminars include the following:

The Impact of Environmental Law on Real Estate and Other Commercial Transactions, October 5-6, 2000, Washington D.C.

International Environmental Law, November 30 - December 1, 2000, Washington, D.C.

Federal Lands in the West Embarking on the New Millennium, October 5-6, 2000, Jackson Hole, Wyoming.

Environmental Insurance: Past, Present and Future, sponsored by ALI-ABA at Chicago, Illinois, on June 15-16, 2000. Fee is \$695 This course concentrates on key issues in the resolution of insurance claims and practical approaches to the new environmental insurance coverage. For more information or to register, call (800) CLE-NEWS.

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