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**MESSAGE FROM THE EDITOR**



“I work for Consumers Energy and I’m in Marshall. There’s oil getting into the creek and I believe it’s from your pipeline. I mean there’s a lot . . . .” Such understatement! That’s how a Consumers Energy employee informed Enbridge of the massive oil spill from a pipeline near the Kalamazoo River in 2010. I can’t help but picture comedian Bob Newhart making that call with his trademark dry humor and deadpan delivery. In this issue, law student Tyler Stewart gives us a gripping account of the day the pipeline broke. He explains why, when Enbridge first noticed the drop in pipeline pressure, it made the problem worse by increasing the pumping rate rather than shutting off the flow. Tyler then explains that the State of Michigan could enhance pipeline safety in Michigan by assuming a greater role under the federal Hazardous Liquid Pipeline Safety Act.

Early each year the *Journal* staff provides you a summary of the previous year’s Michigan public acts regarding the environment and natural resources. This year, editors Pat Paruch and Jason Newman have done an excellent job summarizing three dozen Public Acts that may affect your practice. It’s gratifying to see that although our legislature punted on critical issues such as funding for Michigan’s badly deteriorating roads, it bravely tackled such important issues as who gets the right to salvage roadkill meat after an animal-vehicle collision. If roadkill venison isn’t your taste, you may prefer the article in which Charlie Denton, Tammy Helminski, and Ken Vermeulen explain how the lame duck legislature made important changes to Parts 201 and 215 of NREPA.

Environmental lawyers are familiar (often unhappily so) with the principles that a court will defer to an agency’s interpretation of a statute in most situations, and will normally defer to an agency’s determination of scientific issues, as well. Two articles in this issue provide contrasting illustrations of how courts apply those principles. Law student James Bonar Bridges gives us a superb recounting of the EPA’s controversial “water transfers rule,” which essentially states that no NPDES permit is required when someone moves dirty water from one body of water to another, because, after all, all water bodies in the United States are a single body of water, and such transfers of dirty water are therefore not “additions” of pollutants. Does that sound strange? Well, the first court to consider EPA’s informal position to that effect thought so, and refused EPA’s request to defer to an interpretation that the court thought would lead to “an irrational result.” The Second Circuit similarly refused to defer to the interpretation when it was presented as the government’s “litigating position.” But once EPA adopted the position as a formal rule, the Eleventh Circuit held that EPA’s interpretation, though previously held to be

arbitrary and capricious, now deserves judicial deference, illustrating how running a questionable concept through the rulemaking process can transform an arbitrary and capricious idea into an enforceable regulation. In contrast, my own article in this issue discusses a recent decision in which a federal district judge in Washington, D.C. refused to defer to either the legal basis or the scientific justification for a Fish and Wildlife Service formal rule that removed wolves in Michigan from the endangered species list. I would have expected a court to defer to the agency in such a case.

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

Christopher J. Dunsky  
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## 2014 Michigan Public Acts--Environment and Natural Resources

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2014 was a relatively quiet year for legislative amendments to the Michigan Natural Resources and Environmental Protection Act (MNREPA) and other statutes related to natural resources and the environment. The most significant changes occurred in Part 201, involving the cleanup of hazardous substances, the Parts of MNREPA that establish and govern Michigan's recreational trail system, and the Parts that classify and regulate certain types of industrial materials and hazardous waste.

The following is a summary of Michigan Public Acts adopted in 2014 that pertain to environmental and natural resource issues.

### I. Environmental Protection

#### A. Waste Management and Beneficial Use Byproducts

**PA 24:** This Act amends [Part 115](#) (Solid Waste Management) of MNREPA, adding section [11521b](#) and associated definitions in order to exempt "diverted waste" managed through a waste diversion center from regulation as a solid waste. "Diverted waste," for the purposes of PA 24, means "waste that meets all the following requirements": generated by households, businesses, or government entities; lawfully disposable at a licensed sanitary landfill or municipal incinerator; separated from other waste; and one or more of the following: hazardous material, liquid waste, pharmaceuticals, electronics, batteries, light bulbs, pesticides, thermostats, switches, thermometers or other devices that contain mercury, and sharps. A "waste diversion center" means a parcel of property or a building designated for receiving diverted waste where at least 90 % of the material collected will be diverted waste. Operators

of waste diversion centers must comply with safe management practices for storage and transport of the diverted waste and must comply with record-keeping, access and safety requirements. ([MCL 324.11503](#), [324.11505](#), [324.11506](#), [324.11521b](#))(Effective March 4, 2014).

**PA 178** and **PA 179**: These Acts amend various provisions that pertain to “beneficial use of by-products.” Public Act 178 amended sections of [Part 31](#) (Water Resources Protection), [Part 85](#) (Fertilizers), [Part 115](#) (Solid Waste Management), and [Part 201](#) (Environmental Remediation) of MNREPA pertaining to the classification, generation, use, storage, and regulation of certain industrial by-products as “beneficial use by-products.” The act also amends [Public Act 162 of 1955](#) which governs the licensing, inspection, and sale of agricultural liming material. Public Act 179 amends Part 201 of MNREPA to provide that a person who stores or uses a beneficial use by-product or inert material in compliance with Part 115 would not be liable for a release of hazardous substances. Among other subjects, these public acts:

- Provide for the classification of a number of reusable, environmentally safe industrial by-products as “beneficial use by-products.” Examples include: cement and lime kiln dust, coal or wood ash, foundry sand, pulp and paper mill ash, soil washed from sugar beets, and stamp sands;
- Define categories of “beneficial uses” for which the by-products can be used;
- Redefine “inert material” to include a lengthy list of materials, such as rocks, trees and stumps, excavated soil, including soil removed from a site of environmental remediation or response activity if hazardous substances present in the soil do not exceed cleanup criteria, certain construction and demolition materials, Portland cement clinker, certain crushed asphalt pavement materials, and other materials designated as inert by the Department of Environmental Quality (DEQ);
- Exclude beneficial use by-products and inert materials from the definition of “solid waste;” and
- Require that materials to be used only for a legitimate beneficial purpose can be classified as a “beneficial use by-product.”

([MCL 324.8504](#) *et seq.*; [324.3112e](#); [324.11501](#) *et seq.*; [324.20101](#) *et seq.*; [290.532](#))(PA 178: Effective September 16, 2014; PA 179: Effective June 17, 2014).<sup>1</sup>

**PA 254**: This legislation amended [Part 111](#) (Hazardous Waste Management) of MNREPA to require that applicants for hazardous waste facility operating licenses disclose criminal convictions committed in furtherance of obtaining a license. The amendment also gives DEQ the authority to deny a license based upon such convictions. Prior to the amendment, the statute only required applicants to disclose: (1) criminal convictions of any federal, state, Canadian, or Canadian provincial agency environmental statute; (2) environmental permits or licenses that had been permanently revoked because of noncompliance; and (3) any activities that resulted in an environmental threat (or potential threat) and public funds were used for

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<sup>1</sup> An excellent article by Charles E. Barbieri and Tyler Olney entitled Legislation Expands and Encourages Use of Beneficial Use By-Products appeared in [Michigan Environmental Law Journal](#) (Summer 2014). Their article provides a detailed and comprehensive analysis of the legislative history of regulation of these materials and the impact of these amendments.

mitigation of the threat. ([MCL 324.11123](#))(Effective June 30, 2014).

**PA 258:** Public Act 258 amends [Part 201](#) by adding a definition of “stamp sands” and modifies the definition of “hazardous substances” to exclude stamp sands. Stamp sands are defined as “finely grained crushed rock resulting from mining, milling, or smelting of copper ore and includes native substances contained within the crushed rock and any ancillary material associated with the crushed rock. The act also adds a new section ([324.20101c](#)) that states that property where stamp sands have been deposited are not subject to regulation under Part 201 as long as the property does not contain hazardous substances in concentrations above unrestricted residential criteria. ([MCL 324.20101](#))(Effective March 31, 2015).

**PA 286** and **PA 287:** These public acts extended for three years the sunset dates for certain hazardous waste and liquid industrial waste fees charged by DEQ (handler user charges, manifests, site ID registrations). The fees were scheduled to sunset on October 1, 2014. The Legislature predicated its FY 2014-2015 budget on the extension of these fees. The fees are paid by approximately 4,000 entities and generate approximately \$1.1 million annually in revenue for DEQ. The dollar amount for each fee was not changed. ([MCL 324.11135](#), [324.11153](#), [324.12103](#))(Effective September 23, 2014).

### **B. Water Quality**

**PA 536:** This Act amends section 3109 of MNREPA to exempt municipalities from remedy or penalty resulting from an unauthorized discharge of raw sewage or for a discharge that comes from three or fewer on-site wastewater treatment systems. ([MCL 324.3109](#))(Effective January 15, 2015).

### **C. Scrap Tires**

**PA 543:** This Public Act amends [Part 169](#) of MNREPA (Scrap Tires) to revise and update the regulatory regime for the storage, transportation, and processing of scrap tires. Specifically, the amendments and additions:

- Require a person to obtain the consent of the owner or operator of a scrap tire collection site in order to deliver tires to the site.
- Exclude from the definition of “collection site” a community site owned by a local unit of government or nonprofit organization that received a grant for scrap tire cleanup.
- Eliminate a \$500,000 annual cap on certain scrap tire cleanup grants.
- Allow a written agreement between the owner and operator of a scrap tire collection site to require the operator, rather than the owner, to maintain a bond required by the DEQ.
- Expand the purposes for which the DEQ may use a collection site bond and prescribe the purposes for which the DEQ may use a scrap tire hauler bond.
- Exempt a collection site operator from the bond requirement based on the criteria that apply to a site owner.
- Specify that a collection site owner or operator who violates requirements to limit mosquito breeding is responsible for a state civil infraction, and may be ordered to pay

costs in addition to a fine.

- Allow the owner or operator of a collection site that is also a portable shredding operation to submit a joint registration application for both activities.
- Provide that scrap tires managed in compliance with Part 169 are exempt from regulation as a solid waste under [Part 115](#) (Solid Waste Management).
- Require a scrap tire hauler to maintain a \$10,000 bond in favor of the DEQ unless the hauler is owned and operated by a scrap tire processor and establish provisions regarding the payment of interest on those bonds.
- Require a person who arranged for the removal of scrap tires from his or her property to notify the DEQ of any missing record of information from a scrap tire hauler.
- Require a retailer to obtain the signature of a consumer who purchased replacement tires and retained the tires being replaced, unless the consumer refuses.
- Prohibit a person from intentionally engaging in the open burning of a scrap tire.
- Make it a felony to make a false statement or entry in a registration application, scrap tire transport record, or grant application, and prescribe the penalties.

(MCL [324.16901](#) *et seq.*, [324.16908](#) *et seq.*; and [324.16911](#))(Effective January 15, 2015).

## II. Economic Development/Brownfields

[PA 20](#): This Public Act amends the Brownfield Redevelopment Authority Act (BRAA) to revise the annual deadline for a brownfield redevelopment authority to apply for approval to have State Education Tax revenue paid to the authority. The BRAA provides that certain property tax revenues can be captured by a brownfield authority and used as tax increment revenue to repay certain advances or obligations incurred by the authority for brownfield activities. The BRAA further provides that the State Education Tax (SET) revenue shall be paid to the brownfield authority only upon approval by the Department of Treasury, and only if the amount of tax increment revenue the authority lost as a result of certain personal property tax exemptions enacted in 2007 reduces the allowable school tax capture the authority receives in a fiscal year. An authority may request that the local tax collecting official retain the SET revenue and pay it to the authority upon Department of Treasury approval. Under PA 20, the deadline for submitting an application to the Department of Treasury is now June 15 of the applicable tax year. Previously, the deadline was June 1. ([MCL 125.2665a](#))(Effective February 25, 2014).

[PA 115](#): This Public Act amends [Part 196](#) (Clean Michigan Initiative Implementation) of MNREPA to allow a municipality or a brownfield redevelopment authority with a CMI Brownfield Redevelopment Loan the option of seeking renegotiation of the terms of the loan, if the loan recipient can demonstrate a financial hardship related to the project financed by the loan. Under current law, communities cannot modify their payment structure for these loans. This amendment allows the loan recipient to make the request to the DEQ, which decides whether to renegotiate the length of the loan, the interest rate, and the repayment terms. This amendment, however, does not allow the reduction or elimination of the amount of the outstanding loan principal.

The DEQ is required to report to the Legislature the number of loans refinanced under this Public Act, the local unit of government or authority responsible for each refinanced loan, and the change in the terms of the loan. This information can be included in the department's annual report to the Legislature on the status of brownfield redevelopment authorities' activities. ([MCL 324.19612](#))(Effective April 11, 2014).

**PA 244:** PA 244 amends both the Brownfield Redevelopment Financing Act and the Economic Redevelopment Corporations Act to do the following:

- Permit a brownfield redevelopment authority or economic redevelopment corporation to provide in its by-laws that a person could be appointed to an authority or corporation board in his or her capacity as an elected official.
- Permit the by-laws to specify that the appointed person's term on the board would end upon the expiration of the person's term as a public official, including expiration of the term through resignation or removal from office.

(MCL [125.2655](#), [125.1604](#))(Effective June 27, 2014).

### **III. Recreation**

**PA 210-215:** This series of Public Acts amends and replaces significant portions of [Part 721](#) (Michigan Trailways) of MNREPA. In the early 1990's, the availability of abandoned railroad corridors jump-started the interest in recreational trails not only in Michigan but also in neighboring Midwest states. In response to this opportunity, Michigan adopted legislation in 1993 to establish a process by which the Michigan Natural Resources Commission (NRC) could designate certain trails that meet specific design standards as "Michigan trailways." Legislation to designate "Michigan heritage water trails" was approved around the same time.

Michigan's trail system has grown significantly in the last two decades, leading to discussions among state officials, local governments, and recreation groups about the future of the trail system. In 2010, the Legislature approved PA 45 which required the Department of Natural Resources (DNR) to prepare a comprehensive statewide trail plan. PA 45 also established the Michigan Snowmobiles and Trails Advisory Council along with an Equine Trails Subcommittee.

DNR completed its trail plan in January, 2014, incorporating many of the recommendations of the Trails Advisory Council and the Subcommittee. During the discussions of the trail system which led to the development of the trail plan, various agencies and stakeholders identified a number of shortcomings in the regulatory system in Part 721. Additionally, the success of the "Pure Michigan" travel and tourism campaign triggered an interest in incorporating the trail system into the "Pure Michigan" program.

A legislative package was developed in 2014 to address these issues, and last fall the Legislature adopted these amendments in a series of bills that culminated in the passage of PA 210-215. Among other things, the legislation does the following:

- Deletes the definition of “trailway” but retains the definition of “trail” (a right-of-way adapted to foot, horseback, motorized, or other non-motorized travel).
- Defines “water trail” as a designated route on a body of water, and includes a water trail in the definition of “trail.”
- Deletes provisions relating to the designation by the NRC of “Michigan trailways” and adds the designation of “Pure Michigan” trails and water trails, also revising the criteria for such a designation.
- Transfers from the NRC to DNR the authority to promulgate rules to implement Part 721 as amended and to administer the trail program.
- Transfers from the NRC to DNR authority regarding easements, contracts, and leases related to designated trails.
- Authorizes the DNR Director to designate a city, village, or township meeting certain criteria as a “Pure Michigan trail town.”
- Requires the DNR to work with interested parties to develop an online database of Michigan trail maps as well as a mobile software application of trail maps and other trail information.
- Includes nonprofit organizations and private sector entities among the entities eligible for grants from the Michigan Trailways Fund to operate and maintain designated trail segments.
- Changes the name of the Michigan Snowmobile and Trailways Advisory Council to the Michigan Trails Advisory Council.
- Requires that two members, rather than one member, of the Advisory Council be Upper Peninsula residents.
- Changes the term “Michigan trailways” to “Pure Michigan trails” and “Pure Michigan water trails” in various sections of Part 721 relating to Advisory Council recommendations, fees, funding of projects, and grants.
- Requires the Advisory Council to consult with organizations involved with expanding trail access for people with disabilities.

([MCL 324.72101](#) *et seq.*; [324.1301](#))(Effective September 25, 2014).

[PA 549](#): This Public Act expands the provisions relating to abandoned vehicles to also include abandoned vessels, off-road recreation vehicles, and snowmobiles. A person who abandons these types of vehicles is subject to a civil fine of at least \$500 for a first violation and at least \$1,000 for a subsequent violation. *This act prescribes* procedures for the designation, removal and sale of an abandoned item and the procedures for an owner to contest the designation or removal and redeem the item. ([MCL 324.8901](#), [324.8905a](#), [324.80125](#), [324.80130f](#) *et seq.*, [324.81151](#) and [324.82161](#))(Effective April 16, 2015).

#### **IV. Natural Resources**

**PA 82-85**: This series of Public Acts addresses the recovery of additional oil or natural gas from existing wells by using carbon dioxide extraction methods. [PA 82](#) amends the Severance Tax Act by lowering the taxes paid by companies on oil that is extracted through a “carbon dioxide

secondary or enhanced recovery project,” which is defined as “operations designed to increase the amount of oil or natural gas recoverable from a reservoir by injection of carbon dioxide, either alone or as a primary component of a mixture with other substances, provided the project had been approved . . . .”

[PA 83](#), [PA 84](#), and [PA 85](#) collectively expand the current eminent domain authority to include carbon dioxide pipelines and apply other legislation currently in place for crude oil and petroleum pipelines to carbon dioxide pipelines. Additionally, these Public Acts amend the procedures for eminent domain to provide that actions to take land for purposes of laying, maintaining, operating, and accessing pipelines for carbon dioxide, crude oil, or petroleum will be conducted under the Uniform Condemnation Procedures Act, which contains certain protections for homeowners, rather than under the procedures for railroad companies when laying track. ([MCL 205.303](#); [205.311a](#); [483.1 et seq.](#))(Effective April 1, 2014).

[PA 145](#): This Public Act amends [Part 487](#) (Sport Fishing) of MNREPA to eliminate the statutory open season for black bass, thereby allowing the NRC the exclusive authority to regulate the season (under the NRC’s expanded authority granted to it in Public Act 21 of 2013 and Public Act 255 of 2014 (discussed below)). ([MCL 324.48716](#))(Effective June 3, 2014).

[PA 146](#): This Public Act amends the MNREPA to make September 1, 2015, the new deadline by which landowners can, without penalty, withdraw forestland from the classification of commercial forestland in order to enter the Qualified Forest Program. The previous deadline was June 11, 2014.

The old deadline was put in place by [Public Act 48 of 2013](#), which was part of a package of bills that made various changes to the Commercial and Qualified Forest programs to encourage greater participation, in an effort to promote the continued health and productivity of forestland, as well as encourage new development of non-industrial private forestland. Among the changes, the bills allowed landowners in the Commercial Forest Program to move to the Qualified Forest Property Program without penalty, under certain conditions. In order to avoid a withdrawal penalty, all of the following must occur:

- The owner of the property must withdraw the land from the Commercial Forest Program as provided for in [Part 511](#) of MNREPA;
- The withdrawn land must be placed on the assessment roll in the local tax collecting unit in which the land is located; and
- The owner of the land must apply for, and be granted, admission to the Qualified Forest Program. The owner is required to submit a copy of the recorded qualified forest school tax affidavit by December 31 of the year in which the land is withdrawn.

([MCL 324.51108](#))(Effective June 4, 2014).

[PA 160](#): This Public Act amends MNREPA by eliminating Section 42501(3), which prohibited an individual from holding both a fur dealer's license and a license to trap beaver simultaneously. ([MCL 324.42501](#))(Effective June 11, 2014).



[PA 168](#): This Public Act amends provisions governing the use of a public road end at an inland lake or stream in [Part 301](#) of MNREPA. Part 301 provides that, unless a recorded deed, recorded easement, or other recorded dedication expressly provides otherwise, a public road end may not be used for any of the following purposes:

- Construction, installation, maintenance, or use of boat hoists or boat anchorage devices.
- Mooring or docking of a vessel between midnight and sunrise.
- Any activity that obstructs ingress to or egress from an inland lake or stream.
- The construction, installation, maintenance, or use of a dock or wharf other than a single seasonal public dock or wharf that is authorized by the local unit of government, subject to any permit required under Part 301.

Part 301 also provides that the local unit of government may prohibit a use of a public road end that violates the prohibitions described above. Prior to the amendment, Part 301 defined "local unit of government" as the county, township, city, or village with jurisdiction over a public road. This Public Act revised the definition of "local unit of government" to mean a township, city, or village in which the public road end is located, thereby eliminating the county's jurisdiction to issue permits for the use of public road ends. ([MCL 324.30111b](#))(Effective June 12, 2014).

[PA 253](#): This Public Act revises the permit process for aquatic invasive species abatement and creates a new fund to receive the proceeds from the related fees. It amends Part 33 of MNREPA (Aquatic Nuisance Control) to:

- Make the certificates of coverage (for lakes that are either artificial or without an outlet) and permits (for lakes with outlets) valid for three years instead of one year, unless the applicant requests a shorter time period.
- Provide for electronic application submittal and payments.
- Move the DEQ approval deadline from May 1 to April 15 (or later in certain circumstances).
- Set April 1 as the deadline for permittees to pay annual fees after being granted the permit and allow suspension of the permit for failure to pay by this deadline.
- Require the DEQ to create and maintain a registry, which is to be posted on its website, of bodies of water that are infested by aquatic invasive species and the particular species infesting each waterbody.
- Require the DEQ to adjust the fees to achieve a target in fee revenue, while requiring the fees to be proportional to, and not in exceedance of, current fees.
- Create the "Aquatic Nuisance Control Fund" in the state treasury to receive the revenues derived from application fees, rather than the fees going to the Land and Water Management Permit Fee Fund, and provide that monies left in the fund at the end of each fiscal year carry over to the next fiscal year and do not lapse into the General Fund.
- Require that the monies in the fund be used only for administration of Part 33.
- Prohibit the DEQ from charging a fee for amending an application for a certificate of coverage or permit.
- Define "aquatic invasive species" as "an aquatic species that is nonnative to the

ecosystem under consideration and whose introduction causes or is likely to cause economic or environmental harm or harm to human health." (This definition is currently found in Part 41, which established the Aquatic Invasive Species Advisory Council and is due to be repealed in December, 2015.).

- Subject to certain limits, allow a permittee, without revision to the permit or certificate of coverage, but after notification to the DEQ, to expand the area of impact beyond the area originally authorized in order to include adjacent areas of the same body of water that have become infested after the application was submitted (in which event, the permittee may increase the amount of the chemical used, as authorized in the certificate or permit, by an amount proportionate to the expanded area of impact).
- Require a permittee who expands an area of impact to provide the DEQ with additional information and an additional fee if the fee would have been higher if the expanded area of impact had been included in the original application.
- Expand the activities for which a permit is not required to include: (1) the removal by the riparian owner, or a person authorized by the owner, of plants that are an aquatic nuisance if the removal is accomplished by hand-pulling without using a powered or mechanized tool and all plant fragments are removed from the water and properly disposed of; and (2) raking by the owner or person authorized by the owner of areas of lake bottomland that are unvegetated and predominantly composed of sand or pebbles prior to raking, which would be done without using a powered or mechanical tool, in order to minimized disturbance to the bottomlands.

[\(MCL 324.3301, 324.3305, 324.3306, 324.3307, 324.3309, 324.3311, 324.3315, 324.30103, 324.30113\)](#)(Effective June 30, 2014).

**PA 255:** This Public Act amends [Part 401](#) (Wildlife Conservation) of the MNREPA to allow an individual to possess game killed as a result of a motor vehicle collision. Specifically, this Public Act does the following:

- Grants the vehicle driver first priority to take possession.
- Requires an individual who takes possession of a bear to obtain a salvage tag.
- Requires an individual who takes possession of a deer to obtain a salvage tag, notify the DNR or a local law enforcement agency via telephone or website, or report the possession when reporting the accident to 9-1-1.
- Requires an individual who takes possession of small game or other particular species to prepare a written record and show it to a law enforcement officer upon request.
- Authorizes the DNR to suspend all salvage mechanisms for disease-affected areas, and requires the DNR to revoke the suspension after it verifies the absence of the identified disease in that area.
- Requires the DNR to submit to the Legislature an annual report on the number of salvage tags issued and animals taken under this act.

[\(MCL 324.40115\)](#)(Effective September 28, 2014).

**PA 281:** This legislation garnered a lot of media attention surrounding the debate over wolf hunting. It is one of only two citizen-petition initiated laws in the past five years. This Public Act prospectively re-enacted provisions of [Public Act 520 of 2012](#) and [Public Act 21 of 2013](#) in the event they were overturned by public referendum in November, 2014 (which they were). (Public Act 520 designated the gray wolf as a game species. Public Act 21 extended to the NRC the authority to designate game species, which was previously granted solely to the Legislature.) Since this new legislation includes a \$1 million appropriation for the DNR to fight invasive species, it cannot be overturned through public referendum.

The effect of this Public Act is that it gives the NRC concurrent authority with the Legislature to designate game under [MCL 324.40110](#). It also expands the potential game designees from “animal” to “species of wildlife.” The Legislature, however, retains the sole authority to remove a game designation for a species. It also grants the NRC concurrent authority with the Legislature to establish the first open season for a game species.

The NRC must exercise sound scientific wildlife management in making its decisions. In doing so, it is expressly permitted to take testimony from department personnel, independent experts, and others, as well as review scientific literature and data, among other sources.

This Public Act also allows an active duty member of the military to obtain a license, except a license that requires a lottery, at no cost.

Finally, this Public Act declares that aquatic invasive species, including Asian carp, represent a significant threat to the State’s fisheries, aquatic resources, outdoor recreation and tourism economies, and public safety. To aid the management of aquatic invasive species, it apportions \$1,000,000.00 to the DNR which funds shall not lapse to the general fund if not expended within the fiscal year. ([MCL 324.40103](#), [324.40110](#), [324.40113a](#), [324.43536a](#), and [324.48703a](#))(Effective March 31, 2015).

**PA 416:** This legislation renames [Part 215](#) of MNREPA from the “Refined Petroleum Fund” to the “Underground Storage Tank Corrective Action Funding.” It amends numerous sections of Part 215 to create an Underground Storage Tank Cleanup Fund, which will be administered by the newly-created authority, the Underground Storage Tank Cleanup Fund Authority. The new fund receives a portion of the fuel tax and can be used to reimburse owners or operators for corrective actions that address UST releases, achieve compliance with [Part 213](#) (Leaking Underground Storage Tanks), or assist owners and operators of USTs in meeting their financial assurance requirements. This Public Act also sets a sunset date of December 31, 2016 for funding certain inspection programs carried out by the Michigan Department of Agriculture and Rural Development using funds from the Refined Petroleum Fund. ([MCL 324.21502 et seq.](#))(Effective December 30, 2014).

**PA 537-541:** This series of Public Acts creates felonies for violations involving the illegal possession or introduction of a prohibited aquatic species and provides for the seizure and forfeiture of property used in these violations or in violations of a permit issued under [Part 413](#)

(Transgenic and Nonnative Organisms). ([PA 537: MCL 324.41301, 324.41302, 324.41302a, 324.51303, 324.41305, 324.41306, 324.41310](#); [PA 538: MCL 777.13e](#); [PA 539: MCL 600.4701](#); [PA 540: MCL 24.292](#); [PA 541: MCL 324.41309, 324.47361 and 324.48738](#), )(All five Public Acts Effective April 15, 2015).

[PA 542](#): This legislation amends [Part 201](#) of MNREPA with respect to remediation and cleanup provisions, procedures and definitions. Overall, it revises the definitions of residential and non-residential clean-up criteria, allows the DEQ to approve site-specific cleanup criteria in certain instances, narrows the definition of a facility to exclude divided parcels or sites where natural processes have reduced the hazardous substance levels, and expands the provisions for the use of restrictive covenants. ([MCL 324.20101, 324.20101c, 324.20107a, 324.20114, 324.20114c, 324.20114d, 324.20116, 324.20118, 324.20120a, 324.20120b, 324.20120d, 324.20121, and 324.20126](#))(Effective January 15, 2015). For a more detailed analysis of these amendments, see the article in this issue of the *Michigan Environmental Law Journal* by Charlie Denton, Tammy Helminski, and Ken Vermeulen.

## Michigan “Lame Duck” Again Revises State Environmental Cleanup Laws

*By Tammy Helminski, Charles Denton, and Kenneth Vermeulen, Barnes & Thornburg LLC*

Amendments of [Part 201](#) (Environmental Remediation) of the Natural Resources and Environmental Protection Act (NREPA) were passed by the Michigan Legislature in “lame duck” session. In January 2015, Governor Snyder signed into law [Public Act 542](#), which creates new definitions and amends current provisions regarding remediation and cleanup at sites where hazardous substances have been released. A separate bill, [Public Act 416](#), passed during this same time, makes significant changes to underground storage tank cleanup funding under [Part 215](#) (UST Corrective Action Funding) of NREPA.

### Definitions

The new Part 201 law updates the definition of “all appropriate inquiry” (“AAI”) to clarify applicability of the ASTM 2013 Phase I Environmental Site Assessment standard ([E1527-13](#)). See [MCL 324.20101\(1\)\(c\)](#). The revised language specifies that AAI is an evaluation performed “. . . in conformance with [40 CFR 312](#) (2014).” *Id.* (emphasis added). Adding the reference to the most recent version of 40 CFR 312, the federal requirements for AAI, makes Michigan consistent with EPA’s [December 30, 2013](#) rulemaking that accepts the use of ASTM E1527-13 and eliminates the unnecessary potential confusion and complexity of different standards applying under state and federal law.

The new law clarifies the definition of “non-residential” and “residential” uses for remedial plans. See [MCL 324.20101\(1\)\(ss\)](#). MDEQ risk-based clean-up criteria are based on current and future land use of the contaminated site, which fundamentally distinguishes between “residential” and “non-residential” properties. These categories have prompted some confusion, and this legislation now clarifies that *non-residential* means the category of land use for parcels, or portions of parcels, that are not residential, such as any of the following:

- Industrial, commercial, retail, office, and service uses.
- Recreational properties that are not contiguous to residential property.
- Hotels, hospitals, and campgrounds.
- Natural areas such as woodlands, brushlands, grasslands, and wetlands.

*Id.* On the other hand, *residential* is defined as the category of land use for properties where people live and sleep for significant periods of time – and references the frequency of potential exposure to contaminants reasonably expected or foreseeable compared with the exposure assumptions used by the MDEQ to develop generic residential cleanup criteria under Part 201.

*Id.* Homes and surrounding yards, condominiums, and apartments are examples of this category. *Id.*

These Part 201 amendments also clarify that pieces of a property which have been lawfully divided from the rest of the contaminated site and do not contain hazardous substances in excess of concentrations that satisfy the cleanup criteria for unrestricted residential use are *NOT a regulated Part 201 “Facility.”* See [MCL 324.20101\(1\)\(s\)](#). Also excluded from the definition of “Facility” are sites where natural attenuation or other natural processes have reduced the concentrations of hazardous substances below the criteria for unrestricted residential use. *Id.* The previous exclusion of sites that do *not* fall under the definition of Facility is amended by eliminating the requirement that MDEQ-approved site-specific criteria may not depend on any land use or resource use restriction to ensure protection of the public health or the environment. *Id.*

The new Part 201 law also removes the definition of “free product” and adds definitions for “migrating NAPL,” “mobile NAPL,” and “NAPL” that are tied to the definitions of these terms in [Part 213](#) of NREPA, which is the underground storage tank cleanup program. See [MCL 324.20101\(1\)\(dd\)-\(ff\)](#). Additionally, certain obligations to address a “source” existed in the statute, but now “source” is a defined term. “Source” means “any storage, handling, distribution, or processing equipment from which the release originates and first enters the environment.” See [MCL 324.20101\(1\)\(zz\)](#).

### **Environmental Diligence**

In addition to clarifying which ASTM standard satisfies “all appropriate inquiry” under Michigan law, the new Part 201 law makes other changes to the environmental diligence process required to acquire and maintain a defense to liability under Part 201. A new provision allows for possible late filing of a Baseline Environmental Assessment (BEA) under certain limited circumstances. For example, if the timing requirements for completing and filing a BEA are not met, an owner or operator may request from the MDEQ “a determination that its failure to comply with the time frames . . . when conducting and submitting a [BEA] was inconsequential.” See [MCL 324.20126\(1\)\(c\)](#). The new law also relaxes contaminated site “Facility” transfer disclosure notice requirements. See [MCL 324.20116](#).

### **Changes to Cleanup Criteria**

The Part 201 legislation includes three main changes important to cleanup criteria determinations. First, the way the MDEQ calculates the *background* concentration of a hazardous substance is expanded beyond the 2005 Michigan Background Soil Survey, by adding additional ways of calculating the background levels based upon the site-specific location being investigated. See [MCL 324.20120a](#).

Another significant change regarding cleanup criteria relates to the former “free-product” references for hazardous substances in a liquid phase, by instead referencing Non-Aqueous Phase Liquids (NAPL) and including best practices for managing NAPL developed by the American Society for Testing and Materials (ASTM) or the Interstate Technology and Regulatory Council (ITAR). See [MCL 324.20114\(1\)\(f\)](#).

Third, developing site-specific approaches in instances where there is no analytical method or generic cleanup criteria available for any particular hazardous substance is also facilitated by references to surrogates, modeling or other methods. See [MCL 324.20120a\(9\)](#).

### **Risk-Based Closures and Restrictive Covenants**

As part of a risk-based clean-up approach, a Facility can now, in lieu of determining the nature and extent of the hazardous substance release, opt for, in essence, a presumptive remedy of eliminating the potential for exposure in areas where the hazardous substance is *expected* to be located through removal, containment, exposure barriers, or land use or resource use restrictions. See [MCL 324.20114\(6\)](#).

Throughout the Part 201 amendments, there is an emphasis on partial cleanups. Such partial remedial actions may be based on separate parcels or areas within a site of contamination (or “Facility”), types of hazardous substances, and impacted media.

Corrective actions under Federal [RCRA](#) or NREPA [Part 111](#) are now explicitly correlated with Part 201 clean-ups to avoid or minimize possible duplication.

New Section 21 of Part 201 amends the Restrictive Covenant requirements for land use or resource use restrictions relied on to assure the effectiveness and integrity of a remedy. See [MCL 324.20121](#). This new section clarifies the purpose of land use or resource use restrictions to include: reducing or restricting exposure to hazardous substances, eliminating a potential exposure pathway, providing for access, and to otherwise assure the effectiveness of response activities being undertaken at the property. *Id.* Previously-recorded covenants remain in effect and enforceable.

Institutional controls can also be accomplished by a local ordinance or other law or regulation that for instance limits or prohibits the use of contaminated groundwater, development in certain locations, or how the land is used. These alternative instruments may also include license agreements, contracts with local, state or federal governments, health codes, and government permitting requirements. See [MCL 324.20121\(8\)](#).

Importantly, in addition to being recorded by the real estate owner, restrictions on land and resource uses could be imposed on a property, or part of a property, as part of a conservation easement, court order, or judicially-approved settlement involving the property. *Id.* A restrictive covenant must be written in “plain, everyday language” and the statute now contains very limited required provisions and other optional or variable provisions, the scope of which is similar to those contained in the model document maintained on the MDEQ’s website. *Id.*

### **UST Corrective Action Funding**

[Public Act 416](#) was enacted separately and amends [Part 215](#) of NREPA, now titled “Underground Storage Tank [UST] Corrective Action Funding.” See [MCL 324.21501-21563](#). This law creates a new administrative authority, the Underground Storage Tank Cleanup Fund Authority. Significantly, a portion of the fuel tax will be used to establish and finance a new UST Clean-up Fund, administered by the new Authority, to help owners with UST financial assurance requirements and eventually replace private insurance.

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## **Federal Judge Halts Wolf Hunts (for Now) by Returning Midwest Wolves to the Federal Endangered Species List**

*Christopher J. Dunsky, Christopher J. Dunsky PLLC*

### **Introduction**

Ever since the United States Fish & Wildlife Service (FWS) removed wolves from the federal endangered species list in Michigan and eight other Midwest states in 2011, Michigan wolf hunts have been the object of a three-way game of legislative Ping-Pong. The Michigan Legislature and two competing citizen groups have engaged in a battle of legislation, referenda, and a citizen initiative,<sup>1</sup> all seeking to decide whether wolves may be hunted. The torch of victory has passed several times from one side to the other. Now, like a surprise ending in an O. Henry short story, a U.S. District Judge in Washington, D.C. has at least temporarily ended the game by vacating the FWS delisting of Midwest wolves, so that Michigan wolves revert to their previous status as a federal endangered species. [Humane Society of the United States v. Jewell](#), 2014 WL 7237702, \_\_\_ F.Supp. 3d \_\_\_ (D.D.C. Dec. 19, 2014). Any Michigan law that would authorize wolf hunting is now preempted by section 6(f) of the federal Endangered Species Act

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<sup>1</sup> Article 2 Section 9 of the Michigan Constitution of 1963 reserves to the people the rights of initiative and referendum. The people may use initiative to propose laws to the legislature and to enact laws by popular vote. The power of the people to approve or reject laws already enacted by the legislature is called the power of referendum. [Const. 1963 Art. II, § 9](#)

(ESA).<sup>2</sup>

### **History of FWS Listings of Wolf Species and “Distinct Population Segments”**

The FWS has listed the gray wolf or its subspecies as endangered or threatened species for almost fifty years. The FWS first listed the “timber wolf,” a subspecies of the gray wolf that included wolves in Minnesota, in 1967.<sup>3</sup> By June 1976, the FWS had listed three other subspecies of gray wolves.<sup>4</sup> In 1978, the FWS simplified affairs by listing the entire gray wolf species--“threatened” in Minnesota and “endangered” in the other lower 48 states.<sup>5</sup>

The ESA requires that the FWS adopt and implement a “recovery plan” to help an endangered species return to health.<sup>6</sup> A recovered species may be removed from the list.<sup>7</sup> The FWS adopted a recovery plan for the gray wolf in 1978 and revised the plan in 1992. The recovery plan has been largely successful, with the number and distribution of wolves increasing in Minnesota, Wisconsin, and Michigan.<sup>8</sup>

With its recovery plan succeeding, the FWS began efforts to delist, or downgrade protections for, the gray wolf. In 2003 the FWS promulgated a rule that divided gray wolves into three groups, or “distinct population segments” (DPS):<sup>9</sup> an Eastern DPS, a Western DPS, and a Southwestern DPS.<sup>10</sup> Only wolves in the Southwestern DPS were listed as endangered; wolves in the other two DPSs were downgraded to “threatened” and FWS regulations permitted them to be killed in some circumstances. Two district courts held the 2003 rule to be invalid and vacated it.<sup>11</sup> [Defenders of Wildlife v. Department of Interior](#), 354 F.Supp.2d 1156 (D. Or. 2005); [National Wildlife Fed’n v. Norton](#), 386 F.Supp.2d 553 (D. Vt. 2005).

Under pressure from the State of Wisconsin to allow some wolves to be killed, the FWS promulgated a rule in 2007 that designated wolves in the western Great Lakes states as the “Western Great Lakes Distinct Population Segment,” and simultaneously delisted those wolves

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<sup>2</sup> [16 U.S.C. 1535\(f\)](#).

<sup>3</sup> [32 Fed. Reg. 4001](#) (Mar. 11, 1967).

<sup>4</sup> Northern Rocky Mountain Wolf ([38 Fed. Reg. 14678](#) (June 4, 1973)); Mexican Wolf ([41 Fed. Reg. 17736](#) (Apr. 28, 1976)); Texas Gray Wolf ([41 Fed. Reg. 24062](#) (June 14, 1976)).

<sup>5</sup> [43 Fed. Reg. 9607](#) (Mar. 9, 1978).

<sup>6</sup> [16 U.S.C. 1533\(f\)\(1\)](#).

<sup>7</sup> [16 U.S.C. 1533\(c\)\(2\)](#).

<sup>8</sup> The FWS reports that “In the Western Great Lakes and Northern Rocky Mountains, the gray wolf has rebounded from the brink of extinction to exceed population targets by as much as 300 percent.” [FWS News Release](#), “Service Proposes to Return Management and Protection of Gray Wolves to State Wildlife Professionals Following Successful Recovery Efforts” (June 7, 2013).

<sup>9</sup> In 1978 the ESA definition of “species” was modified to include “any distinct population segment of any [animal] which interbreeds when mature.” [16 U.S.C. 1532\(16\)](#). The ESA does not define “distinct population segment” and there is no contemporaneous legislative history. Very roughly speaking, a distinct population segment can be a group of animals that lives geographically apart from other members of its species, but may not qualify as a subspecies.

<sup>10</sup> [68 Fed. Reg. 15804](#) (Apr. 1, 2003).

<sup>11</sup> For a discussion of these decisions, see *Jewell, supra* note 1, at \*13-14.



as either endangered or threatened.<sup>12</sup> The Humane Society of the United States (Humane Society) and other groups successfully persuaded the court to vacate and remand the rule in [Humane Society of U.S. v. Kempthorne](#), 579 F.Supp.2d 7 (D.D.C 2008). The key issue in *Kempthorne* was whether the ESA authorized the FWS to *simultaneously* establish a DPS and delist it. The FWS argued that the ESA unambiguously gave it such authority.<sup>13</sup> The district court held that the ESA was ambiguous on that point, and remanded the rule to FWS to reconsider that legal issue.<sup>14</sup> Vacating the rule returned wolves in the Midwest to their 1978 status: threatened in Minnesota and endangered elsewhere.

The FWS apparently construed the court's remand order as an invitation to promulgate substantially the same rule with a beefed up legal justification. After all, if a court considers a statute ambiguous, as the *Kempthorne* court did, it will usually defer to an agency's reasonable interpretation. [Chevron USA v. Natural Resources Defense Council](#), 467 U.S. 837 (1984). In December, 2011, the FWS promulgated a final rule that: (1) designated all wolves in Minnesota, Michigan, Wisconsin and parts of six other Midwest states as the Great Lakes DPS, (2) found that wolves in this DPS were not in danger of extinction, and (3) delisted them from protection under the ESA.<sup>15</sup>

This rule set the stage for Michigan and other Midwest states to authorize wolf hunting.

### **2012-2014 Michigan Wolf Legislation, Referenda, and Citizen Initiative**

The Michigan legislative Ping-Pong game over wolf hunting began soon after the FWS promulgated the 2011 rule. The Michigan Legislature scored the first point by enacting [PA 520 of 2012](#) (signed and effective December 28, 2012), which authorized the first wolf hunt in Michigan since the 1920's. PA 520 also authorized the Michigan Natural Resources Commission (the Commission) to decide whether future wolf hunts would be approved.

But a group known as Keep Michigan Wolves Protected (KMWP), funded largely by the Humane Society, quickly countered by launching a campaign for a statewide referendum to reject PA 520. On May 22, 2013, the Michigan Board of State Canvassers certified that the group had collected enough signatures to warrant putting the referendum on the November 2014 ballot. Pending the November vote, PA 520 was suspended pursuant to Article 2 Section 9 of the 1963 Michigan Constitution.

Anticipating that the referendum might succeed, proponents of wolf hunting successfully shepherded a second bill through the Legislature. [PA 21 of 2013](#) (signed and effective May 14, 2013) authorized the Commission to designate new game species not already rejected by referendum at the time PA 21 was enacted, and allowed wolf hunting even if PA 520 was suspended or repealed as a result of the referendum. In May and again in July, 2013, the

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<sup>12</sup> [72 Fed. Reg. 6052](#) (Feb. 8, 2007).

<sup>13</sup> 579 F.Supp.2d at 14-15.

<sup>14</sup> *Id.* at 15.

<sup>15</sup> [76 Fed. Reg. 81666](#) (Dec. 28, 2011).

Commission approved a wolf hunt in the Upper Peninsula, authorizing up to 43 wolves to be killed by hunters.

In August, 2013, KMWP launched a second referendum, this time to repeal PA 21, although it came too late to stop the November 2013 wolf hunt. Twenty-two wolves were taken in the hunt.

While the hunt was underway, a coalition of hunting and conservation groups known as Citizens for Professional Wildlife Management (CPWM) showed that two can play the referendum-initiative game. CPWM launched its own petition drive to propose legislation it dubbed the “Scientific Fish and Wildlife Conservation Act.” The CPWM-supported initiative would reaffirm NRC’s authority to designate wolves as game and approve wolf hunting.

In May and July, 2014, the Board of State Canvassers certified that enough signatures had been collected to put KMWP’s two referenda, as well as CPWM’s initiative, on the November 2014 ballot. However, in late August 2014, the Legislature exercised its prerogative to approve CPWM’s proposal, and thus made it unnecessary for that proposal to go to the voters. CPWM’s proposal thus became PA 281 of 2014. The Legislature protected PA 281 against a citizen petition by including an appropriation of money for the Department of Natural Resources to fight aquatic invasive species. Article 2 Section 9 of the Michigan Constitution provides that the “power of referendum does not extend to acts making appropriations for state institutions.”

Although the voters ultimately sided with KMWP by substantial margins on its two anti-hunting referenda in November 2104, commentators generally have concluded that PA 281 moots those votes and clears the way for the Commission to approve future wolf hunts.<sup>16</sup>

### **Federal Judge Vacates 2011 Rule and Returns Wolves to Endangered Status**

In addition to pursuing two referenda in Michigan, the Humane Society filed a judicial challenge in the U.S. District Court for the District of Columbia to the FWS 2011 rule that had: 1) designated Midwest wolves as a DPS, and 2) removed the DPS from the list of endangered species.<sup>17</sup> The states of Michigan and Wisconsin intervened as defendants and supported the FWS.

Both sides filed motions for summary judgment. Just as in *Kemphorne*, the Humane Society’s primary argument was that the ESA does not authorize FWS to designate a DPS and simultaneously delist it.<sup>18</sup> The FWS argued that the court was required to defer to the FWS’s legal interpretation because that interpretation was not plainly erroneous. The court held that it made no sense for the FWS to designate a DPS that it has decided needs no protection under the ESA.<sup>19</sup> The court relied on the text of the ESA, which provides that the FWS “shall publish . .

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<sup>16</sup> Matheny, Voters Have Their Say on Wolf Hunt, But Will It Matter? *Detroit Free Press*, Nov. 5, 2014.

<sup>17</sup> *Jewell*, *supra* note 1.

<sup>18</sup> *Id.* at \*30.

<sup>19</sup> *Id.* at \*30-31.

. . . a list of all species determined . . . to be endangered species [or] threatened species.”<sup>20</sup> In other words, the ESA authorizes the FWS to list endangered species, not “unendangered” species. The court described the process of listing a DPS as “a one-way ratchet that may be used only to protect species,” and concluded that “[O]nly after a DPS has been created to afford protection . . . may the DPS be revised and the [DPS] downlisted.”<sup>21</sup> The court rejected for several reasons FWS’s secondary argument that Minnesota wolves had “functioned as a DPS” since 1978, including FWS’s own published agency policy regarding DPS’s.<sup>22</sup>

The court also held that the FWS violated the ESA by designating and delisting a DPS consisting exclusively of animals that were members of a species (the gray wolf) that it had previously listed as endangered, reasoning that Congress intended that FWS use the DPS concept only for the purpose of expanding, not reducing, protections for species.<sup>23</sup>

The court went on to find that even if the ESA had authorized FWS to delist the gray wolf in the manner it used, the 2011 rule was not supported by the factual record before the agency. In particular, the court found that the FWS failed to explain: (1) why the parts of six Midwest states excluded from the DPS were not suitable range for wolves; (2) why vulnerability of the wolf to disease is not a continuing threat to wolf existence; (3) how the lack of wolf management plans in six of the nine states that that were wholly or partly within the DPS does not constitute a threat to wolves; and (4) how certain state management plans that permit unlimited killing of wolves in certain areas are not a threat to wolves.<sup>24</sup>

Attorneys who are accustomed to seeing courts defer to an agency’s legal interpretation may be surprised by this result. But courts have a history of interpreting the ESA in favor of protecting endangered species, beginning with the famous snail darter case of *TVA v. Hill*, 437 U.S. 153 (1978).

## Conclusion

The return of Michigan wolves to the federal endangered species list moots state-level efforts to authorize wolf hunting, at least for the present. Of course, the FWS may appeal. Or it may pursue a regulatory strategy to delist wolves that does not depend on simultaneously creating and delisting a DPS, and that is supported by a stronger administrative record explaining and justifying the factual basis for the rule. Well before the court vacated the FWS 2011 rule delisting Midwest Wolves, the FWS had proposed a rule that would remove *all* gray wolves from the endangered and threatened lists, except for the Mexican wolf, which it proposed to maintain as an endangered subspecies.<sup>25</sup> Developing and promulgating a new rule is likely to

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<sup>20</sup> *Id.* at \*31, quoting 16 USC 1533(c).

<sup>21</sup> *Id.* at \*31.

<sup>22</sup> *Id.* at \*33.

<sup>23</sup> *Id.* at \*35-41.

<sup>24</sup> *Id.* at\*43-50.

<sup>25</sup> [78 Fed. Reg. 35664](#) (June 13, 2014). The period for public comment on the proposed rule was extended to Mar 27, 2014. [79 Fed. Reg. 7627](#) (Feb 10, 2014). For a critique of this proposed rule, see Garfinkle, *Among the One*

take substantial time during which wolves will remain a federally protected endangered species.

Whether one agrees with the court's ruling or not, legal counsel for the Humane Society deserve credit for a howling success.



## EPA's Water Transfers Rule: A Soup to Nuts Explanation

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### I. Background

As early as 1879, the United States government exerted control over navigable waters to prevent pollution.<sup>1</sup> By the early 1970s, it had become clear that previous attempts to regulate pollution had been grossly ineffective, and in 1972 the Congress enacted sweeping amendments to the Federal Water Pollution Control Act.<sup>2</sup> These have been commonly referred to ever since as the Clean Water Act (“CWA”). The CWA entrusted the Environmental Protection Agency (“EPA”) to achieve the main purpose of the Act—“to restore and maintain the chemical, physical, and biological integrity of the Nation's waters”—and established an ambitious national goal of completely eliminating the discharge of pollutants into the navigable waters of the United States by 1985.<sup>3</sup>

#### A. NPDES Permits

The CWA takes a practical approach to this “lofty goal of eliminating water pollutant discharge . . . [by] requir[ing] principally that discharges be regulated by permit, not prohibited outright.”<sup>4</sup> The “most important component” of the CWA is the National Pollutant Discharge Elimination System (NPDES) permitting program, provided for by Section 402, 33 U.S.C. § 1342.<sup>5</sup> The NPDES program makes it illegal for any person to discharge a pollutant without first obtaining and complying with a permit.<sup>6</sup> The CWA defines the “discharge of a pollutant” as “[1] any addition [2] of any pollutant [3] to navigable waters [4] from any point source.”<sup>7</sup> Each of these four elements has been the source of much litigation.<sup>8</sup> The Act defines each of the last three elements, but does not define “addition,” nor is the term discussed in the legislative history.<sup>9</sup>

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<sup>1</sup> In his in-depth history, *The Evolution of Water Pollution Control in the United States- State, Local, and Federal Efforts, 1789-1972: Part II*, William L. Andreen argues that the first use of federal control of waterways for this purpose arose after yellow fever outbreaks decimated southern cities in the late 1870s. 22 *Stan. Envtl. L.J.* 215-219 (2003).

<sup>2</sup> *Id.* at 260, 286; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

<sup>3</sup> 33 U.S.C. §§ 1251(a), 1251(a)(1) (1972). This goal has not yet been met, but the CWA has nevertheless dramatically improved the quality of our national waters. Chris Reagen, *The Water Transfers Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, 83 *U. Colo. L. Rev.* 307, 311 (2011).

<sup>4</sup> *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 486 (2d Cir. 2001).

<sup>5</sup> *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1294 (1<sup>st</sup> Cir. 1996); 33 U.S.C.A. § 1342. As of 2001 more than 400,000 facilities were permitted under NPDES, a number that has no doubt grown even larger with the implementation of new storm water requirements in 2003. Environmental Protection Agency, [Protecting the Nation's Water Through Effective NPDES Permits \(Jun 15, 2014\)](#).

<sup>6</sup> *Envtl. Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976).

<sup>7</sup> 33 U.S.C. § 1362(12) (bracketed numbers added).

<sup>8</sup> *Id.* at (6), (7), and (14); *see, e.g., Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 711 (2013) (“pollutant”); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 456-57 (1985) (“navigable waters”), *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1356 (4th Cir. 1976) (“point sources”).

<sup>9</sup> 33 U.S.C. § 1362; *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-175 (D.C. Cir. 1982).

## B. The “Unitary Waters Theory”

The practical effect of having no statutory definition of “addition” is that EPA regulations have been able to carve out exceptions to NPDES permitting for activities that the agency doesn’t construe as “additions.” Starting in 1982, EPA began advancing the “unitary waters theory,”<sup>10</sup> which relies on both a broad interpretation of the CWA and a dictionary definition of the word “addition.”<sup>11</sup> “Addition” is typically defined to mean “to join, annex, or unite,” and the CWA requires an “addition . . . to navigable waters.”<sup>12</sup> Combining these two terms leads EPA to the conclusion that all navigable waters of the United States are one body of water, and that a pollutant must come from the “outside world” to increase the net pollutants in the system.<sup>13</sup> In understanding complicated concepts, metaphors enjoy constant use, and one summarizing EPA’s perspective has been cited and re-cited: “If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not “added” soup or anything else to the pot.”<sup>14</sup>

Section II will briefly examine the history of the “unitary waters theory” in the courts up to the promulgation of EPA’s water transfers rule in 2006. Section III will examine the final rule in detail and chart its record against legal challenges. Finally, Section IV will describe how the uncertainty of the water transfers rule affects state agencies.

## II. The “Unitary Waters Theory” from 1982 to 2005

### A. Early Cases in the 1980s: *Gorsuch* and *Consumers Power*

The 1982 case of *National Wildlife Federation v. Gorsuch* marked the first time that EPA argued that water transfers could be exempt from NPDES permitting. In that case, the National Wildlife Federation (“NWF”) sued EPA to force the agency to require an NPDES permit for a dam in Missouri, where low dissolved oxygen levels in water discharged from the dam killed almost a half-million fish downstream.<sup>15</sup> EPA argued that an NPDES permit is required only when a “point source [introduces] a pollutant into navigable water from the outside world.”<sup>16</sup> Because

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<sup>10</sup> Different terms have been used to explain this theory, including “singular entity” (*Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996)) and “outside world” (*Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 280 F.3d 1364, 1367 (11th Cir. 2002) *vacated sub nom. S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004)). The Supreme Court has followed the majority of appellate courts and called it the “unitary waters theory,” and that is the approach taken here. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 96, 124 S. Ct. 1537, 1538 (2004). EPA itself assigns no name to this concept, though its justifications for the water transfers rule are indistinguishable from this theory. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 FR 33697-01 (Jul 13, 2008).

<sup>11</sup> *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009).

<sup>12</sup> *Id.* (quoting *Webster’s Third New International Dictionary* 24 (1993); 33 U.S.C. § 1362(12)).

<sup>13</sup> *Id.*; *Gorsuch*, 693 F.2d at 165 (“EPA argues . . . that for addition of a pollutant from a point source to occur, the point source must *introduce* the pollutant into navigable water from the outside world.”)

<sup>14</sup> *Catskill I*, 273 F.3d at 492.

<sup>15</sup> *Gorsuch*, 693 F.2d at 162-164; Brad W. Blank, The Unitary Waters Approach: The Government’s Misguided Attempt to Limit the Reach of the Clean Water Act, 42 San Diego L. Rev. 1259, 1277-78 (2005) (citing *Nat’l Wildlife Fed’n v. Gorsuch*, 530 F. Supp. 1291, 1302 (D.D.C. 1982), *rev’d*, *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)).

<sup>16</sup> *Gorsuch*, 693 F.2d at 165.

the dam was not physically introducing a pollutant into the water the way, for example, that a dam discharging lubricating oil from its turbines would, EPA argued that no NPDES permit was required.<sup>17</sup> The Court of Appeals was swayed by EPA's logic in the case, perhaps because the upstream and downstream bodies of water were clearly physically connected. There was also arguably only one body of water in *National Wildlife Federation v. Consumers Power Co.* six years later, leading the Sixth Circuit to the same conclusion.<sup>18</sup> There, Consumers Power pumped water from Lake Michigan into an artificial reservoir on a nearby hill, and released it back downhill through turbines to generate electricity when energy was needed. These turbines killed fish and other aquatic life, and NWF argued that the resulting bouillabaisse was polluting Lake Michigan and required an NPDES permit.<sup>19</sup> In its *amicus curiae* brief supporting Consumers Power Company, EPA again made the argument that no pollutant was being introduced to Lake Michigan from the outside world.<sup>20</sup> Because the pumped storage facility wasn't adding anything to the water, the court again accepted EPA's interpretation.<sup>21</sup>

## B. Restricting Water Transfers: 1988-2006

Though *Gorsuch* and *Consumers Power* would be cited in almost every subsequent case or rule involving water transfers, the unitary waters theory "struck out in every court of appeals" whenever it made an appearance over the next two decades.<sup>22</sup> All of these cases involved pumping water from one location to another, adding pollutants not originally present in the receiving body of water.<sup>23</sup>

In *Dubois v. United States Department of Agriculture*, the First Circuit held that the transfer of water from a river to a pond required an NPDES permit.<sup>24</sup> There, a skiing facility in New Hampshire was pumping water from the Pemigewasset River, "for years one of the most polluted rivers in New England," for use in its snow-making equipment, and then discharging the waste water into Loon Pond, a pristine, remote pond high in the White Mountains that was a drinking water source for the nearby town of Lincoln.<sup>25</sup> This process was introducing foreign contaminants such as the bacteria *Giardia lamblia*, phosphorus, oil, and grease into the pond.<sup>26</sup> Although the two bodies of water were hydrologically connected in that water from the pond flowed down from a brook into the river, the court found that an uphill transfer of water and pollutants would not have occurred naturally.<sup>27</sup> This, combined with the observation that Congress could not have intended "such an irrational result" as a unitary waters approach, led

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<sup>17</sup> *Id.* at 165 fn.3.

<sup>18</sup> *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 590 (6th Cir. 1988).

<sup>19</sup> *Consumers Power*, 862 F.2d at 581-82.

<sup>20</sup> *Id.* at 585; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.*, 08-CV-5606 KMK, 2014 WL 1284544 at \*7 (S.D.N.Y. Mar 28, 2014) ("Catskill III").

<sup>21</sup> *Consumers Power*, 862 F.2d at 589-90.

<sup>22</sup> *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009).

<sup>23</sup> See Sara Colangelo, *Transforming Water Transfers: The Evolution of Water Transfer Case Law and the NPDES Water Transfers Proposed Rule*, 35 *Ecology L.Q.* 107, 119 (2008).

<sup>24</sup> *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1273 (1st Cir. 1996).

<sup>25</sup> *Dubois*, 102 F.3d at 1277-1278, 1297.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1296.

the court to rule that the ski lift required an NPDES permit to continue its pumping operation.<sup>28</sup> This permit still stands as the only one issued by EPA for a water transfer without the intervening addition of pollutants.<sup>29</sup>

In 2001, a similar case found its way to the Second Circuit Court of Appeals in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York* (“Catskill I”).<sup>30</sup> At issue here was a tunnel routing water from a reservoir to a stream, which eventually flowed into a second reservoir that supplied New York City with water.<sup>31</sup> Plaintiffs sued because the transfer was creating pollution in the form of suspended particles, turbidity, and heat, which was interfering with the otherwise-pristine trout fishing conditions in the water.<sup>32</sup> The two bodies of water in this case were hydrologically connected only in that both were tributaries of the Hudson River.<sup>33</sup> Water from one would never reach the other without human intervention.<sup>34</sup> The Second Circuit found that the “sameness” in *Gorsuch* and *Consumers Power* could not be stretched to apply in this case, and that “[n]o one [could] reasonably argue that the water[s] . . . are in any sense the ‘same,’ such that ‘addition’ of one to the other is a logical impossibility.”<sup>35</sup> Thus the court ruled that a permit was required for the pumping to continue.<sup>36</sup> The court also ruled that because EPA had asserted the “unitary waters theory” only as a litigation strategy and never adopted it as a rule, it was not due the same degree of deference as regulations adopted after a public commenting period.<sup>37</sup>

The Eleventh Circuit ruled on the issue in 2003, in *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District* (“*Miccosukee I*”).<sup>38</sup> In this case, plaintiff-appellee Indian Tribe was concerned about a drainage operation that was pumping water extremely high in phosphorus from communities in southern Florida into the ecologically-sensitive wetlands of the Everglades.<sup>39</sup> Plaintiffs were not seeking to enjoin the Water District’s pumping operations, the cessation of which would have flooded the western half of Broward County, but were merely trying to force it to seek an NPDES permit for its activities.<sup>40</sup> Finding that the canal through which the waste water was discharged qualified as a “point source,” and that the

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<sup>28</sup> *Id.* at 1296-1297.

<sup>29</sup> Memorandum from Ann R. Klee & Benjamin H. Grumbles, Environmental Protection Agency, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers 2, fn.4 (Aug. 5, 2005).

<sup>30</sup> *Catskill I*, 273 F.3d at 481.

<sup>31</sup> *Id.* at 484.

<sup>32</sup> *Id.* at 485.

<sup>33</sup> *Id.* at 484.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 492.

<sup>36</sup> *Id.* at 481.

<sup>37</sup> *Id.* at 489-91 (citing *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655 (2000)).

<sup>38</sup> *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002).

<sup>39</sup> Blank, Unitary Waters Approach, 42 San Diego L. Rev. at 1262-63 (citing Brief for the Respondent Friends of the Everglades at 1-6, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626), 2003 WL 22733911).

<sup>40</sup> *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 280 F.3d 1364, 1370 (11th Cir. 2002).



pumping qualified as an “addition” because the pollutants would not have entered the wetlands but for that activity, the court agreed that an NPDES permit was required.<sup>41</sup> If a federal appellate court was going to recognize a need for less regulation of water transfers, it would be the Ninth Circuit, where a system of water conveyances far larger than those encountered in *Catskill I* have made it possible for metropolises to rise from the desert.<sup>42</sup> In *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, however, the Ninth Circuit decided to stand instead with the First and Second Circuits and reject the unitary waters theory.<sup>43</sup> In this case, the defendant was pumping groundwater full of both dissolved minerals and heavy metals as part of a coal-mining operation in the Powder River Basin of southeastern Montana, and then discharging that water into the Tongue River.<sup>44</sup> Because pollutants in the groundwater would degrade the quality of the river, the court ruled that the fact that the process was not adding new pollutants was immaterial, and thus the case was decided on the same grounds relied on in *Dubois* and *Catskill I*.<sup>45</sup>

### C. 2004: The Question Goes to the Supreme Court

Unlike *Dubois*, *Catskill I*, and *North Plains*, where the United States Supreme Court denied petitions for *certiorari*, the Court decided to wade into the dispute in *Miccosukee II*.<sup>46</sup> The court agreed to review only one issue from *Miccosukee I*: whether the canal was a “point source” even though the pollutants were only passing through and did not originate in the canal.<sup>47</sup> Because of the importance of a potential ruling on the NPDES program, the Solicitor General’s office submitted an *amicus* brief on behalf of the U.S. Government that argued in favor of a “unitary waters” approach.<sup>48</sup> The Court first ruled that canals or other mechanisms that merely transport pollutants can be “point sources” within the meaning of the CWA.<sup>49</sup> Though invited to do so by both sides, the Court chose not to rule on the merits of the “unitary waters theory,” instead remanding the question to the lower court.<sup>50</sup> As part of its argument, the Government requested that the Court adopt the “unitary waters” theory out of deference to EPA, because it had been a longstanding view of that agency.<sup>51</sup> But the Supreme Court found, as the Second

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<sup>41</sup> *Id.* at 1368-1369, 1371.

<sup>42</sup> *See, generally*, A. Dan Tarlock, The Future of Prior Appropriation in the New West, 41 Nat. Resources J. 769 (2001); Holly Jo Franz, *et. al*, An Insatiable Thirst: The Impact of Water Law on Sprawl in the West, Nat. Resources & Env’t, Spring 2001, at 228.

<sup>43</sup> 325 F.3d 1155, 1165 (9<sup>th</sup> Cir. 2003).

<sup>44</sup> *Id.*, at 1157-1158.

<sup>45</sup> *Id.* at 1163.

<sup>46</sup> *Loon Mountain Recreation Corp. v. Dubois*, 521 U.S. 1119, 117 S. Ct. 2510 (1997); *Fid. Exploration & Prod. Co. v. N. Plains Res. Council, Inc.*, 540 U.S. 967, 124 S. Ct. 434 (2003); *City of New York, N.Y. v. Catskill Mountains Chapter of Trout Unlimited, Ltd.*, 549 U.S. 1252, 127 S. Ct. 1373 (2007) (denying petition for *Catskill II*); *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 539 U.S. 957, 123 S. Ct. 2638 (2003) (“*Miccosukee II*”).

<sup>47</sup> *Miccosukee II*, 2004 WL 849782 (U.S.), 1 (2004).

<sup>48</sup> *Miccosukee II*, 541 U.S. at 107-108.

<sup>49</sup> *Id.* at 105.

<sup>50</sup> *Id.* at 95-96, 112. In his dissent, Justice Scalia argued that a remand was pointless because the Court of Appeals had considered the “unitary waters theory” and dismissed it in a footnote. 541 U.S. 95, 112-113 (J. Scalia, *dissenting*) (citing *Miccosukee I*, 280 F.3d at 1368 fn.5).

<sup>51</sup> *Miccosukee II*, 541 U.S. at 107 (citing Brief for United States as *Amicus Curiae* 16).

Circuit had done in *Catskill I*, that the Government was unable to provide a single administrative document tying EPA to that position.<sup>52</sup>

#### D. 2006: EPA Proposes a Water Transfers Rule

Sixteen months after Justice O'Connor's observation in *Miccosukee II* that EPA had never produced an administrative document espousing the "unitary waters" theory, the agency sent a memorandum on water transfers to all EPA Regional Administrators ("Klee Memo").<sup>53</sup> While this memo admitted that the CWA did not expressly authorize the Agency to exempt water transfers from the obligation to obtain NPDES permits, EPA argued that the carefully balanced federalism recognized in the CWA compelled this conclusion.<sup>54</sup> EPA argued that §§ 101(g) and 510(2) of the CWA explicitly instructed EPA not to interfere with water resource allocations, a function that should be left to the states.<sup>55</sup> EPA also said that water transfers are unlike the types of water discharges Congress intended to regulate, because they do not discharge effluent into a navigable body of water but instead transfer water from one navigable body of water to another, and because they cannot be controlled at the source.<sup>56</sup>

In the conclusion of the Klee Memo, EPA noted that it would begin a rulemaking process to address this issue.<sup>57</sup> The proposed rule, published on June 7, 2006, reiterated the points made in the Klee Memo and noted that the exemption would not apply to water subjected to an intervening industrial, municipal, or commercial use, which is covered by other EPA rules.<sup>58</sup> The proposed rule received over 18,000 public comments. The most stinging rebuke may have been the comments submitted by thirteen State Attorneys General and the Minister of Water Stewardship from the Canadian Province of Manitoba ("AG Memo").<sup>59</sup> The AG Memo recommended that EPA permanently withdraw the rule as arbitrary, capricious, and in contravention of the plain text and prime objective of the Clean Water Act.<sup>60</sup> The specific concerns of the states were that the rule would undo efforts to prevent the spread of invasive species and would allow the transfers of very different waters with no permit (*e.g.*, pumping hot water into cold water or pumping salt water into fresh).<sup>61</sup> In response to the argument at the core of EPA's reasoning—that states should be allowed to control water transfers within their own borders—the AG Memo offered several counterpoints. First, it argued that maintaining a strong "national floor" of water quality controls is just as important as protecting

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<sup>52</sup> *Id.* at 107-108; *Catskill I*, 273 F.3d at 489-90.

<sup>53</sup> *Id.*; Klee Memo, *supra* note 29.

<sup>54</sup> Klee Memo at 4-5.

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.* at 7-8.

<sup>57</sup> Klee Memo *supra* note 29, at 19.

<sup>58</sup> National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 FR 32887-01 (Jun 7, 2006) (citing 40 CFR 122.2, defining process wastewater; 40 CFR 125.80-125.89, regulating cooling towers; 40 CFR 122.45(g), regulating intake pollutants for technology-based permitting; 40 CFR part 132, Appendix F, Procedure 5-D, regulating intake pollutants in the Great Lakes).

<sup>59</sup> The thirteen states were (in the order listed on the comment): New York, Connecticut, Delaware, Illinois, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Rhode Island, Vermont, and Wisconsin. EPA-HQ-OW-2006-0141-1383 ("AG Memo").

<sup>60</sup> AG Memo, at 2, 26.

<sup>61</sup> *Id.* at 2-3, 5 fn. 5.

states' rights, and cited concerns that imprudent transfers in one state could harm the water quality in other states that are downstream or share large bodies of water.<sup>62</sup> The AG Memo also criticized EPA's premise that the Act authorizes EPA to exempt water transfers in its language reserving authority to the states. The states argued that this language is too vague to create a categorical exemption and that the plain text of the Act clearly requires pollutant transfers to be permitted.<sup>63</sup> Finally, the AG Memo disagreed with EPA's assertion that requiring NPDES permits would burden the states, noting that states already successfully issue "tens of thousands" of permits, and that requiring permits for water transfers has not brought Pennsylvania (the one state requiring them since the 1980s) to a screeching halt.<sup>64</sup> After the Klee Memo, but before EPA published the proposed rule, the Second Circuit revisited its ruling on water transfers. In *Catskill II*, decided a week after EPA began the notice-and-comment rulemaking procedure on the water transfers rule, the Second Circuit heard an appeal in the case that it had remanded five years earlier.<sup>65</sup> The district court had assessed a \$5,749,000 penalty against New York City, which the city appealed.<sup>66</sup> On appeal, the Second Circuit found little but the: "warmed-up arguments that we rejected in *Catskill I*, with the additional contention that either the Supreme Court's *Miccossukee* decision, or EPA [Klee Memo], or both compel a result different from the one we reached earlier."<sup>67</sup> Agreeing with the city's concession that the Klee Memo was not entitled to *Chevron* deference, the court again ruled against water transfer exclusions, finding that EPA's argument that permitting water transfers would excessively burden state regulators was not persuasive under *Skidmore*.<sup>68</sup>

### III. The EPA Final Rule: 40 C.F.R. § 122.3(i)

#### A. EPA Issues the Final Rule.

EPA issued the final rule on June 13, 2008.<sup>69</sup> The rule, which reflected no changes from the proposed rule, exempts water transfers from the NPDES permitting process and defines water transfers as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use."<sup>70</sup> EPA once again justified the rule by saying that regulating water transfers should be left to the states.<sup>71</sup> The preamble to the final rule explicitly mentioned how important these transfers are to provide cities with water, indicating that EPA is wary of getting involved in the inter-state disputes over water that have become increasingly commonplace.<sup>72</sup> The preamble also outlined the long history of the term "outside world" in the courts, stating that the unitary waters theory

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<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Id.* at 20.

<sup>64</sup> *Id.* at 25.

<sup>65</sup> *Catskill II*, 451 F.3d 77; see Section IIa.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 82.

<sup>68</sup> *Id.* at 82, 87.

<sup>69</sup> National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 FR 33697-01 (Jun 13, 2008).

<sup>70</sup> *Id.* at 33699.

<sup>71</sup> *Id.* at 33702.

<sup>72</sup> *Id.*; *supra* note 42; see Cameron McWhirter, [In Latest War Between the States, Georgia Says Tennessee is All Wet](#), *The Wall Street Journal*, (Jun 15, 2014).

has received a cool welcome in the courts only because the courts failed to extend *Chevron* deference to EPA's argument.<sup>73</sup>

EPA also responded to comments submitted in response to the proposed rule. The most common complaints about the rule seemed to be that the phrase "intervening industrial, municipal, or commercial use" was unclear.<sup>74</sup> EPA attempted to clarify this confusion by saying that conveyances of water (water moving through pipes, canals, and pumping stations) would not require a permit, while any use that withdraws water from the "waters of the United States" and then returns it (like cooling water, drinking water, or irrigation water) would require a permit.<sup>75</sup> Finally, EPA considered the argument advanced in the AG Memo and elsewhere that this rule would open the floodgates for non-permitted transfers that add hot water to cold water, salt water to fresh, and greatly increase the spread of invasive species.<sup>76</sup> EPA again fell back on the states' rights argument, saying that it should be left to each state to address in-stream or downstream effects of water transfers.<sup>77</sup>

### **B. Challenges to EPA's Rule in Federal Appellate Courts.**

Within a week after EPA issued the final rule, petitions for review were filed in the First, Second, and Eleventh Circuit Courts of Appeal.<sup>78</sup> On July 22, 2008, five cases were consolidated and moved to the Eleventh Circuit by the United States Judicial Panel on Multidistrict Litigation.<sup>79</sup> The consolidated case was stayed pending the review of *Friends of Everglades, Inc. v. South Florida Water Management District* ("Friends of Everglades I"), filed in the Eleventh Circuit in August, 2007, which the court thought could be dispositive on deciding the petitions.<sup>80</sup>

Despite being issued before EPA issued its final water transfers rule, the Eleventh Circuit's ruling in *Friends of Everglades I* reads like a commentary on EPA's authority to exempt water transfers. The underlying case began in 2002, with plaintiffs seeking an injunction to stop a pump station operating in the same area as the stations in the *Miccosukee* cases.<sup>81</sup> When that case went to the Supreme Court, the district court in *Friends of Everglades I* stayed proceedings until *Miccosukee* was resolved.<sup>82</sup> Finally, in late 2006, the district court issued a decision very similar

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<sup>73</sup> 73 FR 33697-01, 33700 fn.4 (Jun 13, 2008).

<sup>74</sup> *Id.* at 33704.

<sup>75</sup> *Id.* EPA also notes that water purification systems that discharge filtered pollutants back into the original body of water, thus increasing the total concentration of pollutants, also require permits. *Id.* at 33705.

<sup>76</sup> *Id.* at 33705.

<sup>77</sup> *Id.* at 33705. Although EPA apparently determined that it was less burdensome on state governments to handle the myriad resultant effects of this rule than to require permits for water transfers, no evidence of the consideration behind this decision appears in the memo, the proposed rule, or the final rule.

<sup>78</sup> *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280 (11th Cir. 2012); *Miccosukee Tribe of Indians of Florida v. EPA*, No. 08-13653 (11th Cir.); *Florida Wildlife Federation v. EPA*, No. 08-13657 (11th Cir.); *Environment America v. EPA*, No. 08-1853 (1st Cir.); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, No. 08-3203 (2d Cir.).

<sup>79</sup> *Catskill III* at 11-12.

<sup>80</sup> *Id.*

<sup>81</sup> *Friends of Everglades, Inc. v. S. Florida Water Mgmt. Dist.*, 02-80309 CIV, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006).

<sup>82</sup> *Id.*

to the one in *Miccosukee I*. Following the earlier rulings on pumping, the court found that although a permanent injunction was unwarranted given the necessity of the operation, an NPDES permit was required.<sup>83</sup> The lower court did not give the water transfers rule any consideration, however, because the rule was not proposed until after the trial.<sup>84</sup>

On appeal, however, the Eleventh Circuit very quickly made a point of analyzing the lower court's decision in the context of EPA's rule, which had become final by the time the Eleventh Circuit issued its decision. The court cited two Supreme Court cases in support of its conclusion that the timing of the regulation, and even whether it was proposed in response to the lower court's ruling, made no difference in the weight that should be given to the rule.<sup>85</sup> Despite the clear judicial preference in favor of requiring permits in "all of the existing precedent," the Eleventh Circuit found that the only factors relevant in determining the validity of the rule were the two steps in *Chevron*.<sup>86</sup> For the first step—deciding whether the language of the statute was clear—the court evaluated whether the term "addition...to navigable waters" in 33 U.S.C. § 1362(12) (and the definition of "navigable waters" as "the waters of the United States" in 33 U.S.C. §1362(7)) clearly indicated that all navigable waters were a single body of water.<sup>87</sup> The court found that Congress used the term "any navigable waters" in other parts of the statute to refer to singular bodies of water, and this created ambiguity.<sup>88</sup> Moving to the second step, the court quickly determined that EPA's interpretation in light of this ambiguity was not arbitrary or capricious.<sup>89</sup> Because EPA's rule was reasonable, the court reversed the lower court's ruling.<sup>90</sup> The Eleventh Circuit denied the plaintiffs' motion to rehear the case *en banc*, and the Supreme Court rejected separate petitions for *certiorari* from Friends of Everglades and the intervening Miccosukee Tribe.<sup>91</sup>

*Friends of Everglades v. EPA* ("Friends of Everglades II"), the much-anticipated decision that sprang from the consolidated petitions filed within a week of EPA's final rule, was finally decided in 2012.<sup>92</sup> The Eleventh Circuit's decision was anticlimactic, however, and focused on whether the courts of appeals or the district courts had subject matter jurisdiction. Section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), "creates a bifurcated jurisdictional scheme in which

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009) (citing *Smiley v. Citibank*, 517 U.S. 735, 740–41, 116 S.Ct. 1730, 1734 (1996), *United States v. Morton*, 467 U.S. 822, 835 n. 21, 104 S.Ct. 2769, 2776 n. 21 ).

<sup>86</sup> *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1219, 1227-1228 (11th Cir. 2009).

<sup>87</sup> *Id.* at 1223.

<sup>88</sup> *Id.* at 1224-1225.

<sup>89</sup> *Id.* at 1227-1228 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984): "[a] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

<sup>90</sup> *Id.* at 1228.

<sup>91</sup> *Friends of the Everglades v. S. Florida Water Mgmt. Dist.*, 605 F.3d 962 (11th Cir. 2010); *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 131 S. Ct. 643 (2010); *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 131 S. Ct. 645 (2010).

<sup>92</sup> *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280 (11th Cir. 2012).

jurisdiction over certain claims against EPA is vested exclusively in the circuit courts, and the remainder are vested in the district courts.”<sup>93</sup> The petitioners who were joined in the consolidated proceedings argued that the case belonged in the district court, while EPA argued that the court of appeals had exclusive subject matter jurisdiction. Intervenor United States Sugar Corporation argued that even if the court of appeals lacked jurisdiction, it still had the authority to exercise hypothetical jurisdiction to deny the petitions.<sup>94</sup> In a nine page decision, the court quickly dealt with EPA’s arguments. EPA argued that two different provisions in the Clean Water Act, 33 U.S.C. §§ 1369(b)(1)(E) and 1369(b)(1)(F), respectively, grant exclusive subject matter jurisdiction to the court of appeals for petitioners’ petition. Because the water transfers rule dealt neither with effluent limitations (covered by 33 U.S.C. §1369(b)(1)(E)) nor with issuing or denying permits (covered by 33 U.S.C. §1369(b)(1)(F)), the court was unpersuaded by EPA’s arguments.<sup>95</sup> Finally, the court found that the Supreme Court had explicitly rejected the theory of “hypothetical jurisdiction” as pointless navel-gazing, and refused to engage in such speculation.<sup>96</sup> Because the Eleventh Circuit lacked subject matter jurisdiction, the petitions were dismissed.<sup>97</sup> This time, EPA petitioned the Supreme Court for *certiorari*, only to be denied.<sup>98</sup>

### **C. Challenges to EPA’s Rule in Federal District Courts.**

After *Friends of Everglades II*, two cases in federal district courts have considered challenges to the legitimacy of the rule. In *ONRC Action v. U.S. Bureau of Reclamation*, the United States District Court for the District of Oregon considered a case involving the Klamath Straits Drain in southern Oregon.<sup>99</sup> This case was originally filed in 1997, dismissed as part of a settlement agreement seven years later, and then reopened in 2009.<sup>100</sup> The defendant Bureau repeated EPA’s unsuccessful argument from *Friends of Everglades II* that the courts of appeals had exclusive subject matter jurisdiction over challenges to the water transfers rule.<sup>101</sup> The ONRC court rejected the argument, holding that the rule dealt neither with effluent limitations nor with issuing or denying a permit.<sup>102</sup> Having decided that it had subject matter jurisdiction, the district court proceeded to determine whether the rule was reasonable under *Chevron*.<sup>103</sup> The ONRC court ruled that the Eleventh Circuit’s decision in *Friends of Everglades II* (finding the rule reasonable) was binding in this case since that opinion had been issued in consolidated cases

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<sup>93</sup> *ONRC Action v. U.S. Bureau of Reclamation*, 2012 WL 3526833 (quoting *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.*, 266 F.Supp.2d 1101, 1109 (N.D.Cal.2003)).

<sup>94</sup> *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d at 1283.

<sup>95</sup> *Id.* at 1286-1288.

<sup>96</sup> *Id.* at 1288-1289.

<sup>97</sup> *Id.* at 83.

<sup>98</sup> *E.P.A. v. Friends of the Everglades*, 134 S. Ct. 421 (2013); *U.S. Sugar Corp. v. Friends of the Everglades*, 134 S. Ct. 422 (2013); *S. Florida Water Mgmt. Dist. v. Friends of the Everglades*, 134 S. Ct. 422 (2013).

<sup>99</sup> *ONRC*, 2012 WL 3526833.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at \*24.

<sup>102</sup> *Id.* at \*\*24-26.

<sup>103</sup> *Id.*

filed in a number of different circuits, and further held that even if the Eleventh Circuit had lacked jurisdiction its decision was still persuasive.<sup>104</sup>

*Catskill III*, the most recent challenge to EPA's rule, reached the opposite conclusion.<sup>105</sup> The case began as one of the many petitions challenging EPA's final rule shortly after it was published, but was not consolidated with the cases that became *Friends of Everglades II* because it was filed in a district court. The case that became *Catskill III* was instead combined with another action seeking injunctive and declaratory relief, *States of New York v. EPA*, brought by nine states and the Canadian Province of Manitoba.<sup>106</sup> Then, the Southern District of New York ruled in favor of EPA's motion to stay further proceedings in the combined cases until the consolidated cases in *Friends of Everglades II* were resolved. When *Friends of Everglades II* was dismissed, several parties in that action joined *Catskill III* (which, like *ONRC*, had been properly commenced in a district court).<sup>107</sup> In *Catskill III*, the district court outlined the long history of the unitary waters theory in the courts before conducting a *Chevron* analysis of the rule.<sup>108</sup>

Turning to step one of *Chevron*, the court found that the statutory term "navigable waters" was sufficiently ambiguous to allow multiple interpretations.<sup>109</sup> Finding the statute unclear, the court proceeded to step two of *Chevron*.<sup>110</sup> The court found one of EPA's arguments to be particularly unclear: that water being conveyed through a "pipe," "tunnel," or "discrete conveyance" was not "navigable waters," but that water conveyed in a canal may be so, because the canal itself could qualify as "navigable waters."<sup>111</sup> Further, the court was not swayed by the argument that Congress hadn't considered water transfers to be "additions" or "discharges" elsewhere in the Act.<sup>112</sup> Even if EPA had presented stronger arguments, the court would still have rejected the rule at step two of *Chevron*, for two reasons. First, EPA had failed to consider any alternatives (such as regulating transfers under NPDES). Second, EPA had failed to demonstrate how the rule was consistent with what it understood to be the intent of Congress.<sup>113</sup> Finally, the court took EPA to task over its states' rights argument, finding that the rule would weaken the ability of states to control pollution within their borders.<sup>114</sup> In oral argument, the attorney for the State of Colorado, an intervening defendant in the case, conceded that his state's only recourse against dirty water transfers from, for example, New

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<sup>104</sup> *Id.* at \*30 (holding that "opinions issued by other Circuit Courts of Appeal deciding consolidated petitions for review of agency regulations are binding outside that circuit"). The court noted the Ninth Circuit's decision in *North Plains* (*supra* Section IIb), but disregarded its conclusions because that decision had been issued before EPA's rule. *Id.* at \*31.

<sup>105</sup> *Supra* note 20.

<sup>106</sup> *States of New York, et al. v. EPA*, 2008 WL 5367877 (S.D.N.Y.).

<sup>107</sup> *Catskill III* at \*12.

<sup>108</sup> *Id.* at \*\*8-9, 13.

<sup>109</sup> *Id.* at \*17.

<sup>110</sup> *Id.* at \*27.

<sup>111</sup> *Id.* at \*31.

<sup>112</sup> *Id.* at \*\*38-39.

<sup>113</sup> *Id.* at \*42.

<sup>114</sup> *Id.* at \*\*45-46.

Mexico, would be in interstate compacts or common-law nuisance claims, with no statutory protection.<sup>115</sup> For these reasons, the *Catskill III* court reached a different conclusion than the Eleventh Circuit in *Friends of Everglades I*, and remanded the water transfers rule to the agency to reevaluate its methodology.<sup>116</sup> Soon after this decision, EPA, numerous western states and water districts, and others filed appeals challenging the remand.<sup>117</sup>

#### IV. Conclusion

It is unclear how the Second Circuit, which already dismissed the unitary waters theory in *Catskill I* and *II*, will rule on the merits of the water transfers rule, but litigation on this matter will undoubtedly continue to attract the attention of numerous parties. The key impetus for the rule seems to be concern over the growing importance of water transfers in the western United States.<sup>118</sup> This has created a divide between the western states, which favor the rule because large western cities rely on the transfers, and eastern states, which generally favor a stricter permitting process to protect large interstate bodies of water like the Great Lakes and vulnerable wetlands.<sup>119</sup>

When it comes to permitting water transfers within their borders, states have been given little guidance. After EPA has approved a state's NPDES program, the state has sole authority to issue permits for discharges within its borders.<sup>120</sup> EPA has approved NPDES programs for all but four states.<sup>121</sup> The state agencies that issue NPDES permits have been hesitant to follow EPA's lead on the water transfers rule, no doubt concerned that the rule will be held invalid by more federal courts.<sup>122</sup> As Montana learned in *North Plains*, state law cannot contradict or limit the scope of the CWA without violating the Supremacy Clause of the Constitution.<sup>123</sup> Therefore, any state that refuses to issue an NPDES permit for a water transfer because of EPA's water transfers rule risks being sued.

Although a state would not be able to exempt water transfers from its NPDES program without a valid supporting EPA regulation, a state could require permits for water transfers without its

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at \*58.

<sup>117</sup> John Herzfeld, [EPA, Water Authorities, Western States Challenge Remand of Water Transfer Rule](#) (Jun 17, 2014); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.*, No. 14-1991 (2<sup>nd</sup> Cir. filed Jun 12, 2014).

<sup>118</sup> *Supra* at footnotes 42, 72.

<sup>119</sup> *Miccosukee II*, 541 U.S. at 108. One needs only look to the *amici curiae* briefs submitted in *Miccosukee II* or in *Catskill III* to understand the states' interests in this issue. Thirty states or their Governor's councils participated in this process, with 11 western states supporting the unitary waters theory or the rule, and 19 primarily eastern states in opposition. See docket of *Miccosukee II*, 02-626; *Catskill III* at 12.

<sup>120</sup> *Wisconsin Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700, 703 (7th Cir. 2013).

<sup>121</sup> Environmental Protection Agency, [Specific State Program Status](#), (Accessed Jun 26, 2014).

<sup>122</sup> See Appendix I.

<sup>123</sup> *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1165 (9th Cir. 2003) (citing U.S. Const. art. VI, cl. 2; *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 851 (9th Cir.2002)); see also *Flambeau*, 727 F.3d at 703 ("EPA retains supervisory authority over the state program and is charged with 'notify[ing] the State of any revisions or modifications [to the State's program] necessary to conform to [CWA] requirements or guidelines.'").



NPDES program running afoul of national standards.<sup>124</sup> Pennsylvania has required permits for water transfers since its Supreme Court required it to do so in 1986.<sup>125</sup> Far from grinding to a halt, regulators in the Commonwealth have reported that requiring NPDES permits has provided a “flexible, efficient and effective means to protect water quality and stream uses.”<sup>126</sup> Voluntarily permitting and regulating water transfers within their borders, however, seems to be a step that few states are willing to take.<sup>127</sup>

Even though states have the ability to render EPA’s rule moot by choosing to regulate water transfers, the success or failure of EPA’s rule in coming court battles still warrants close attention. Given the highly partisan atmosphere in Washington, Congressional action to clarify the meaning of “addition” in the CWA or to expressly exempt water transfers from NPDES permits is highly unlikely.<sup>128</sup> The only federal appellate court to hear a unitary waters case since the promulgation of the final rule has been the Eleventh Circuit, which ruled in favor of EPA.<sup>129</sup> If the Second Circuit follows its earlier decisions and finds a rule based on the unitary waters theory to be unreasonable, the resulting circuit split could again place the question in front of the Supreme Court.

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<sup>124</sup> Klee Memo at 4.

<sup>125</sup> *Id.* at 4, fn.6 (Aug. 5, 2005) (citing *Del-Aware Unlimited, Inc. v. Com., Dep't of Env'tl. Res.*, 96 Pa. Cmwlth. 361, 508 A.2d 348 (1986), where the court required permits for a nuclear plant using the Delaware River to cool its facilities).

<sup>126</sup> Jon Harris Maurer, Exempting Water Transfers: Watering Down Clear Statutory Protections, 27 J. Land Use & Env'tl. L. 383, 411 (2012) (citing Pennsylvania’s *amicus* brief in *Miccosukee II* at 17, *Miccosukee II*, 2003 WL 22793537).

<sup>127</sup> Exempting Water Transfers, 27 J. Land Use & Env'tl. L. at 412.

<sup>128</sup> See generally, Thomas O. McGarity, EPA at Helm’s Deep: Surviving the Fourth Attack on Environmental Law, 24 Fordham Env’tl. L. Rev. 205 (2013); Sandra Zellmer, Treading Water While Congress Ignores the Nation’s Environment, 88 Notre Dame L. Rev. 2323 (2013); Benjamin Ewing, Douglas A. Kysar, Prods and Pleas: Limited Government in an Era of Unlimited Harm, 121 Yale L.J. 350 (2011).

<sup>129</sup> *Friends of the Everglades*, 699 F.3d at 1289.

## Four Years after the Kalamazoo River Oil Spill: Should Michigan Oversee Inspection of its Hazardous Liquid Pipelines?

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### I. Introduction

On April 29, 2014, Bill Schuette, the Attorney General of Michigan, and Dan Wyant, Director of the Michigan Department of Environmental Quality, sent a letter (Schuette Letter) to Enbridge Pipelines Inc. (Enbridge) inquiring about “a matter of very serious concern to the State of Michigan and its citizens: Enbridge’s Line 5 oil pipelines located at the Straits of Mackinac between Lakes Huron and Michigan.”<sup>1</sup> The Schuette Letter expressed concern about the transportation of large quantities of oil through two pipelines that lay on the state-owned bottomlands directly under the Mackinac Bridge. The Attorney General and the Director stated that they hoped to commence an open dialogue between the State and Enbridge about the unique risk of an oil spill in the Straits of Mackinac.<sup>2</sup>

The section of Enbridge’s Line 5 system questioned by the Schuette Letter consists of two 20-inch-diameter, single-walled pipelines that were “designed and built in 1953 and have never been replaced.”<sup>3</sup> The pipes are used to transport crude oil and other petroleum products from Canada and the Western United States to refinery facilities in Sarnia, Ontario, “at the rate of millions of gallons per day.”<sup>4</sup>

In the Schuette Letter, the Attorney General and the Director emphasized the unique risks presented by the pipelines that lay “literally *in* the Great Lakes.”<sup>5</sup> An oil spill originating from the aging pipelines has the potential to cause catastrophic damage to the area:

Strong currents in the Straits could rapidly spread any oil leaked from the pipelines into both Lakes Huron and Michigan, causing grave environmental and economic harm. Efforts to contain and clean up leaks in this area would be extraordinarily difficult, especially if they occurred in winter or other severe weather conditions that commonly occur in the Straits.<sup>6</sup>

The Schuette Letter requested information about inspection records, pipeline leak detection records, and spill response contingency plans, and asked for a response from Enbridge within 60 days.<sup>7</sup>

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<sup>1</sup> [Letter from Bill Schuette](#), Attorney General, State of Michigan and Dan Wyant, Director, Michigan Department of Environmental Quality to Stephen J. Wouri, Enbridge Inc. and Richard L. Adams, Enbridge Pipelines Inc. (Apr 29, 2014) (accessed Jan 17, 2015) [hereinafter Schuette Letter].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

<sup>7</sup> Attachment 1 to Schuette Letter, *supra* note 1.

Four years before the Schuette Letter was sent to Enbridge, a different pipeline owned and operated by Enbridge ruptured near Talmadge Creek in Marshall, Michigan.<sup>8</sup> Over 840,000 gallons of oil spilled from the 30-inch pipeline and flowed 35 miles down the Kalamazoo River.<sup>9</sup> In response to the spill, the Pipeline and Hazardous Materials Safety Administration (PHMSA), a division of the United States Department of Transportation (DOT), issued a record \$3.7 million civil penalty against Enbridge based on twenty-four violations of federal regulations.<sup>10</sup>

The DOT has regulatory and enforcement authority over all interstate oil and hazardous materials pipelines in the United States.<sup>11</sup> The DOT also has the responsibility to inspect interstate oil pipelines in the United States, including the 2,854 miles of interstate oil pipelines in the State of Michigan.<sup>12</sup> After the 2010 Kalamazoo River oil spill, however, there is concern over the adequacy of federal regulation, enforcement and inspection of interstate oil pipelines. The National Transportation Safety Board (NTSB) in its official Pipeline Accident Report of the Kalamazoo River oil spill concluded that PHMSA's "ineffective oversight of pipeline integrity management programs, control center procedures, and public awareness" was a contributing cause of the massive oil spill.<sup>13</sup>

The State of Michigan must determine what is best for the state, the Great Lakes and the people of Michigan when it comes to transporting oil through the state. Interstate oil pipelines running across the state and under the Great Lakes must be adequately maintained, and the prescribed safety standards must be adequately enforced. Michigan has the opportunity to obtain certification from the federal government to oversee inspection of interstate pipelines within its borders.<sup>14</sup> First looking back at the 2010 Kalamazoo River oil spill, this paper examines the current hazardous liquid pipelines regulatory framework and where the current system may be ineffective, and proposes that a state inspection program may lead to safer hazardous liquid pipelines in Michigan.

## **II. Kalamazoo River Oil Spill**

### **A. Sunday, July 25, 2010, 5:58 pm EDT**

The scene was a wetland near Marshall, Michigan.<sup>15</sup> A segment of a 30-inch-diameter hazardous liquid pipeline owned and operated by Enbridge ruptured about 0.6 miles

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<sup>8</sup> National Transportation Safety Board, Pipeline Accident Report: Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan, Jul 25, 2010. Pipeline Accident Report NTSB/PAR-12/01 (adopted 2012) [hereinafter NTSB Enbridge Report].

<sup>9</sup> *Id.*

<sup>10</sup> Pipeline and Hazardous Materials Safety Administration, [PHMSA Announces Enforcement Action Against Enbridge for 2010 Michigan Oil Spill](#) (accessed Jan 17, 2015).

<sup>11</sup> 49 USC 60102.

<sup>12</sup> *Id.*

<sup>13</sup> NTSB Enbridge Report, *supra* note 8, at 121.

<sup>14</sup> 49 USC 60106(b).

<sup>15</sup> NTSB Enbridge Report, *supra* note 8.

downstream of the Marshall Pump Station.<sup>16</sup> Instantly, crude bitumen oil began to flow from a 6-foot 8-inch fracture directly into the wetland.<sup>17</sup> The wetland, however, could not contain the heavy oil that soaked the rupture site.<sup>18</sup> The crude oil flowed from the wetland into Talmadge Creek and followed the course of the creek north into the Kalamazoo River.<sup>19</sup> Rainfalls expedited the flow of the creek and the oil quickly spread west down the Kalamazoo River toward Lake Michigan.<sup>20</sup>

The rupture occurred during a scheduled shutdown of the Line 6B pipeline, which runs from Griffith, Indiana, to Sarnia, Ontario, Canada and is a 293-mile section of the more expansive Lakehead System that runs from Edmonton, Alberta, Canada to Sarnia, Ontario.<sup>21</sup> A pipeline operator working from Edmonton began standard shutdown procedure by stopping pumps along Line 6B while simultaneously increasing upstream pressure in order to terminate the flow of oil along Line 6B.<sup>22</sup> When the pipeline ruptured, the pumps near the segment stopped automatically and alarms sounded on the operator's control board in the Edmonton control center.<sup>23</sup> Five minutes later, a Material Balance System (MBS) alarm, signifying a severe leak, sounded and the operator informed his shift lead.<sup>24</sup> The shift lead and an MBS analyst concluded that the alarm was caused by a column separation near the pump station and was not cause for concern.<sup>25</sup> There was no further discussion about the alarms during the operator's shift.<sup>26</sup> As a result, the Enbridge control center did not commence any emergency procedures.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.*

<sup>20</sup> "Weather reports from the W.K. Kellogg Airport, Battle Creek, Michigan, about 13 miles west of Marshall, reported rainfall amounts of about 2.4 inches on Jul 22 and 23, 0.6 inch on Jul 24, and 1.37 inches on Jul 25." *Id.* at 19.

<sup>21</sup> *Id.* at 1.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.*

<sup>24</sup> Enbridge uses a Computational Pipeline Monitoring system "that utilizes measurements and pipeline data to detect anomalies that could indicate possible leaks. The CPM system that Enbridge uses provides a sophisticated computer model of our pipelines, and continuously monitors changes in the calculated volume of liquids. At Enbridge, we refer to the model as our Material Balance System (MBS). If the MBS-calculated amount of liquids within our pipeline is less than expected, an alarm is triggered at our Control Center in Edmonton, Alberta, Canada." Enbridge [Line 6B Response](#) (accessed Jan 17, 2015).

<sup>25</sup> "Column separation, sometimes called slack line . . . can occur at any point in a pipeline where the pressure in the line is below the pressure at which the oil becomes a vapor resulting in liquid-and-vapor mix. The vapor within the pipeline forms a void that restricts the flow of liquid. Any void in the internal volume of the pipeline, including a large loss of oil either from a rupture or drain off into lower elevations, would result in column separation indications over the leak detection software. To eliminate column separation, pressure must be increased above the vapor pressure of the liquid. This may require generating back pressure in the line by closing a downstream valve or increasing the delivery rate or pressure from an upstream [pump station.]" NTSB Enbridge Report, *supra* note 8 at 52.

<sup>26</sup> *Id.* at 8.

**B. Monday, July 26, 2010, 4:04 am EDT**

Ten hours after the initial rupture, a new operator working the night shift at the Enbridge control center in Edmonton restarted Line 6B after the scheduled shutdown.<sup>27</sup> Instantly, Line 6B pumped crude oil out of the fracture and into the surrounding wetlands. Again, alarms began to sound at the control center but the operator maintained flow through the pipeline.<sup>28</sup> First, a 5-minute MBS alarm commenced, and again the shift lead concluded the problem was caused by a column separation.<sup>29</sup> By 4:24 am, a 20-minute MBS alarm appeared. Instead of following Enbridge procedures that required a pipeline shutdown when problems could not be corrected within 10 minutes (the “10-minute rule”), the operator started a larger pump upstream of the leak to increase pipeline pressure.<sup>30</sup> From 4:04 am to 5:03 am, oil flowed freely out of the fracture and into the waterways. Finally, after an hour, Line 6B was shut down once more.<sup>31</sup>

**C. Monday, July 26, 2010, 7:20 am EDT**

On the morning of July 26, operators in the Enbridge control center concluded that the alarms were false because software was unreliable during what they believed was a column separation.<sup>32</sup> The supervisor then told the pipeline operator, “To me it sounds like you need to try again and monitor it. Like [an Enbridge MBS analyst] said, do it over again.”<sup>33</sup> The Enbridge control center was wrong; it was dealing with a leak, not a column separation. Line 6B was started for a second time at 7:20 am, followed once more by numerous alarms at the control center.<sup>34</sup> From 7:20 am to 7:52 am, crude bitumen oil flowed freely into the wetlands near Talmadge Creek and the Kalamazoo River.<sup>35</sup> Finally, after 32 additional minutes of flow and zero attempts to commence emergency procedures, Line 6B was shut down.

**D. Monday, July 26, 2010, 11:18 am EDT**

At 11:18 am the next day, the Enbridge control center was notified of the spill via its emergency telephone line.<sup>36</sup> An employee of Consumers Energy, a major Michigan gas and electricity utility, noticed crude oil in Talmadge Creek while reporting to the scene after receiving more than 20

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<sup>27</sup> *Id.* at 12.

<sup>28</sup> *Id.*

<sup>29</sup> *See supra* note 25.

<sup>30</sup> The control staff is directed to follow the “10-minute rule,” representing the amount of time a pipeline is allowed to operate in instances of column separation and abnormal operations before being shut down. However, in this case, the operators believed that the column separation could be fixed by increasing pipeline pressure. NTSB Enbridge Report, *supra* note 8 at 12.

<sup>31</sup> *Id.* at 13.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 13.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 14.

calls about gas leak odors.<sup>37</sup> Finally, Enbridge sealed off the rupture site by closing remote valves on either side of the damaged pipeline.<sup>38</sup> It had been 17 hours since the initial rupture.

**E. Monday, July 26, 2010, 11:45 am EDT**

Thirty minutes later, the first Enbridge employees arrived on site, confirming the oil presence near the ruptured pipeline.<sup>39</sup> The four-person crew went back to the Marshall Pump Station to retrieve equipment that would allow them to install 20-foot lengths of sorbent boom across Talmadge Creek. The first responders from Enbridge had no estimate of released volumes of oil when they began their containment efforts.<sup>40</sup>

**F. Monday, July 26, 2010, 1:30 pm EDT**

On Monday afternoon, two Enbridge managers decided to split tasks, one focusing on stopping the leak at the source while the other focused on installing oil booms downstream of the advancing oil.<sup>41</sup> Neither Enbridge employee succeeded. Enbridge finally notified the National Response Center, a 24-hour hotline managed by the U.S. Coast Guard, of the rupture and release two hours after the company confirmed the spill.<sup>42</sup> Only at this time could the National Response Center notify 16 federal and state agencies about the spill.<sup>43</sup>

**G. Monday, July 26, 2010, 4:32 pm EDT**

Arriving on-scene late Monday afternoon, the U.S. Environmental Protection Agency (EPA) coordinator assessed the spill and took the position of federal on-scene coordinator.<sup>44</sup> EPA issued an administrative removal order under Section 311(c) of the Clean Water Act,<sup>45</sup> requiring the company to stop the flow of oil into Talmadge Creek and the Kalamazoo River.<sup>46</sup> By July 28, Enbridge had stopped all oil flow into the river.<sup>47</sup>

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<sup>37</sup> "I work for Consumers Energy and I'm in Marshall. There's oil getting into the creek and I believe it's from your pipeline. I mean there's a lot . . ." *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 15.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> *Id.* at 16.

<sup>42</sup> *Id.*

<sup>43</sup> The NTSB Enbridge Report provides no evidence that Enbridge or the National Response Center contacted local emergency response in the immediate aftermath of the spill. Local emergency responders did not report to the scene until the emergency response was turned over to EPA on Jul 26. Firefighters were dispatched to investigate an odor in response to a 911 call received on the evening of Jul 25. The caller described a strong odor of either natural gas or crude oil, but the firefighters who searched the area were unfamiliar with the odors associated with crude oil and were unable to identify the source. Seven additional 911 calls reported strong odors in the same area over the course of 14 hours following the first call. Firefighters were not dispatched to the scene in response to the subsequent calls. *Id.* at 103.

<sup>44</sup> *Id.* at 16.

<sup>45</sup> 33 USC 1321(c).

<sup>46</sup> See *In the Matter of Enbridge Energy, LP*, Env'tl. Prot. Agency (Case No. CWA 1321-5-10-001), issued Jul 27, 2010.

<sup>47</sup> NTSB Enbridge Report, *supra* note 8 at 16.

In total, more than 840,000 gallons of crude bitumen oil discharged into Talmadge Creek and the Kalamazoo River.<sup>48</sup> EPA directed Enbridge to secure more supplies and equipment for the response, but it was too late.<sup>49</sup> Oil spread down the Kalamazoo River over 38 river miles and into Morrow Lake.<sup>50</sup> Three hundred twenty people and an additional 11 worksite employees reported experiencing adverse health effects including headache, nausea, and respiratory troubles.<sup>51</sup> Additionally, residents of six houses self-evacuated on July 26<sup>th</sup> because of odors associated with the oil spill.<sup>52</sup> As the Kalamazoo River and Talmadge Creek clean-up effort continues the cost of the clean up has surpassed \$1 billion.<sup>53</sup>

#### H. PHMSA Corrective Action Order and Notice of Probable Violation

On July 28, 2010, the PHMSA issued a Corrective Action Order to Enbridge requiring “corrective actions to protect the public, property, and the environment.”<sup>54</sup> Pursuant to its authority under the Pipeline Safety Act (PSA), the PHMSA began an investigation of the Kalamazoo River spill.<sup>55</sup> On July 2, 2012, the PHMSA issued a Notice of Probable Violation to Enbridge citing 24 violations of federal regulations.<sup>56</sup> Violations included inadequate pipeline integrity management, failure to minimize the volume of hazardous liquid released in the event of a failure to notify police during an emergency, operating Line 6B prior to correcting an unsafe condition that presented an immediate hazard to persons or property, and failing to notify authorities of the accident at the earliest practicable moment following discovery.<sup>57</sup> In response to these violations, PHMSA assessed a nearly \$3.7 million civil penalty against the company.<sup>58</sup>

### III. Federal Regulation of Hazardous Liquid Pipelines

Under the PSA, the United States Department of Transportation (DOT) has regulatory and enforcement authority over 192,388 miles of pipelines<sup>59</sup> that transport crude oil and other petroleum products across the United States.<sup>60</sup> The purpose of the PSA is to “provide adequate

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<sup>48</sup> “The Accident ultimately resulted in a spill of more than 20,000 bbls of crude oil and the contamination of approximately 38 miles of the Kalamazoo River.” Pipeline and Hazardous Materials Safety Administration, Revised Notice of Potential Violations and Proposed Civil Penalty, p 3 (Jul 5, 2012). [hereinafter PHMSA Revised Notice].

<sup>49</sup> NTSB Enbridge Report, *supra* note 8 at 61.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 18.

<sup>52</sup> *Id.*

<sup>53</sup> Garrett Ellison, [New Price Tag for Kalamazoo Oil Spill Cleanup](#): Enbridge says \$1.21 billion, MLive (accessed Jan 17, 2015).

<sup>54</sup> *In the Matter of Enbridge Energy Partners, Ltd.*, PHMSA [Final Corrective Action Order](#) (Case No. 3-2010-5008H), issued Jul 28, 2010, (pursuant to the Pipeline Safety Act; 49 USC 60112(d)); *see also*, PHMSA Revised Notice, *supra* note 48 at 3.

<sup>55</sup> 49 USC 60101 *et seq.* 49 USC 60117(a) grants authority to conduct investigations.

<sup>56</sup> PHMSA Revised Notice, *supra* note 48, at 1.

<sup>57</sup> *Id.*

<sup>58</sup> 49 USC 60122 (subjecting Enbridge to a civil penalty not to exceed \$100,000 for each violation for each day the violation persists up to a maximum of \$1,000,000 for any related series of violations).

<sup>59</sup> Pipeline and Hazardous Materials Safety Administration, [Annual Report Mileage for Hazardous Liquid or Carbon Dioxide Systems](#) (accessed Jan 17, 2015).

<sup>60</sup> 49 USC 60102(a)(1); 49 CFR 190.1 (2013).

inspection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation.”<sup>61</sup>

The PSA was enacted to provide “a national hazardous liquid pipeline safety program with nationally uniform minimal standards and with enforcement administered through a Federal-state partnership.”<sup>62</sup> Regulation under the PSA is differentiated between interstate<sup>63</sup> and intrastate<sup>64</sup> hazardous liquid pipelines.<sup>65</sup> Interstate pipeline facilities, pipelines used for transportation of hazardous liquids in interstate or foreign commerce, are exclusively subject to federal regulation by the DOT.<sup>66</sup> Under this regulatory authority, the Pipeline and Hazardous Materials Safety Administration (PHMSA),<sup>67</sup> a division of the DOT, prescribes minimum safety standards for pipeline transportation and for pipeline facilities.<sup>68</sup> These safety standards include requirements for annual reporting,<sup>69</sup> reporting of accidents and safety-related conditions,<sup>70</sup> pipeline design,<sup>71</sup> pipeline construction,<sup>72</sup> pressure testing,<sup>73</sup> operation and maintenance,<sup>74</sup> pipeline personnel qualification,<sup>75</sup> and corrosion control.<sup>76</sup> State authorities may not regulate interstate hazardous liquid pipelines<sup>77</sup> and “may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.”<sup>78</sup>

Intrastate hazardous liquid pipelines are subject to the same federal regulatory authority as interstate pipelines unless a state obtains certification from the DOT to regulate its intrastate pipelines.<sup>79</sup> Therefore, unlike interstate pipelines, a state authority may regulate its intrastate

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<sup>61</sup> 49 USC 60102(a)(1).

<sup>62</sup> 49 CFR pt. 195, app. A (2015).

<sup>63</sup> An “interstate hazardous liquid pipeline facility” is a “hazardous liquid pipeline facility used to transport hazardous liquid interstate or foreign commerce.” 49 USC 60101(a)(7).

<sup>64</sup> An “intrastate hazardous liquid pipeline facility” is a “hazardous liquid pipeline facility that is not an interstate hazardous liquid pipeline facility.” 49 USC 60101(a)(10).

<sup>65</sup> A “hazardous liquid pipeline facility” is a “pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid.” 49 USC 60101(a)(5).

<sup>66</sup> 49 USC 60104(c); 49 CFR 195.1(a); *See also*, 45 CFR pt. 195, app. A (2015).

<sup>67</sup> The Pipeline and Hazardous Materials Safety Administration (PHMSA) is directed to perform the duties and powers related to pipeline and hazardous materials transportation and safety vested in the Secretary of Transportation by the PSA. 49 USC 108(f)(1).

<sup>68</sup> 49 USC 60102(a)(2).

<sup>69</sup> 49 CFR 195.49.

<sup>70</sup> 49 CFR 195.50; 49 CFR 195.55.

<sup>71</sup> 49 CFR 195.100.

<sup>72</sup> 49 CFR 195.200.

<sup>73</sup> 49 CFR 195.300.

<sup>74</sup> 49 CFR 195.400.

<sup>75</sup> 49 CFR 195.501.

<sup>76</sup> 49 CFR 195.551.

<sup>77</sup> “The [PSA] expressly preempts states from imposing any additional safety standards on interstate pipelines...” *Shell Oil Co. v. City of Santa Monica*, 830 F2d 1052, 1063 (CA 9, 1987).

<sup>78</sup> 49 USC 60104(c); *Olympic Pipeline Co. v. City of Seattle*, 437 F3d 872, 878 (CA 9, 2006).

<sup>79</sup> “A state authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation



pipelines if it obtains certification from the DOT under section 60105(a) of the PSA and prescribes standards that are compatible with the minimum federal safety standards.<sup>80</sup> States may use this authority to impose safety requirements in addition to the federal standards.<sup>81</sup>

While states lack the authority to impose additional safety standards on interstate pipelines, the PSA provides two important exceptions that give states the opportunity to oversee interstate pipelines. If a state is certified under section 60105(a) of the PSA to regulate its intrastate pipelines, the DOT may enter into an agreement with the state authorizing it to participate in oversight and inspection of interstate pipeline transportation.<sup>82</sup> Under agreements of this type, state authorities are granted the ability to participate in special investigations involving accidents or new construction of pipelines or to assume additional inspection or investigatory duties.<sup>83</sup> States, in order to enter into an agreement with the DOT, must implement an inspection program that is consistent with the PHMSA's and is consistent with the safety policies and provision provided under the PSA<sup>84</sup> and must promote preparedness and risk prevention activities that enable communities to live safely with pipelines.<sup>85</sup> Additionally, the DOT may designate a state agent authority to conduct inspections of pipeline operators and facilities to ensure compliance with federal minimum safety standards on behalf of the DOT.<sup>86</sup>

The PSA provides partial funding for states that obtain certification from the PHMSA.<sup>87</sup> The DOT must assist state authorities with up to 80 percent of the cost of personnel, equipment, and activities reasonably required to carry out a safety program under a certification under section 60105(a), an interstate inspection agreement under section 60106(b) of the PSA, or to act as an agent of the DOT for inspections of interstate hazardous liquid pipelines.<sup>88</sup>

#### **IV. Limitations of Federal Regulation and Enforcement of Oil Pipelines**

Hazardous liquid pipelines carry over 75% of the United States' crude oil and around 60% of its refined petroleum products.<sup>89</sup> In the big picture, pipeline transportation is safe, cheap and important to the United States economy. While pipeline releases have caused relatively few fatalities in absolute numbers, a single pipeline accident can be catastrophic in terms of

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only if those standards are compatible with the minimum standards prescribed under this chapter." 49 USC 60104(c).

<sup>80</sup> 49 USC 60104(c); *see also*, *Olympic Pipeline Co.*, 437 F3d at 878.

<sup>81</sup> *Olympic Pipeline Co.*, 437 F3d at 878.

<sup>82</sup> 49 USC 60106(b)(1).

<sup>83</sup> *Id.*

<sup>84</sup> 49 USC 60106(b)(2)(A).

<sup>85</sup> 49 USC 60106(b)(2)(c).

<sup>86</sup> 49 USC 60117(c); *Olympic Pipeline Co.*, 437 F3d at 878.

<sup>87</sup> 49 USC 60107(a).

<sup>88</sup> 49 USC 60107(a).

<sup>89</sup> Parfomak, Cong. Research Serv., R41536, *Keeping America's Pipelines Safe and Secure: Key Issues for Congress* (Jan 9, 2013), p 1.

environmental and economic damage.<sup>90</sup> It is important, therefore, that the DOT, and specifically the PHMSA, adequately enforce federal minimum pipeline safety standards.

The PHMSA uses a variety of tools to enforce the federal minimum safety standards; program inspections, pipeline inspections, investigations of pipeline incidents and enforcement actions, including administrative actions such as corrective action orders and civil penalties.<sup>91</sup> Federal inspection of programs and pipeline facilities, while integral for effective enforcement and oil spill prevention, is not always adequate.<sup>92</sup> Understaffing within the PHMSA makes it impossible for the 135 staff inspectors to adequately inspect the 192,388 miles of interstate hazardous liquid pipelines within the United States.<sup>93</sup> In response to the Kalamazoo River oil spill, the NTSB concluded that “PHMSA’s limited oversight of pipeline emergency preparedness that led to the approval of a deficient facility response plan” contributed to the severity of the environmental consequences.<sup>94</sup>

State certification for inspection of interstate hazardous liquid pipelines may be the necessary step for Michigan to take in order to better ensure safe oil pipelines within the state. By obtaining certification, Michigan would provide state inspectors to focus on inspecting pipelines within state borders.<sup>95</sup> The state inspectors would relieve some of the burden from the federal inspectors. Most important, however, state inspectors would have the opportunity to develop hands-on working relationships and positive communications with pipeline operators within the State of Michigan.

## **V. State Oversight of Hazardous Liquid Pipelines**

Fourteen states have obtained certification from the DOT for state oversight of intrastate hazardous liquid pipeline transportation, and five of those states act as interstate agents of the DOT.<sup>96</sup> Three states in the Great Lakes region—Indiana, Minnesota and New York—are certified under section 60105(a) of the PSA to regulate intrastate pipelines.<sup>97</sup> Minnesota and New York have also entered into agreements with PHMSA to oversee inspection of interstate hazardous liquid pipelines within each respective state.<sup>98</sup>

In the State of Washington, state certification of pipeline regulation and inspection was driven by an event similar to the Kalamazoo River oil spill. On June 10, 1999, a pipeline ruptured and

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<sup>90</sup> *Id.* at 2.

<sup>91</sup> 49 CFR 195 *et seq.*

<sup>92</sup> See 49 CFR 195.452 (inspection and oversight is an important aspect of integrity management programs on pipeline segments near “high consequence areas”).

<sup>93</sup> Cong. Research Serv., *supra* note 89 at 15-18.

<sup>94</sup> NTSB Enbridge Report, *supra* note 8 at 121.

<sup>95</sup> 49 USC 60117(a).

<sup>96</sup> Pipeline and Hazardous Materials Safety Administration, [State Pipeline Safety Programs—Hazardous Liquid Program](#) (accessed Jan 17, 2015) (listing Arizona, Minnesota, New York, Virginia and Washington as states acting as interstate oil pipeline agents).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

released 237,000 gallons of gasoline into a creek in Bellingham, Washington.<sup>99</sup> The gasoline ignited after spilling into the creek, resulting in an explosion that killed an 18-year-old fisherman and two 10-year-old boys who were playing in the river.<sup>100</sup> Total property damage exceeded \$45 million.<sup>101</sup> In response, the Washington State Legislature enacted its own Pipeline Safety Act a year later.<sup>102</sup>

The Act responded to the Bellingham tragedy and aimed to “protect the health and safety of the citizens of the State of Washington and the quality of the state’s environment by developing and implementing environmental and public safety measures aimed at...transporting hazardous liquids and gas by pipeline within the State of Washington.”<sup>103</sup> The Act called for (1) amendment of the federal pipeline safety act to delegate authority to qualified states to adopt and enforce safety standards equal to or more stringent than federal standards; (2) a state authority, the Washington Utilities and Transportation Commission (WUTC) to administer and enforce federal safety standards and requirements; and (3) higher levels of funding for state and federal pipeline safety activities and for states to respond to pipeline accident emergencies.<sup>104</sup> Additionally, the act required that WUTC apply for and maintain certification under 60105(a) of the PSA.<sup>105</sup> Under Washington’s Pipeline Safety Act, the WUTC was mandated to inspect hazardous liquid pipelines, collect fees, oversee the testing of hazardous liquid pipelines as required by federal law, and file reports with the DOT as required to maintain certification.<sup>106</sup>

On November 26, 2002, the WUTC entered into the “Interstate Pipeline Transportation Agreement” with the DOT.<sup>107</sup> The agreement provided the WUTC with jurisdiction, pursuant to the certification provision of PSA section 60105(a), over the 74.8 miles of intrastate hazardous liquid pipelines within the state subject to the PSA.<sup>108</sup> Additionally, the agreement delegated authority to the WUTC to participate in the interstate pipeline safety program to ensure that the 708.5 miles of interstate hazardous liquid pipelines within the state complied with the federal safety standards.<sup>109</sup> Through the statutory delegation and certification, “the agreement granted the WUTC the authority to address and oversee a wide variety of pipeline issues, including incident investigation, safety monitoring, inspections, and reporting, as the DOT’s agent.”<sup>110</sup>

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<sup>99</sup> National Transportation Safety Board, Pipeline Accident Report: Pipeline Rupture and Subsequent Fire in Bellingham, Washington (1999) (adopted 2002).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Wash Rev Code 81.88.005 *et seq.*; *see also*, *Olympic Pipeline Co.*, 437 F3d at 879.

<sup>103</sup> Wash Rev Code 81.88.005(1).

<sup>104</sup> Wash Rev Code 81.85.005(3).

<sup>105</sup> Wash Rev Code 81.85.090.

<sup>106</sup> Wash Rev Code 81.85.090(1-4).

<sup>107</sup> *Olympic Pipeline Co.*, 437 F3d at 879.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

The Washington Utilities and Transportation Commission has promulgated regulations covering hazardous liquid pipeline design, construction, repair, operation, maintenance, and reporting.<sup>111</sup> After working closely with DOT and PHMSA for two years, the WUTC became the lead inspector for all interstate hazardous liquid pipeline inspections and incidents within the State of Washington in 2003.<sup>112</sup> The WUTC receives federal funding for its pipeline safety program under section 60107(a) of the PSA.<sup>113</sup> To cover the remainder of the costs of the program, the WUTC collects pipeline safety fees from hazardous liquid pipeline companies based on total pipeline miles reported and an allocation of work hours that the safety program dedicates to specific pipeline companies.<sup>114</sup>

Since the Bellingham oil spill and explosion in 1999, there has not been a serious hazardous liquid pipeline incident in the State of Washington.<sup>115</sup> In the past decade, there have been 12 reported incidents involving hazardous liquid pipelines in Washington State, totaling 138 barrels of spilled hazardous materials and \$1,289,467 of property damage.<sup>116</sup> Seven full-time inspectors work to continually ensure that the hazardous liquid pipelines in the state comply with federal safety standards.<sup>117</sup> With the seven state inspectors, the state averages one inspector per 101 miles of interstate hazardous liquid pipeline.<sup>118</sup>

In contrast, 23 inspectors from the Central Region Office of the PHMSA inspect interstate hazardous liquid pipelines within twelve states across the Midwest.<sup>119</sup> Michigan has experienced 54 reported incidents involving hazardous liquid pipelines in the past decade, including the Kalamazoo River oil spill in 2010.<sup>120</sup> Not including the 20,000 barrels of oil that leaked from Line 6B into the Kalamazoo River, an additional 12,466 barrels of oil have spilled in Michigan since 2004.<sup>121</sup> Along with the 53 other incidents, the Kalamazoo River oil spill contributed to over \$855 million in property damage within the state in the past decade attributed to hazardous material pipeline incidents.<sup>122</sup>

## VI. Conclusion

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<sup>111</sup> Wash Admin Code 480-75 *et seq.*

<sup>112</sup> Washington Utilities and Transportation Commission, [About Pipeline Safety](#) (accessed Jan 17, 2015).

<sup>113</sup> Wash Admin Code 480-75-240.

<sup>114</sup> Wash Rev Code 81.85.090(2); Wash Admin Code 480-75-240.

<sup>115</sup> Pipeline and Hazardous Materials Safety Administration, [Pipeline Incidents by System Type: Serious Incidents Portal](#) (accessed Jan 17, 2015).

<sup>116</sup> Pipeline and Hazardous Materials Safety Administration, [Pipeline Incidents by System Type: All Incidents Portal](#) (accessed Jan 17, 2015).

<sup>117</sup> Washington Utilities and Transportation Commission, [Pipeline Safety in Washington State](#) (accessed Jan 17, 2015).

<sup>118</sup> This is in contrast to 135 PHMSA inspectors working to inspect 192,388 miles of interstate hazardous liquid pipeline, for a ratio of 1 inspector per 1425 miles of pipeline.

<sup>119</sup> Pipeline and Hazardous Materials Safety Administration, [PHMSA Pipeline Safety Program](#) (accessed Jan 17, 2015).

<sup>120</sup> [Pipeline Incidents by System Type: All Incidents Portal](#) (accessed Jan 17, 2015).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

Communication between the state and Enbridge has, in fact, commenced on the topic of Enbridge's Line 5 pipeline the Straits of Mackinac. After a response from Enbridge, the Attorney General and the Director then sent an additional letter to Enbridge on July 24, 2014.<sup>123</sup> In this July 2014 letter, the State notified Enbridge that the Line 5 pipeline was not currently in compliance with the terms and conditions of the April 23, 1953 "Straits of Mackinac Pipe Line Easement" granted by the State of Michigan.<sup>124</sup> In its June 27 response to the Schuette Letter, Enbridge acknowledged that some portions of the Line 5 pipeline went unsupported for a span of greater than seventy-five feet along the Straits of Mackinac. The failure to meet the 75-foot support spacing requirement triggered a ninety-day period within which Enbridge was required correct the issue and come into compliance with the Easement.<sup>125</sup>

Crude oil transportation through hazardous liquid pipeline may, in fact, be the most desirable form of oil transportation through the state, but Michigan cannot afford another spill like the 2010 Kalamazoo River incident. The notice of noncompliance with the 1953 Easement is a clear assertion by the state that it recognizes the need to oversee the safety of oil pipelines within Michigan. In the absence of state certification under the PSA, the state is creatively finding ways to ensure that the pipelines running under our lakes and near our rivers are safe. The communications between the state and Enbridge express a clear understanding by both parties that a strong relationship between the state and a pipeline operator can lead to mutual understanding about the importance of pipeline safety. Michigan can go one step further. By obtaining certification to oversee interstate pipeline inspections, Michigan has the opportunity to develop a strong legal relationship with Enbridge and other pipeline operators to ensure that oil pipeline transportation does not jeopardize human safety, the Michigan economy and the Michigan environment.

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<sup>123</sup> [Letter from Bill Schuette](#), Attorney General, State of Michigan and Dan Wyant, Director, Michigan Department of Environmental Quality to Bradley Shamala, Enbridge Energy LP (Jul 24, 2014) (accessed Jan 17, 2015).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*