



# Michigan Environmental Law Journal

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## **A PROGRESS REPORT ON THE PROMULGATION OF RULES FOR “ALL APPROPRIATE INQUIRY” UNDER CERCLA**

**By: R. Craig Hupp\***

Congress in 2002 required the U.S. Environmental Protection Agency (“USEPA”) to promulgate regulations defining how prospective purchasers of property should perform “all appropriate inquiry” into potential contamination on real property. After a negotiated rule-making process, a USEPA-appointed committee recommended a set of rules to USEPA. On August 26, 2004, USEPA published a Notice of Rulemaking in the Federal Register based on the draft rules from the negotiated rule-making process<sup>1</sup> and initiated a public comment period that closed November 30, 2004.<sup>2</sup> The draft rules are accompanied by a lengthy preamble that should be regarded as required reading. The recommended rules include a number of small but significant changes in the current process, put additional burdens on the preparer of the environmental assessment, and establish the professional qualifications for individuals who perform assessments. However, it is not clear that the rules, if adopted, will improve either the accuracy or quality of the assessment process.

### **1. *A Brief History of Environmental Due Diligence***

CERCLA as originally enacted provided for strict liability for owners and operators of facilities for clean-up costs incurred by federal and state governments.<sup>3</sup> Current owners and operators were liable even if the property was contaminated before the current owner or operator acquired or occupied the property. To ameliorate the draconian effect of this liability, CERCLA was amended in 1986 by the Superfund Amendment and Reauthorization Act of 1986 (“SARA”).

As amended by SARA, CERCLA had several exceptions to its strict liability scheme, one of which is known as the “innocent purchaser” or “innocent landowner” defense. The term innocent purchaser is not used in CERCLA and the defense arises out of the interplay between the liability section, §107<sup>4</sup> and the definition of “contractual relationship.” § 101(35)(A).<sup>5</sup> One liability exception arises if a potentially liable person (either an owner or an operator) can establish by a preponderance of the evidence that the release and resulting damages “were caused solely by an act or omission of a third party other than ... one whose acts or omission occurs in connection with a contractual relationship with the defendant.”<sup>6</sup> Typically preexisting contamination is caused by a third party, so at first glance it would appear that a new owner or operator should not be liable for preexisting contamination caused by another. But there is no protection if this third party had a contractual relationship with the new owner or operator. CERCLA defines deeds, leases and other instruments transferring ownership or possession as contractual relationships.<sup>7</sup> Because a new owner or operator typically has a deed or lease from a prior owner or operator, that contractual relationship brings the new owner or operator back into the liability scheme. However, there is an exception to the definition of contractual relationship that excludes from that definition transactions where the contaminated property was

acquired or occupied after the hazardous substance was disposed on the property and the new owner or occupant, at the time the owner/operator acquired the property, “did not know and had no reason to know” that a hazardous substance had been disposed of at the property.<sup>8</sup> A new owner can only claim not to know or have had no reason to know if the new owner undertook “all appropriate inquiry” (“AAI”) before acquisition.<sup>9</sup> The new owner who performs all appropriate inquiry and discovers nothing to suggest hazardous substances were disposed of at the property is the elusive innocent purchaser.

SARA, which amended CERCLA to create the innocent purchaser defense, requires an inquiry that is “consistent with good commercial or customary practice in an effort to minimize liability,” taking into account

“[A]ny specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.”<sup>10</sup>

This amendment to CERCLA spawned a major environmental due diligence industry. The customary environmental due diligence practice that developed became known as a Phase I Environmental Site Assessment and a rough standardization developed. Typically a Phase I did not include environmental sampling. Instead, if the Phase I study resulted in the conclusion that there had been or might have been a release of hazardous substances, environmental sampling was recommended to verify whether a release had occurred. That typically was done under a separate scope of work that became known as a Phase II Environmental Assessment. Although the scopes of work for Phase Is and Phase IIs converged on fairly similar practices, there were concerns that there was not a clearly-defined and agreed-upon standard that regulators and courts would recognize as meeting CERCLA’s requirements for “all appropriate inquiry.”

As the result of this concern, the American Society for Testing Materials developed a standard-setting process. That culminated in ASTM’s adoption of Standard E 1527-97, “Standard Practice for Environmental Site Assessment: Phase I Environmental Assessment Process.” That standard was updated in 2000 and reissued as E 1527-00. The purpose of E 1527 is to determine whether a piece of property is affected by “Recognized Environmental Conditions.” A Recognized Environmental Condition (“REC”) is defined as “the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products ....”<sup>11</sup> If a property is subject to a REC as discovered and reported by the environmental due diligence, then the prospective purchaser/occupant would have reason to know that a release or threat of release might have occurred or exist on the property, disqualifying the prospective purchaser from status as an innocent purchaser. The converse is also true; a “clean” Phase I would support an innocent purchaser defense even if pre-existing contamination were discovered after acquisition. In some cases, a REC identified in the Phase I would be based on the possibility of a prior release - for example, soil staining that might be residue of the release of a hazardous substance. It has been accepted practice that some RECs can be eliminated by further inquiry (i.e., by a Phase II), including, where appropriate, sampling that demonstrated that the condition giving rise to the REC was not in fact associated with a release or threat of release, although E 1527 does not specifically provide that a Phase II may be used to eliminate RECs identified by a Phase I.

## **2. In 2002, Congress Stepped Into the Due Diligence Debate**

There remained some concerns whether the ASTM standard would be recognized by the regulators and the courts as “all appropriate inquiry.” That led to the effort in the Brownfields Act to mandate a standard by regulation to provide, at least in theory, more certainty as to the level of environmental due diligence that would be deemed to satisfy all appropriate inquiry. While only time will tell whether this legislative intent to provide more certainty than that provided by E 1527 will be successful, the language is not without ambiguity and thus is unlikely to provide absolute certainty as to the necessary scope of AAI.

In January 2002, Congress amended CERCLA with the Small Business Liability Relief and Brownfields Revitalization Act of 2001 (the “Brownfields Act”).<sup>12</sup> The purpose of Title II, Subtitle B, *Brownfields Liability Clarifications*, of the Brownfields Act is to address liability issues affecting potential owners and operators of contaminated property. The Brownfields Act attempts to bring some clarification to the level of due diligence required of potential owners and operators attempting to qualify for the “innocent purchaser” exemption to CERCLA’s strict liability scheme. The Brownfields Act requires that USEPA undertake rule making to define the “all appropriate inquiry” that a potential owner and operator must undertake.<sup>13</sup> The Act adopted the current ASTM Phase I standard as an interim standard for AAI pending adoption of a final rule.<sup>14</sup>

AAI is relevant not only to the innocent landowner defense but is also relevant to new liability exemptions created by the Brownfields Act, known as the contiguous property exemption and the bona fide prospective purchaser exemption<sup>15</sup> respectively, and to brownfields site characterization and assessment grant programs.<sup>16</sup> Note that the three liability exemptions and the draft AAI rules are written in terms of the landowner. They do not acknowledge that prospective tenants who could become CERCLA “operators” have a similar need and interest in obtaining exemptions from liability for historic contamination.

## **3. The New Liability Scheme For Prospective Purchasers**

### **a. Elements of AAI**

The Act sets forth 10 elements for AAI.<sup>17</sup>

- i. Preparation by an environmental professional;
- ii. Interviews with past and present owners and occupiers of the property and in some instances, neighbors;
- iii. Review of historical information to determine previous uses and occupancies since the property was first developed;
- iv. Searches for recorded environmental liens;
- v. Review of federal, state, tribal and local records;
- vi. Visual inspection of the property and adjacent properties
- vii. Incorporation of specialized knowledge or information by the property acquirer;

- viii. Relationship of the purchase price to the value of the property if uncontaminated;
- ix. Commonly known or reasonably ascertainable information about the property; and
- x. Degree of obviousness of contamination and the ability to detect contamination by appropriate investigation.

The Act directs USEPA to effectuate these criteria by adopting implementing rules by January 2004.<sup>18</sup> USEPA missed this deadline and the final rule is still months away.

### **b. Concepts Added by the Brownfields Act to the Scope of Due Diligence**

The Brownfields Act includes as criteria for AAI several inquiries/factors that go beyond the ASTM standard (which standard failed to incorporate these statutory elements defined by SARA):

[T]he specialized knowledge or experience of the prospective purchaser, the relationship of the purchase price to the value of the property if the property were not contaminated, commonly known or reasonable ascertainable information about the property, the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation.<sup>19</sup>

The Brownfields Act also grafted a remedial requirement onto the definition of due diligence. Once an innocent purchaser discovers, notwithstanding due diligence, that the property has had a release, the innocent purchaser (as well as the contiguous owner and the bona fide prospective purchaser) must stop any continuing release, prevent any threatened future release and prevent or limit exposure to any previously-released hazardous substance.<sup>20</sup> This requirement is similar to the “due care” requirements under Part 201 of Michigan’s Natural Resources and Environmental Protection Act.<sup>21</sup> This aspect of AAI was discussed in the Michigan Environmental Law Journal,<sup>22</sup> and will not be discussed further here except to note the following. The preamble to the proposed rules warns repeatedly that data gaps not appropriately addressed in the AAI process can create a circumstance where a purchaser otherwise qualified as an innocent landowner or a bona fide prospective purchaser can lose its exemption from liability because it will not have enough information to meet the statutory requirement that it take reasonable steps to stop on-going releases after acquiring the property.

### **c. The Process for Developing the AAI Rules and Status of the Rulemaking**

In April 2003, USEPA gave notice in the Federal Register<sup>23</sup> that it was establishing a Negotiated Rulemaking Committee on All Appropriate Inquiry pursuant to § 9(a)(2) of the Federal Advisory Committee Act.<sup>24</sup> The USEPA appointed a wide variety of stakeholders to the Committee and charged with recommending a set of rules by December, 2003. The Committee included representatives from about 25 non-federal organizations, including associations representing the banking, real estate, housing, environmental, and environmental consultant industries and representatives from a number of federal agencies - for example, the Department of Housing and Urban Development. The first committee meeting was held on April 29 and 30, 2003.<sup>25</sup>

At its sixth meeting on November 12 to 14, 2003, the Committee adopted a consensus draft of rules for AAI (the "Consensus Draft"). The Consensus Draft is envisioned as a new regulatory section, 40 C.F.R. 312, "Standards For Conducting All Appropriate Inquiries." The USEPA will now review the recommendations, potentially modify them, write a preamble and initiate the rulemaking process. It is expected that the proposed rule will follow the Consensus Draft, given the process in developing the draft and that a draft was adopted by consensus of diverse stockholders. It was expected that formal rule making would begin in June 2004,<sup>26</sup> but USEPA did not publish the draft rule until late August 2004.

#### **4. Summary of the Consensus Draft AAI Rule**

For properties purchased before May 31, 1997, the Brownfields Act provides that a court must consider the defendant's specialized knowledge or experience, the relationship of the purchase price to the value of the property if uncontaminated, commonly-known information about the property, the obviousness of the contamination, and the ability of the defendant to detect contamination by appropriate investigation.<sup>27</sup> For properties purchased after May 31, 1997, the Brownfields Act adopted E-1527-97 as an interim standard until USEPA promulgates the new AAI rules.<sup>28</sup> USEPA then adopted E-1527-00 as an interim AAI standard until the new AAI rule is promulgated.<sup>29</sup>

The procedures recommended in the Consensus Draft have much in common with the ASTM standard in terms of general scope and record review. Those parts of the Consensus Draft will not be discussed in any detail here. The focus here will be on several areas that go beyond or differ from the ASTM standard. It must be emphasized there are many differences that, although minor and beyond the scope of this article, must be carefully observed in performing the new AAI process.

##### **a. The Scope of AAI**

The Consensus Draft applies to persons attempting to qualify for the exemptions of innocent purchaser, bona fide prospective purchaser and contiguous property owner (hereinafter "qualifying persons").

A qualifying person must commission an inquiry "to identify conditions indicative of releases or threatened releases on, at, in, or to the subject property" (a "CIR").<sup>30</sup> The recommended standards "are not intended to require identification of quantities or amounts, either individually or in the aggregate, of hazardous substance ... that because of said quantities and amounts, generally would not pose a threat to human health or environment."<sup>31</sup> In other words, a qualifying person is not charged with determining whether a *de minimis* level of contamination is present. By comparison, E-1527 excludes from the definition of RECs, those concentrations that are so small as to be unlikely to pose a material risk of harm or lead to environmental enforcement.<sup>32</sup>

The required investigation consists of an inquiry by an environmental professional pursuant to a scope of work set forth in Proposed Rule ("PR") 312.21, collection of additional information by qualifying persons under a scope of work defined at PR 312.22, and a search for recorded environmental liens by the qualifying person which is provided to the environmental professional. In carrying out the standards and practices, the responsible person (either the qualifying person or the environmental professional, depending on the task) must gather all

information that is publicly available, obtainable within a reasonable time and cost and which can practicably be reviewed, and review and evaluate the thoroughness and reliability of the information gathered.<sup>33</sup> Data gaps must be identified, sources of information consulted to fill in the data gap must also be identified, and the environmental professional must comment on the significance of the data gap.<sup>34</sup> Sampling may be conducted to address data gaps but is not required.<sup>35</sup>

The environmental professional must prepare a written report, including 1) an opinion whether the inquiry has identified a CIR on, at, in or to the subject property, 2) a discussion of any data gaps and whether they have affected the ability to identify a CIR, and 3) the qualifications of the environmental professional and a certification that the environmental professional has the qualifications required by the regulations and that the professional has followed the AAI standards and procedures.<sup>36</sup> We anticipate that AAI reports will frequently conclude that data gaps prevent the environmental professional from opining that there are no CIR's on the Property.

The scope of the environmental professional's inquiry is set forth in PR 312.21(b) and subsequent rules and includes interviews with present and past owners and occupants,<sup>37</sup> review of government records,<sup>38</sup> visual inspection of the property and adjoining properties,<sup>39</sup> commonly known or reasonably ascertainable information,<sup>40</sup> and the degree of obviousness and ability to detect contamination.<sup>41</sup> In addition, the inquiry must take into account information provided to the environmental professional as the result of inquiries conducted by the qualifying person, including the presence of recorded liens and information available because of the qualifying person's specialized knowledge or experience.<sup>42</sup>

#### **b. Differences with ASTM E1527**

There are minor differences between the AAI and E1527 that include but are not limited to:

- i. Educational and experiential qualifications for an environmental professional are established;
- ii. There is a requirement to check local and tribal regulatory records as well as state and federal records;
- iii. Use history goes back to first developed use, not 1940, but the proposed regulation leaves it to the environmental professional's judgment as to which historical sources are reviewed;
- iv. Search distances for various environmental indicators vary from the ASTM standard;
- v. Registries of environmental land use restrictions and engineering controls applicable to the property must be reviewed;
- vi. Neighboring property owners must be interviewed when assessing abandoned properties; and

- vii. AAI applies to residential properties in commercial use, not just rentals of more than four units.

The reader is encouraged to compare ASTM E1527 and PR 312 carefully because the above list does not capture all differences.

Given the size of the environmental due diligence industry, it should be no surprise that of the foregoing criteria, it was the criteria defining the minimum qualifications of the environmental professional that generated the most debate. After months of debate, the Consensus Draft recommended the criteria based on several combinations of education, licensure, training and experience.

### **c. The Purchaser's Specialized Knowledge or Experience**

The Brownfields Act and the Consensus Draft put a new obligation on the qualifying person. Past practice has been to put the burden solely on the environmental professional performing the Phase I to identify RECs. Now the qualifying person must add to the inquiry any information available because of the qualifying person's specialized knowledge or experience. This could be extensive. A manufacturing company acquiring another company's plant could be expected to have substantial knowledge of potential causes and locations of releases of hazardous substances. Presumably, such a qualifying person would be expected to apply its own knowledge of the typical use, handling and disposal of hazardous substances in its industry when evaluating the likelihood of a CIR. In some cases, the qualifying person might even have more industry-specific knowledge than the environmental professional about the general likelihood of releases and disposals.

In addition, the Consensus Draft places the responsibility on the qualifying person, not the environmental professional, to determine whether there have been recorded environmental liens.<sup>43</sup>

### **d. Shelf Life of an AAI Inquiry**

The recommendation provides that an AAI inquiry may be relied upon if conducted within one year before purchase, provided that the interviews, visual inspections and record review obligations were conducted or updated within 180 days prior to purchase.<sup>44</sup> The results of an AAI inquiry can be transferred to someone other than the original user and can be included in the new user's AAI inquiry so long as the new user meets its AAI obligations and has appropriately updated the interview, visual inspections and record review if necessary.<sup>45</sup>

### **e. Degree of Obviousness of Contamination and Ability to Detect It by Appropriate Investigation**

In scoping an inquiry to meet the proposed AAI regulations, the environmental professional and the qualifying person must consider the degree of obviousness of contamination and the ability to detect it. In other words, what is the likelihood the property is contaminated and how hard would it be to discover the contamination through sampling or other means? The proposed regulation directs the environmental professional and qualifying person to consider the information discovered through record review, visual inspection, etc.

The Consensus Draft does not require sampling as part of an AAI inquiry and the committee specifically declined to adopt such a requirement. The Consensus Draft does require that data gaps be identified and that the environmental professional comment on the significance of data gaps with regard to the ability to opine whether CIRs are present.<sup>46</sup> The qualifying person and the environmental professional must consider "the ability to detect contamination by appropriate investigation."<sup>47</sup> Further, it requires the environmental professional to include "an opinion regarding additional appropriate investigation, if any."<sup>48</sup> Again, at several locations in the Preamble, USEPA warns of the consequences of not identifying on-going releases on the property and advises purchasers to keep that in mind when deciding whether to sample. Taken together, these proposed regulations will certainly lead to conclusions that there are data gaps that can be filled by sampling and analysis.

For any property where solvents or hazardous substances were used in any kind of volume or for any duration, it is possible that in hindsight a trier of fact would conclude that a purchaser who knew of that use was on notice before acquisition of the likelihood of contamination, even if the AAI report is equivocal because of data gaps. The currently-prevailing practice of performing Phase IIs to fill in data gaps is strong evidence of the ability to detect much suspect contamination by sampling and analysis and that it is accepted commercial practice to do so. Thus, although the regulations duck the question of whether sampling is "required," many qualifying parties will have to answer the question and the answer will frequently be "yes."

## **5. Summary**

The proposed AAI rules are a fairly straightforward implementation of the 10 factors set forth in the Brownfields Act. The Act itself creates several burdens and obligations that go beyond current practice. Potentially most troublesome is the requirement that the due diligence take into account the qualifying person's specialized knowledge or experience. This will increase the risk of 20/20 hindsight: "Given your knowledge, experience and/or prior history, you should have known...." Time will tell whether the new AAI regulations will provide the prospective purchaser with any more comfort or certainty than ASTM E 1527-00. The author is not optimistic on this point.

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<sup>1</sup> 69 Fed. Reg. 51541 (August 26, 2004). For detailed information on specific aspects of the proposed rule, contact Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment at 202-566-2774, [overmeyer.patricia@epa.gov](mailto:overmeyer.patricia@epa.gov). Extensive information on the development of the rule is available at <http://www.epa.gov/brownfields/regneg.htm>.

<sup>2</sup> 69 Fed.Reg. 56016 (September 17, 2004).

<sup>3</sup> 42 U.S.C. 9607(a).

<sup>4</sup> § 107, 42 U.S.C. 9607.

<sup>5</sup> § 101(35)(A), 42 U.S.C. 9601(35)(A).

<sup>6</sup> 42 U.S.C. 9607(b)(3).

<sup>7</sup> 42 U.S.C. 9601(35)(d).

<sup>8</sup> 42 U.S.C. 9601 (35)(A)(i).

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

<sup>10</sup> 42 U.S.C. 9601 (35)(B) (before amendment by the Brownfields Act).

<sup>11</sup> ASTM 1527-00, ¶ 1.1.1.

<sup>12</sup> Small Business Relief and Brownfields Revitalization Act of 2001, Pub.L. 107-118, 115 Stat.2356 (2002).

<sup>13</sup> Brownfields Act, § 223(2)(B)(ii).

<sup>14</sup> Brownfields Act, § 223(2)(B)(iv)(II).

<sup>15</sup> Brownfields Act, § 221, codified at 42 U.S.C. 9607(q) and (r)(1).

<sup>16</sup> Brownfields Act, 42 U.S.C. 104(k)(2).

<sup>17</sup> Section 223 of the Brownfields Act, 42 U.S.C. 9601(35)(B).

<sup>18</sup> Brownfields Act, § 223(2)(B)(ii), 1§ 223.

<sup>19</sup> 42 U.S.C. § 101(35)(B)(iii)(VII-X).

<sup>20</sup> Brownfields Act § 223(2)(B)(i)(I), codified at 42 U.S.C. 9601(35)(B)(I).

<sup>21</sup> MCL 324.20107a.

<sup>22</sup> Dunsky, Progress Report on EPA's Implementation of The Small Business Liability Relief and Brownfields Revitalization Act, 20 Mich. Env'tl. L.J. (3), p. 11 (2002).

<sup>23</sup> 68 Fed Reg. 10747 (April 7, 2003).

<sup>24</sup> 5 U.S.C. 9(a)(2).

<sup>25</sup> Background on the Committee and its recommendations can be found at <http://www.epa.gov/swerosps/bf/regneg.htm>.

<sup>26</sup> To stay current with the Brownfields Act and the AAI rulemaking, the ASTM is updating E 1527-00 through its E 1527 Task Group.

<sup>27</sup> Brownfields Act, § 223(2)(B)(iv)(I).

<sup>28</sup> Brownfields Act, § 223(2)(B)(iv) (II).

<sup>29</sup> 68 Fed. Reg. 24888-891 (May 9, 2003).

<sup>30</sup> Proposal Rule ("PR") 312.20(d).

<sup>31</sup> PR 312.20(g).

<sup>32</sup> ASTM E 1527-00, ¶ 1.1.1.

<sup>33</sup> PR 312.20(e).

<sup>34</sup> PR 312.20(f).

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

<sup>36</sup> PR 312.21(c) and (d).

<sup>37</sup> PR 312.23.

<sup>38</sup> PR 312.26.

<sup>39</sup> PR 312.27.

<sup>40</sup> PR 312.30.

<sup>41</sup> PR 312.31.

<sup>42</sup> PR 312.25, 312.28.

<sup>43</sup> Note that under CERCLA and Part 201, environmental liens arise upon the government's expenditure of funds. 42 U.S.C. 9607(l); MCL 324.20138(1). Thus the more conservative inquiry, although not required by the Consensus Draft, is whether remedial funds have been spent and not whether an environmental lien has been recorded.

<sup>44</sup> PR 312.20(b).

<sup>45</sup> PR 312.20(c).

<sup>46</sup> PR 312.21(c)(2).

<sup>47</sup> PR 312.31.

<sup>48</sup> PR 312.31(b).

## **ENVIRONMENTAL LAW ESSAY CONTEST 2004 WINNER**

Each year the Environmental Law Section of the State Bar of Michigan sponsors an environmental law essay contest open to all students enrolled in any U.S. or Canadian law school. The winning essay receives a cash prize and the opportunity to be published in the Michigan Environmental Law Journal.

The 2004 winning essay published below was written by Emily Green of Holland, Michigan, a law student at Wayne State University in Detroit, Michigan. At the time of her submission, Ms. Green was an intern with the United States Environmental Protection Agency, Criminal Enforcement Division, located in Denver, Colorado.

### **A COMMENTARY AND CRITICISM OF MICHIGAN BROWNFIELD LEGISLATION**

**BY: EMILY GREEN**

States within the rust belt have similar characteristics, most notably the decline in formerly thriving steel and manufacturing cities. Due to the concentration of brownfield properties in the rust belt states, brownfield legislation in these states has evolved into some of the most successful and comprehensive in the country. Although Michigan is renown for hosting "one of the leading brownfield initiatives in the nation,"<sup>1</sup> many abandoned and underutilized properties remain in Detroit and Michigan's other distressed urban areas.

This essay examines the strategies and policies of brownfield programs in other rustbelt states as they relate to Michigan in four critical areas: (1) information, (2) simplification, (3) standards, and (4) financial incentives. By means of analyzing the strengths and weaknesses employed in these states, Michigan can mold its program to better appeal to communities and developers. The goal of brownfield redevelopment is to remediate contaminated land and create viable tax revenue. To further this goal and entice investors to struggling urban areas, information must be more readily available, the process simplified, standards reduced, and financial incentives increased.

#### ***A. Information***

##### **1. Public Awareness and Participation**

When balancing economic interests, environmental health and safety issues must be considered. Inconsistent definitions of brownfields make it difficult to accurately measure the market for brownfields.<sup>2</sup> Another hindrance is "the absence of adequate, publicly available, private and government commercial data collection systems that measure revenues generated from the sale of goods and services" stemming from brownfields.<sup>3</sup> Brownfields, regardless of their potential value, may still be viewed as high-risk due to many factors, such as the lack of

public awareness of incentives and the brownfield redevelopment process.<sup>4</sup> Successful brownfield redevelopment often requires cooperation between the public and private sectors and community groups.<sup>5</sup> Local involvement also serves an important check to ensure institutional and zoning controls are enforced. By the same token, public awareness and involvement are beneficial in the decision-making process because institutional controls function as a restriction that may inhibit future growth by locking the site into a particular land use unless further remediation is completed.<sup>6</sup>

Some states avoid public involvement in Voluntary Cleanup Programs because it is seen as a deterrent and a delay to the cleanup process.<sup>7</sup> In Michigan, where state funds are used for remediation, or where significant public interest exists, there are provisions that require the Michigan Department of Environmental Quality (MDEQ) to notify the local government and provide an opportunity for local government and the public to comment.<sup>8</sup> Overall, though, the regulatory efforts to incorporate public involvement are meager at best.

This is not the case in other rust belt states. An excellent example of public outreach is the Indiana Department of Environmental Management's Environmental Justice website.<sup>9</sup> The website hosts a guide for citizen participation, available in print and online, that details environmental regulations and opportunities for public participation throughout the cleanup and remediation processes. It is available in English and Spanish, as well as a condensed version containing program highlights. Contact information is readily available including online comment and complaint forms, a general email address, as well as local and toll-free phone numbers to an environmental justice coordinator.<sup>10</sup>

In New York, the newly-passed environmental legislation contains provisions aimed at expanding citizen participation. The legislation mandates the preparation of a citizen participation handbook to guide applicants in the design and implementation of a citizen participation plan for brownfield remediation projects.<sup>11</sup>

Pennsylvania maintains Notice of Intent to Remediate (NIR) requirements for each of its cleanup standards.<sup>12</sup> A party must submit a NIR to the Department of Environmental Protection, the local newspaper, and municipality before commencing cleanup.<sup>13</sup> The same notice requirements are mandated upon completion of cleanup.<sup>14</sup> Exceptions to this rule include cleanups conducted according to the background or statewide standards that do not require notice if cleanup is accomplished within 90 days of release.<sup>15</sup> Conversely, cleanups under the site specific or special industrial standard must comply with more stringent notice requirements, including a 30 day comment period in which the municipality may request involvement in the project.<sup>16</sup>

## **2. Expanding the Brownfield Redevelopment Financing Act**

Decentralization of brownfield redevelopment to the local level is sound policy in that local officials are often in the best position to identify and assess potential brownfield properties and community needs.<sup>17</sup> The Brownfield Redevelopment Financing Act (BRFA) allows a qualified local unit of government, known as a "core community," to create a brownfield redevelopment authority.<sup>18</sup> These communities are eligible for the incentives available for contaminated properties under Part 201 of the Natural Resources and Environmental Protection Act<sup>19</sup> (Part 201), as well as incentives on properties that meet the broad definition in the BRFA.<sup>20</sup> Currently, there are only 88 core communities<sup>21</sup> yet there are many other Michigan communities with "blighted" or "functionally obsolete" properties that would benefit from the ability to entice developers with the extra incentive. By allowing other communities to apply for

“core community” status, planning requirements would also be in place, ensuring more efficient and effective redevelopment.

## **B. Simplification**

### **1. Streamlining the Approval Process**

The lengthy process involved with obtaining government approval hinders some potential developers. Time frame is an important consideration to most developers because they rely on a tight schedule to produce profits.<sup>22</sup> In Michigan, the 45-day period in which an applicant must conduct a Baseline Environmental Assessment (BEA) under Part 201 helps to streamline the process for limiting liability on the part of the applicant. Once a BEA is submitted to the state, statute dictates a 15-day report review deadline for the MDEQ in an effort to accelerate the state’s review process.<sup>23</sup> However, the MDEQ is not tightly held to this deadline.<sup>24</sup> Pennsylvania, on the other hand, has a policy where reports are automatically approved if staff fails to meet the deadline.<sup>25</sup> Ohio attempts to alleviate some untimeliness through provisions that allow a party to begin remediation without notifying the Ohio EPA.<sup>26</sup> These provisions, however, are tailored towards Ohio’s program as a whole and may not provide a solution for Michigan.

Like Pennsylvania, Michigan could benefit from a measure that more firmly commits the state to its proscribed deadline under Part 201. Michigan has utilized an automatic approval under the BRFA that allocates 60 days in which the MDEQ must respond to a work plan or it is considered approved.<sup>27</sup> However, approval under the BRFA is for the purpose of tax capture and does not include automatic approval of a BEA or compliance with due care requirements for purposes of Part 201.<sup>28</sup> Despite the fact that firm review deadlines streamline the review process and provide predictability, automatic approval may not be a sound environmental policy as applied to Part 201. In addition, automatic approval does not sufficiently account for situations in which many proposals are filed at once or the complexity of each proposal.

### **2. Certified Professionals**

Michigan environmental legislation has contributed, at the very least, to the Michigan economy through the creation of jobs in the environmental consulting field. The 1997 economic census reported 179 environmental consulting establishments in Michigan with 1,115 payroll employees. These firms brought in \$92,577,000 in receipts and paid their employees \$38,746,000.<sup>29</sup>

This environmental consulting industry is engaged primarily to provide “advice and assistance to businesses and other organizations” on environmental issues such as “control of environmental contamination from pollutants, toxic substances, and hazardous materials.”<sup>30</sup> Services rendered may include identifying problems, measuring and evaluating risks, and recommending solutions.<sup>31</sup> Employees include “a multi-disciplined staff of scientists, engineers, and other technicians with expertise in areas such as air and water quality, asbestos contamination, remediation, and environmental law.”<sup>32</sup>

A 1993 amendment that took effect in 1999 created a state regulation mandating that those working with leaking underground storage tank (LUST) sites be certified either as a qualified consultant or certified professional.<sup>33</sup> This mechanism is in place to assure that consultants are certified to meet minimum requirements of expertise and capability to conduct corrective actions necessary at these sites.<sup>34</sup> In practice, these requirements promote efficiency by relieving the state of the burdens associated with direct review and oversight throughout the

corrective action process.<sup>35</sup> In turn, this expedites the entire cleanup process and improves quality.<sup>36</sup>

Similar requirements do not exist for environmental professionals conducting BEAs on Part 201 sites where LUSTs do not exist. A BEA includes first a Phase I Environmental Site Assessment (ESA), and if necessary, a Phase II ESA.<sup>37</sup> The Phase I ESA consists of research and physical examination of the property.<sup>38</sup> Research is conducted by examination of regulatory agency files and historical maps to determine the past uses of the property; a physical walk-through also helps evaluate potential sources of existing contamination.<sup>39</sup> A Phase II ESA, however, is a much more detailed scientific process that may include the collection of soil and/or groundwater samples<sup>40</sup> to determine the vertical and horizontal extent of contamination. The professionals conducting this work may be unsupervised, and the process may not be overseen by the state.

Ohio, on the other hand, requires the use of certified professionals and laboratories under its VAP.<sup>41</sup> To qualify as a certified professional, an individual must hold a bachelors degree in an appropriate scientific or engineering concentration, have eight years of professional cleanup experience (three of which are at a supervisory or managerial level), possess good moral character, and demonstrate professional knowledge and competence to perform the required tasks.<sup>42</sup> The experiential requirement may be lowered based on such factors as graduate level education.<sup>43</sup> The certification process requires an application and affidavit of character, original educational transcripts, six references, and a \$2,500.00 payment.<sup>44</sup> The use of certified professionals does not preempt state involvement entirely; rather, the VAP requires the state to perform random audits on 25% of properties under the program each year.<sup>45</sup>

Similar to Ohio, Michigan could benefit from a program requiring a certain amount of knowledge or expertise, at least on a supervisory level. If a certified professional was required at each site, the amount of state involvement could be reduced, enhancing efficiency in review and reducing costs. Also, if certification is required for consultants, more flexible standards could be introduced, as is discussed below.

### **C. Standards**

Ultimately, the success of brownfield redevelopment rests with private developers, who operate to make a profit. The two principal options to reduce the cost of remediation and redevelopment for private developers are to (1) reduce cleanup standards and (2) increase incentives. The 1995 amendments already lowered the overall cleanup standard for carcinogens from 1:1,000,000 to 1:100,000.<sup>46</sup> It is unlikely that this general standard will be further reduced, nor is there any indication that a further reduction is a desirable outcome. However, the introduction of more flexible standards may increase the appeal of brownfield redevelopment.

#### **1. External Controls**

Part 201 authorizes the use of three cleanup standards as well as engineering and institutional controls. Engineering controls create a physical barrier, such as a parking lot or fence, between the contaminated land and the public.<sup>47</sup> Institutional controls "prevent unacceptable risk from exposure to the hazardous substances"<sup>48</sup> by requiring public notice of contamination in the recorded property deed.<sup>49</sup> External controls function to minimize cleanup costs by reducing the amount of contaminants permanently cleaned up.<sup>50</sup> Thus, the remediation is more financially cost effective. However, allowing contaminants to remain on the

property may leave the public susceptible to social and environmental costs. It is too soon to know if reduced cleanup standards and institutional controls have an adverse impact on human health, safety, and wellbeing. For example, a long-term social and environmental cost is the effect of contaminant migration,<sup>51</sup> which may occur even at a site that has been approved with external controls. At the same time, privately-owned sites may not be regulated or watched at all, unless there is contaminated material seeping onto adjacent property.<sup>52</sup> Nonetheless, external controls make brownfield redevelopment a more financially viable option.

Michigan authorizes institutional controls but fails to explicitly provide for extended monitoring of these controls. Instead, it relies on the stipulation that liability protection can be revoked if the land use changes or cleanup is deemed inadequate.<sup>53</sup> Significant state resources would likely be required to closely monitor each individual site, but Michigan policy raises questions as to whether the public is adequately protected from remaining contaminants.

Pennsylvania's Land Recycling Program takes proactive measures to ensure the effectiveness and implementation of engineering and institutional controls at approved cleanup sites.<sup>54</sup> Such measures include public access to information regarding approved projects where controls were used as part of the remediation and inspection of deed records for accurate descriptions of land use impediments.<sup>55</sup> At a minimum, Michigan could require similar inspections of deed records to ensure that approved external controls are properly recorded.

## 2. Changing Standards

The social and scientific views of acceptable levels of toxicity may change over time, and therefore, statutory levels should allow for reevaluation over time.<sup>56</sup> Pennsylvania takes these fluctuations into consideration by allowing for deviation from their regulatory levels of toxicity "due to current continuous development of the toxicity values by the United States EPA, ATSDR and California EPA."<sup>57</sup> As mentioned above, Michigan reduced the standard for carcinogens from 1:1,000,000 to 1:100,000 in 1995.<sup>58</sup> New York's 2003 legislation, in contrast, mandates a 1:1,000,000 standard for carcinogens.<sup>59</sup> The New York legislation also added other measures to place a premium on environmental concerns. For instance, projects that achieve permanent cleanup of contamination, including restoration of groundwater to specified level, are preferred over projects that do not achieve permanent results.<sup>60</sup> Additionally, tax credits are increased in proportion to the extensiveness of the cleanup. An example is that the site preparation credit is 12% for businesses and 10% for personal, but both increase by 2% for remediation projects that receive authorization for unrestricted land use.<sup>61</sup>

A unique feature of Ohio's VAP is its flexibility in allowing variances from applicable cleanup standards where an applicant can show that attaining relevant cleanup standards is "technically infeasible or cost prohibitive."<sup>62</sup> The applicant must also show that the proposed variance will "protect human health, improve environmental conditions on the site, and are necessary to promote, protect or enhance employment opportunities or reuse of the site."<sup>63</sup> The fact that the application fee alone is \$18,500<sup>64</sup> may suggest the amount and frequency with which the department receives variance request applications.

Similar to Pennsylvania, Michigan could introduce a provision that allows deviation in toxicity levels based on national standards. Alternatively, the fact that New York recently mandated a higher standard for carcinogens may also suggest that Michigan should reexamine levels of carcinogens as they relate to public health. It also appears a simple solution to preference projects that obtain permanent cleanup of contaminants, however, this does not adequately address the objective of brownfield redevelopment aimed at increasing the tax base

and economic viability of the property. Ohio's solution to flexibility presents a unique approach that places a fee in lieu of remediation. Depending on how subjectively the proposal criteria are interpreted, the variance may or may not actually protect public health and the environment.

### **3. Flexible Standards: Considering Surficial Geology**

Certain areas are more sensitive to urbanization and contamination than others.<sup>65</sup> The chemical characteristics of contaminants affect their behavior in different types of soil. The two factors influencing contaminate transport are the contaminant's (1) geologic environment and (2) physical chemistry.<sup>66</sup> Of these two, geologic environment, which includes soil composition, appears most important in determining contaminant migration.<sup>67</sup> Sandy soils are more permeable than clay soils, resulting in expedited contaminant migration, thus greater importance is placed on the degree and nature of contaminants in sandy soil environments.<sup>68</sup> On the other hand, in clay-rich soils, contaminants migrate on top of the underlying clay formation. Due to the low permeability of the clay particles, the contaminants tend to bind to the clay particles, and thus, they remain in high concentration rather than migrating.<sup>69</sup> This prevents contaminants from reaching the groundwater where contaminants are quickly dispersed great distances and contaminate the water supply -- a greater health and safety concern.

A case in point is the city of Detroit. Because the soil beneath the city of Detroit is almost entirely comprised of clay,<sup>70</sup> contaminants discharged within the city limits generally remain more contained and easier to remediate. Outside the city limits the soil types vary, but are largely comprised of sandier components and arguably have a greater tendency for migration, leading to higher cleanup and remediation costs and greater liability. There is also variance in the physical chemistry of contaminants discharged into the soil. For example, the contaminants most commonly detected at sites of environmental contamination within the greater Detroit area are Volatile Organic Compounds (VOCs).<sup>71</sup> VOCs absorb strongly to clay particles and weakly to sandy particles.<sup>72</sup> In sandy soils they migrate vertically, due to the force of gravity until they reach groundwater, the transport mechanism, and thus, have potential to migrate considerably from the point of release.<sup>73</sup> A study conducted at 220 sites within the Detroit area found 96% of the areas contained VOCs.<sup>74</sup> Therefore, if emission standards were flexible according to soil composition, an incentive could be created for developers to build industrial sites (especially those emitting VOCs) within the Detroit city limits, as opposed to the outlying areas containing sandier soil.

#### ***D. Financial Incentives***

The principal concern of developers is generating profits. In the most distressed areas, the market for brownfield redevelopment is virtually non-existent absent financial incentives. One such incentive, the single business tax credit, is attractive to developers because it can be used by the developer or sold.<sup>75</sup> There currently exist ways for a developer to qualify for more than one tax credit. Other funding sources, such as CMI, could also be increased, but available dollar amounts are subject to change on an annual basis, leaving funds susceptible to budget fluctuations.<sup>76</sup> Because CMI was itself funded by a lump sum, it will inevitably run out unless the program either receives more funding from the legislature or another means of contribution is written into the program. A rough estimate is that as of 2003, there may only be enough CMI funds remaining for another year or two.<sup>77</sup>

Michigan's Brownfield legislation assumes that private investors will view the tax increment financing and small business tax credits as a prudent business investment.<sup>78</sup> This assumption may work for many areas, but not in the most depressed economic areas. The

success of incentives is particularly seen in areas where real estate is at a premium and the economy is strong. It is in these areas that developers see little risk in their investment. In some cases, municipal authorities report being passed over by developers, in which case the developer absorbs the cost and passes it on to the consumer.<sup>79</sup> However, in most cases, the local authorities recruit developers.<sup>80</sup>

Over-reliance on tax increment financing should be avoided. Tax increment financing relies on future tax revenue to finance present redevelopment activities.<sup>81</sup> This type of financing is attractive in urban areas suffering from prevalent decline and blight, such as Detroit and other declining rust belt cities. However, careful planning is necessary when relying on future revenues.

The most recent program employing tax credits is in New York, where tax credits are used to bolster local employment.<sup>82</sup> The Remediated Brownfield Tax Credit is offered towards property taxes at qualified sites, and the credit is increased with the number of jobs created.<sup>83</sup> In addition to the base credit awarded for a brownfield project, an 8% bonus is awarded if at least half of the site is located in an "environmental zone," which is defined by a poverty rate of 20% or more and an unemployment rate one-and-a-quarter times the statewide average.<sup>84</sup>

### CONCLUSION

Although the scope of urban decline stems from many issues, the present focus is on turning areas of decline into viable sources of tax revenue and the expansion of employment opportunities. Brownfield redevelopment is one solution to the more than 40,000 surplus acres of abandoned or underutilized parcels of land within the city limits of Detroit and other distressed urban areas.

The basic elements of successful brownfield remediation programs are sufficient liability protection, flexibility, and financial incentives. Michigan has each of these components, yet blighted urban areas continue to suffer from a lack of interest and incentives to develop within the city limits. Thus, it is advantageous to examine brownfield legislation and policy in different locales and on various levels. In utilizing components of the brownfield programs in each state, the state of Michigan may be able to alleviate urban decline, thereby continuing its reputation as hosting one of the leading brownfield redevelopment programs in the nation.

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<sup>1</sup> See Hula, *There is Gold in Those Brownfields...Maybe: Brownfield Reuse and Urban Economic Development in Michigan*. Informing the Debate: Urban Housing and Land Development (2002) p 3.

<sup>2</sup> See Charles Bartsch, et al., *Brownfields: The National Perspective* (Mark Johnson, ed., 2001) p 2.

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

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> Hudak, *Addressing Barriers to Brownfield Redevelopment: Analysis of CERCLA and the Voluntary Cleanup Programs of Ohio, Pennsylvania and Michigan* (April 19, 2002) p 60 (major paper submitted to the faculty of the Virginia Polytechnic Institute and State University).

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<sup>7</sup> See *id.* at 23. See also Eisen, *Brownfields of Dreams?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U ILL L REV 998-1000 (1996) (Noting that focus has been on lowering cleanup standards and limiting liability rather than on public participation issues. States with VCPs “fail to encourage direct communication amongst developers, the state, and the affected community” despite the fact that VCPs “are likely to encounter public resistance precisely because they do not provide an opportunity for meaningful public participation.” Further, Eisen suggests that the success of VCPs depends on meaningful input from the community.).

<sup>8</sup> *Id.* at 46. See also *Cady v City of Detroit*, 289 Mich 499, 514 (“Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the attraction of a desirable citizenship and fostering its permanency are within the proper ambit of the police power.”).

<sup>9</sup> INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, *IDEM’s Environmental Justice Program*, at <http://www.in.gov/idem/environmentaljustice>.

<sup>10</sup> INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, *IDEM’s Guide for Citizen Participation*, at <http://www.in.gov/idem/guides/publicparticipation>.

<sup>11</sup> See Pennsylvania Department of Environmental Protection, *Fact Sheet: Overview of the Land Recycling Program* (2002) p 1-2.

<sup>12</sup> Hudak, n 6 *supra*, at 38.

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

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

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

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

<sup>17</sup> Hudak, n 6 *supra*, at 58.

<sup>18</sup> See Szymecko & Voice, *Brownfield Redevelopment Guidebook for Michigan* (Johnson, ed., 2002) p 2.

<sup>19</sup> MCL 324.20100

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

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

<sup>22</sup> Hudak, n 6 *supra*, at 54.

<sup>23</sup> MCL 324.20129(a)(2).

<sup>24</sup> Hudak, n 6 *supra*, at 54-55. See also MCL 324.20129a(4) regarding MDEQ accountability towards the stated review deadline. (It mandates only that the MDEQ annually submit a report to the legislature listing the average amount of time taken to issue a written determination and the number of times that the Department failed to meet the deadline.)

<sup>25</sup> *Id.* at 55.

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

<sup>27</sup> MCL 125.2665(5).

<sup>28</sup> MCL 125.2665(6).

<sup>29</sup> UNITED STATES CENSUS BUREAU, *1997 Economic Census: Professional, Scientific, and Technical Services for Michigan*, at [http://www.census.gov/epcd/ec97/mi/MI000\\_54.HTM](http://www.census.gov/epcd/ec97/mi/MI000_54.HTM). The results of the 2002 economic census are not yet available.

<sup>30</sup> UNITED STATES CENSUS BUREAU, *1997 Economic Census: Environmental Consulting Services*, at <http://www.census.gov/epcd/ec97/def/54162.HTM>.

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

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

<sup>33</sup> Mich. Department of Environmental Quality, *Underground Storage Tank Qualified consultant and Certified Professional Program* (2003) p 1, 8.

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *See id.* at 12.

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

<sup>37</sup> Michigan Department of Environmental Quality, *Part 201 Citizen's Guide: Baseline Environmental Assessments* (2003) p 4.

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

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> OHIO ENVIRONMENTAL PROTECTION AGENCY, FACT SHEET: OHIO'S VOLUNTARY ACTION PROGRAM, 1 (2001).

<sup>42</sup> OHIO ENVIRONMENTAL PROTECTION AGENCY, *How to Participate as a Certified Professional in the Voluntary Action Program*, at [www.web.epa.state.oh.us/derr/pdf\\_doc\\_wpd/fact6.pdf](http://www.web.epa.state.oh.us/derr/pdf_doc_wpd/fact6.pdf).

<sup>43</sup> *See id.*

<sup>44</sup> *Id.* at 2.

<sup>45</sup> *See* Hudak, n 6 *supra*, at 32.

<sup>46</sup> MCL 324.21304a(3).

<sup>47</sup> Hudak, n 6 *supra*, at 45.

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<sup>48</sup> MCL 324.20118(6)(d)(ii). See also MCL 324.20120b(5) (An example given under this subsection is “an ordinance that prohibits the use of groundwater or an aquifer” and “shall be published and maintained in the same manner as zoning ordinances.”)

<sup>49</sup> MCL 324.21310a(1).

<sup>50</sup> Hudak, n 6 *supra*, at 59.

<sup>51</sup> *Id.* at 59. See also Eisen, n 7 *supra*, at 778, 779,

(“Hazardous chemicals that are subject to erosion processes, leaching or aeolian transport may readily migrate onto adjoining properties. Such contaminants may also pose a risk to animals and plant life that can facilitate the spread to surrounding areas. Even the most thorough attempts by a property owner to restrict access to property are not likely to prevent contaminant migration. Therefore, the public has an interest in ensuring the neutralization or removal of harmful contamination that exists on private property.”).

<sup>52</sup> See Interview with Smedley, Michigan Department of Environmental Quality, in Lansing, MI. (November 3, 2003).

<sup>53</sup> Hudak, n 6 *supra*, at 53-54.

<sup>54</sup> PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *Pennsylvania’s Land Recycling Program – A True Innovation in American Government 1995 – 2002*,

at <http://www.dep.state.pa.us/dep/deputate/airwaste/wm/landrecy/facts/Summary/LandRecyclingFS.htm>.

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

<sup>56</sup> Hudak, n 6 *supra*, at 61.

<sup>57</sup> PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *Land Recycling Program Toxicity Database*, at <http://www.dep.state.pa.us/toxicity/toxicityvaluechanges.htm#introduction> (ATSDR is the Agency for Toxic Substances and Disease Registry).

<sup>58</sup> MCL 324.21304a(3).

<sup>59</sup> See PDEP, n 11 *supra*.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Hudak, n 6 *supra*, at 32.

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

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

<sup>65</sup> Rogers, *Environmental Geology of Metropolitan Detroit* (1996) p 97.

<sup>66</sup> *Id.* at 100.

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

<sup>68</sup> *See id.* at 110.

<sup>69</sup> *Id.* at 111.

<sup>70</sup> *See generally, id.* at 20.

<sup>71</sup> *Id.* at 98.

<sup>72</sup> *Id.* at 102.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 104.

<sup>75</sup> *See Phillips & Rising, Feature: Environmental Law: Financing Brownfield Redevelopment*, 76 Mich BJ 54 (1997).

<sup>76</sup> MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, *DEQ Grant and Loan Guide: Brownfield Redevelopment Grants*, at <http://www.deq.state.mi.us/documents/deq-fbsd-cmi-BrownfieldRedevelopmentGrants.pdf>.

<sup>77</sup> *See* Interview with Ron Smedley, n 52 *supra*.

<sup>78</sup> *See* Hula, n 6 *supra*, at 11.

<sup>79</sup> *Id.* at 12.

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

<sup>81</sup> Hudak, n 6 *supra*, at 64.

<sup>82</sup> *See* NEW YORK DEPARTMENT OF ENVIRONMENTAL PROTECTION, *Frequently Asked Questions About Remedial Program Finance and Reform*, at <http://www.dec.state.ny.us/website/der/superfund/legisfaq.html>.

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

<sup>84</sup> NEW YORK DEPARTMENT OF ENVIRONMENTAL PROTECTION, *Summary of Refinance and Reform Legislation*, at <http://www.dec.state.ny.us/website/der/superfund/legisummary.html>, p 9.

## COMMITTEE REPORTS

### PROGRAM COMMITTEE

Meeting Minutes – March 16, 2005

The Program Committee held a meeting on March 16, 2005. Attendees included: John Tatum, Kurt Brauer.

1. Planning Programs for the remainder of 2005.

a. Report on February 26th Bengel Nature Center program by Grant Trigger

Mr. Brauer reported that the Bengel Nature Center was well attended by ELS members, including a large turnout of law students. We also learned quite a bit about the presence of cougars in Michigan.

b. June 17 & 18 Higgins Lake Program

Messrs. Tatum and Brauer discussed the format for the June 17<sup>th</sup> Program at Higgins Lake, and agreed that last year's event was a remarkable success and that this year the program should follow the same format. Suggestions were made that there may be enough interest to get an update of the same, or similar water law issues. Another suggestion was that the current Savoy Energy permit request to drill near the South Branch of the Au Sable River (Mason Tract) is timely, interesting and useful.

c. Fall Program

Messrs. Tatum and Brauer discussed the format for the Fall Program, to be held in conjunction with the ELS annual meeting. As previously, it would likely follow an "update" format with speakers from the MDEQ.

2. Other Topics.

a. Noah Hall. Mr. Brauer noted that Noah Hall had accepted a faculty position at Wayne State University Law School to replace Bo Abrams.

b. John Tatum mentioned that the Administrative Law section will be holding a program on the new Office of Administrative Hearings, which became part of DLEG earlier this year. The program will be held in May 2005, and may be of interest to the ELS. Mr. Brauer volunteered to contact Rich Patterson or Dennis Mack to see if the ELS could co-sponsor the event and advertise the event to its members.

c. Would a program relating to environmental reporting under Sarbanes/Oxley be interesting to the section? Has one been done recently?

3. Next Meeting.

The next meeting will be April 20, 2005 at 5:30 p.m.

## MICHIGAN ENVIRONMENTAL ADMINISTRATIVE LAW JUDGE DECISIONS

### **Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, As Amended Petition of Martin and Deborah Ocedek**

File No. 00-05-0040

January 27, 2004

The petitioners, Martin and Debra Ocedek, own a piece of land on Torch Lake that contains regulated wetlands. The petitioners applied for a permit to fill in a portion of those wetlands so that they could build a home. Specifically, the permit was sought because they needed to fill a portion of the wetlands in order to have a driveway. The petitioners argued that the only feasible alternative to the proposed wetland fill is an upland parcel that is not reasonable or prudent. The Geological and Land Management Division (GLMD) of the Department of Environmental Quality (DEQ) argued that it is required to consider alternatives outside of the land owned by the petitioner.

The legislature set forth its finding in MCL 324.30302 that the use or fill of wetlands is a matter of state concern since a wetland of one county may be affected by acts on the rivers, lakes, streams, or wetlands of other counties. Therefore, the legislature has mandated that any person wishing to fill a wetland seek a permit from DEQ. Under MCL 324.30311, DEQ may not issue a permit unless the permit is in the public interest, the permit is necessary to realize the benefits derived from the activity, and the activity is otherwise lawful. Additionally, the permit may not be issued unless it is shown that there will be no unacceptable disruption to aquatic resources. The permit applicant also must show that: (1) the activity is primarily dependent on being located in the wetland, and (2) there are no feasible and prudent alternatives. MCL 324.30311(4). Feasible and prudent alternatives are not restricted to the lands owned by the petitioners; they can include land that the petitioner does not currently own as long as they take into consideration the reasonability of higher costs.

In the present case, the Proposal for Decision (PFD) found that the only other alternative was an upland parcel and that a fill in this location would disrupt the most productive part of the wetland and thus it would not be a reasonable and prudent alternative. The GMLD argued that §30311(4)(b) allowed the consideration of alternative locations not currently owned by the petitioner. The DEQ Director stated that the DEQ would in the future be required take into consideration alternative sites under §30311(4)(b) when making its permit decisions, thus overturning DEQ's interpretation of §30311(4)(b) in the Petition of Robert Brammer as applied to the Petition of Robert James. But the Director held that it would be unfair to deny the petitioners' permit application when the law governing reasonable and prudent alternatives has been reinterpreted.

Thus, the Director adopted the 2003 Proposal for Decision only as it applies to this case, with no precedent being established, and held that the permit should be issued to the petitioners.

Author: Diab H. Rizk, Michigan State University College of Law

**PART 303, WETLANDS PROTECTION, OF THE NATURAL RESOURCES AND ENVIRONMENTAL ACT,  
1994 PA 451, AS AMENDED PETITION OF ROBERT L. AND BONNIE REDMOND**

FILE NO. 01-49-0070-P

AUGUST 16, 2004

2004 WL 1906167 (MICH. DEPT. NAT. RES.)

Petitioners Robert L. and Bonnie Redmond applied for a permit under Part 303 of PA 451 to fill approximately .11 acres of wetland on their Lake Michigan lakefront property. The property, located in Mackinac County, is bisected by Epoufette Bay Road and contains regulated wetlands on both sides of the road. The petitioners planned to deposit 442 cubic yards of fill to construct a single-family residence, a septic field and a driveway on the landward side of the road. The Michigan Department of Environmental Quality (DEQ) denied the permit application on October 5, 2001. The petitioners filed a petition for a contested case hearing on November 2, 2001.

In reviewing DEQ's decision to deny the permit, the Administrative Law Judge (ALJ) considered the factors listed in Part 303 and issued a Proposal for Final Decision (PFD) recommending that the permit be granted. The ALJ first determined that the entire parcel of land contained wetlands and the petitioners were required to obtain a permit for their project. He then addressed the statutory factors and found that the petitioners' proposed activity was in the public interest. As part of this public interest balancing test, the ALJ determined that the project insignificantly impacted wildlife habitat, water quality, and other wetland resources in the area, and would have insignificant impact on aquatic resources. Next, the ALJ determined that no feasible and prudent alternatives to the proposed location of the project existed because the chosen location was the least detrimental to the wetlands on the petitioners' land. Finally, the ALJ found that the amount of wetlands to be filled did not present an unacceptable disruption of aquatic resources such as to warrant mitigation.

Accordingly, the ALJ issued a PFD recommending that the DEQ grant the petitioners' permit application. The Director of DEQ ultimately incorporated the PFD into his Final Decision and Order on August 16, 2004.

Author: Alissa DeGrow, Michigan State University College of Law

## MICHIGAN ENVIRONMENTAL CASENOTES

### **City of Brighton v Twp of Hamburg** 260 Mich App 345; 677 NW2d 349 (2004)

Plaintiff, the City of Brighton, sought to expand its wastewater treatment plant, and obtained an amended National Pollutant Discharge Elimination System (NPDES) permit for the expansion from the Michigan Department of Environmental Quality (MDEQ). Defendant, the Township of Hamburg, refused to accept plaintiff's site plan application pursuant to a township moratorium on wastewater treatment plants. Thereafter, defendant adopted an ordinance setting stricter limits on the discharge of certain nutrients into local waters than those granted by the NPDES permit. Plaintiff filed suit against defendant requesting that the defendant's ordinance be preempted as a matter of law by Part 31 of the Natural Resources and Environmental Protection Act (NREPA).

The Defendant argued that it had the right to preempt the state regulations with more stringent standards for water pollution to protect the health and safety of its residents. The trial court rejected this argument, and granted summary judgment to the plaintiff, holding that the local ordinance was preempted as a matter of law. The Defendant appealed.

In finding that NREPA preempted the defendant's ordinance, the appeals court relied on *People v. Llewellyn*. The *Llewellyn* court held that a municipality is precluded from enacting an ordinance if that ordinance directly conflicts with the state statutory scheme, or, in the absence of direct conflict, if the state statutory scheme preempts the ordinance. The *Llewellyn* court further outlined four factors that indicate state preemption of a city regulation: (1) exclusive control is expressly provided in the state law, (2) preemption is implied upon an examination of legislative history, (3) the state regulatory scheme is pervasive, or (4) the nature of the regulated subject matter demands uniformity to serve the State's purpose. The court found that the defendant's ordinance was preempted because the ordinance fulfilled the third and fourth factors. The court held that NREPA presented a pervasive and comprehensive regulatory scheme that granted sole responsibility for regulation to the MDEQ and indicated that the Legislature impliedly intended to preempt the regulation of waste discharges into the waters of the State. The court further held that the nature of the State's inter-connected waterways called for a statewide, uniform system of regulation, and that the state's ability to control water pollution across the State would be hindered by inconsistent local regulations.

Author: David Hobstetter, University of Michigan Law School

### **Carabell v. United States Army Corps of Engineers** 391 F3d 704 (CA6 2004)

In 1993, Plaintiffs June and Keith Carabell applied to the Michigan Department of Environmental Quality (MDEQ) for a permit to fill 15.9 of the 19.61 acres of property they own in Chesterfield Township, in order to construct a 130-unit condominium development. At the time, 15.96 acres of their property constituted one of the only large forested wetland areas in Macomb County. After the United States Environmental Protection Agency (EPA) and the United States Fish and Wildlife Service filed comments opposing their application, MDEQ denied it based on its anticipated impact on the wetlands. Plaintiffs appealed, and a state administrative law judge

(ALJ) ordered issuance of a permit for a 112-unit alternative condominium to be developed, mitigated by on-site wetland enhancement. Exercising its jurisdictional authority under the Clean Water Act (CWA), EPA asserted federal control of the project, advising MDEQ of the United States Army Corps of Engineers' (Corps) authority to process a federal permit application before Plaintiffs could go forward. Plaintiffs applied to the Corps for a permit, and after three inspections of the proposed project area by the Corps, a permit evaluation was issued, stating that the proposed project would cause serious long-term damage to the wildlife, vegetation, and overall local ecology, as well as some minor negative impacts downstream. Soon thereafter, the application was denied for those reasons and because the Carabells' failed to overcome the presumption that practical alternatives with lesser negative impact were available.

Plaintiffs filed an administrative appeal, contesting jurisdiction of the Corps because, they said, the wetlands were isolated by a spoil berm from any outside waters. Plaintiffs further argued that because MDEQ's permit issuance effectively precluded rejection of that permit by the Corps, and, regardless, they had met the relevant statutory and regulatory requirements, the Corps should have approved their application. The appeal was denied for lack of merit.

Plaintiffs filed suit in federal district court on July 26, 2001, and the presiding magistrate judge denied their cross-motion for summary judgment and granted the Corps' cross-motion for summary judgment. The judge found: (1) the adjacency of the property to tributaries of navigable waters, created a sufficient nexus to the "waters of the United States," so that CWA jurisdiction did apply; and (2) the Corps' decision was rationally based. The district court accepted the magistrate judge's recommendations and entered an order reflecting them. Plaintiffs appealed, arguing that the district court erred in finding CWA jurisdiction and in approving of the Corps' denial of Plaintiffs' permit application.

The Court of Appeals noted that a ditch on the border of Plaintiffs' property was separated from wetlands only by a man-made berm. Through various tributaries, that ditch connects to Lakes Huron and Erie, among other "waters of the United States." The court held that because adjacent wetlands can constitute waters of the United States under the CWA, 33 C.F.R. § 328.3(a)(7) granted the Corps CWA jurisdiction. That finding, and the Court's agreement with the district court's finding that the Corps' decision to deny the application was neither arbitrary nor capricious, led it to affirm the grant of summary judgment for the Corps. The order was filed September 27, 2004. A motion for an en banc rehearing was denied January 10, 2005.

Author: Adam Gitlin, University of Michigan Law School

**Greenbaum v United States Environmental Protection Agency**  
370 F3d 527 (CA6 2004)

Petitioners Robert Greenbaum, a Cleveland resident, and the Sierra Club brought suit against the U.S. Environmental Protection Agency (EPA), claiming that the EPA "illegally waived statutory requirements when it redesignated" Cuyahoga County, Ohio to "attainment" status under the Clean Air Act (CAA), for "particulate matter, specifically for particles known as PM10." The CAA requires states to submit a state implementation plan (SIP) to the EPA, outlining specific pollution control measures to meet National Ambient Air Quality Standards (NAAQS) for a particular air pollutant, in order for the EPA to redesignate a geographic area from "nonattainment" to "attainment," based on whether that area meets the NAAQS for that particular pollutant. Petitioners claim that the EPA unlawfully approved Ohio's SIP even though

it did not include a New Source Review (NSR) designed to monitor new and modified sources of a pollutant, as required by the CAA, and thus assure maintenance of the NAAQS.

The Sixth Circuit held that, since the EPA approved Ohio's NSR program on January 10, 2003, and the deadline for challenges to the ruling expired on March 11, 2003 (before petitioners filed their claim), it could not, under the prudential mootness doctrine, reach the issue of whether Ohio's NSR program should have been fully approved prior to redesignation. The court also rejected petitioners' argument that the NSR program is a required pollution control "measure" and "therefore should be among the contingency measures required by the CAA." The EPA's interpretation of the word "measure," which the court found to be reasonable, places a program of the NSR's nature outside the category of contingency measures. The court disagreed with petitioners' assertion that Ohio's maintenance plan contingency measures must be sufficient by themselves to correct any violation of pollution standards. Rather, the court opined that such measures "need only be sufficient in EPA's judgment to help assure that the State will promptly correct any future violation." Thus, Ohio's maintenance plan is not "woefully inadequate," as petitioners claim. The court agreed with EPA that "no maintenance plan could, or should be expected to, cover every possible contingency." For all of these reasons, the court upheld the EPA's redesignation of Cuyahoga County from nonattainment to attainment for particulate matter.

Author: Azhar Majeed, University of Michigan Law School

### **Berryhill v Gratiot Conservation District**

No 248217, 2004 WL 1882886; 2004 Mich App LEXIS 2254 (Aug 24, 2004)

Two issues were considered in this appeal. The first is a claim under the Whistleblower's Protection Act (WPA), *MCL 15.361 et seq.*, for which the trial court granted Defendant summary judgment.

Plaintiff Robin Berryhill was hired by Defendant Gratiot Conservation District, pursuant to a grant from the Michigan Department of Environmental Quality (MDEQ), to research and inventory environmental contamination in the district. Plaintiff reported violations of environmental laws directly to an MDEQ administrator rather than limiting her reports to a university department and her supervisor. This supervisor discouraged such actions, and urged that if she proceeded she minimize the issue. After Plaintiff reported several violations to the MDEQ, she was terminated. According to the MDEQ administrator, her reports angered the

Defendant's board. Defendant stated that she was terminated for her attitude, which Plaintiff argued was a pretext. The court held that Plaintiff presented sufficient evidence of a genuine issue of fact regarding the reasons for her termination, and remanded the case for a jury trial.

The second issue regarded appropriate remedies for a violation of the Open Meetings Act (OMA) by Defendant. If a public body takes action during a proceeding that violates the OMA, a court has the discretion to invalidate that action. Defendant violated the OMA in deciding to discharge Plaintiff, but later put the same issue to a vote in an open meeting and essentially ratified its earlier decision. The court found that the violation was an innocent misunderstanding of proper procedure, and affirmed the lower court's ruling that these circumstances did not warrant invalidating the action and reinstating Plaintiff.

Author: Susan West, University of Michigan Law School

## ENVIRONMENTAL LAW SECTION COUNCIL MEETINGS

### MEETING MINUTES - November 20, 2004

#### Present:

In Person: Grant Trigger, Peter Holmes, Craig Hupp, John Byl, Bob , Scott Hubbard, Anna Maiuri, Tom Phillips, Todd Dickinson, Dustin Ordway, Charles Toy.

By Phone: Pat Paruch, Susan Topp, Chris Dunsky, John Tatum, Chris Bzdok, Sharon Newlon, Joe Quandt, Chuck Barbieri, Steve Huff, Charlie Denton, Tim Lozen.

Absent: Ken Burgess, Lee Johnson, Susan Johnson, Mike Leffler.

1. **Minutes:** The minutes of the September 30 meeting were approved.
2. **Secretary-Treasurer's Report:** John Byl presented the Secretary/Treasurer's report. He reported that there is a balance in the Section's account of \$18,955.56 as of September 30. The Section had net income during the fiscal year (October 1, 2003 through September 30, 2004) of \$11,555.74. Mr. Byl also proposed a revised budget. A draft budget for fiscal year 2005 was previously approved at its April, 2004 Council meeting. The Council discussed a number of possible revisions to the budget, and ultimately approved the attached draft budget for fiscal year 2005. The Council noted that the approved budget will be subject to amendment in February.

The Council also discussed a possible tribute to Stew Freeman. After discussion, the Council passed a motion to name this year's essay contest after Stew Freeman. The Chair, Grant Trigger, agreed to send a letter to the Freeman family.

We also discussed possible use of Section funds for other membership services, including a possible program for young lawyers. The purpose would be to encourage young lawyers to participate in the environmental section. Dustin Ordway and Chris Bzdok are discussing possible ideas for such a program. We discussed the possibility of having Steve Chester, Mike Leffler and/or Skip Pruss and other possible high profile speakers to participate in such a program.

3. **Standing Committee Reports:** Grant first commented that he hopes to recruit additional members to the Air Committee.
  - A. **Membership Committee.** There are now slightly over 800 members. Dustin Ordway reported that he expects a final electronic directory to be available in early 2005 and annually thereafter.
  - B. **Program Committee.** Susan Topp and Bob Schroder reported that a program will be held at the Novi Sheraton on December 9. The program will include "doing the deal on time and limiting the risk". Bob Schroder and Anna Maiuri are the co-chairs of the program. An agenda of their program is included on the web site.

Susan Topp made arrangements to have the Business Law Section announce the program on its listserve. Pat Paruch agreed to follow up with the Real Estate Section regarding the announcement.

- (1) The Higgins Lake meeting and program will be held on June 17 and 18, 2005. Joe Quandt agreed to help arrange a program at Higgins Lake.

- C. **Environmental Law Journal.** Bob Schroder reported on the success of the first electronic version of the Journal. Only seven section members requested hard copies. Because of the administrative ease with the electronic version, we may go to four issues per year rather than three. Bob is interested in receiving articles. Bob will assign article deadlines to subject matter committees. That will be forwarded to Grant, who will circulate the deadlines among the committee chairs.

A motion was passed by the Council to require each subject matter committee to write at least one article per year. The Chair of the subject matter committee will be responsible for ensuring that such an article is written for the Journal.

- D. **Technology Committee.** John Tatum reported that the new listserve is working reasonably well.
- E. **Desk Book.** No report.

#### 4. **Subject Matter Committee Reports.**

- A. **Air.** No report.
- B. **Environmental Litigation.** Steve Huff reported on Rule 702 with respect to the admission of expert testimony. He said that this rule more closely follows the federal rule on the admissibility of expert testimony. Under Rule 702, if a court determines that technical information will be helpful, the evidence is admissible in the discretion of the court. This creates an independent obligation of the court to review the testimony to see if it meets all the criteria.

Mr. Huff also reported on the court decision in *Craig v. Oakwood Hospital*. In that case, the court concluded that if someone asks for an evidentiary hearing, they will likely get one regarding the qualifications of an expert and the admissibility of the expert testimony.

Finally, Mr. Huff noted that mold litigation is continuing. He also noted that crystalline silica litigation is hot nationally.

- C. **Hazardous Substances and Brownfields.** Craig Hupp gave a report that summarized a DEQ presentation at a recent MAEP (Michigan Association of Environmental Professionals) meeting. The DEQ presentation related to some new operational memoranda. Among other things, the DEQ discussed the relevance of GSI criteria to storm sewers (i.e., Rule 716 of the Part 201 Rules). The DEQ indicated that the GSI criteria are relevant if the storm water system has or could have a hydraulic connection with the groundwater. The DEQ further concluded that an exceedence of the GSI criteria near the storm sewer is a violation of Part 31. Finally, the DEQ reported during the meeting that a closed

LUST site could be reopened if the GSI criterion with respect to storm water was ignored in a closure. (It was the view of some council members that such a position would be inconsistent with Part 213.)

There was also a brief discussion of the decision in *Cuno v. DaimlerChrysler*, in which the Sixth Circuit Court of Appeals found that a tax credit offered to DaimlerChrysler was unconstitutional because it violated the dormant commerce clause. There is significant concern that this decision could jeopardize various brownfield SBT tax credits in Michigan. Numerous parties are filing amicus briefs in that case.

## 5. **Liaison Reports.**

- A. **State Bar of Michigan Board of Commissioners.** No Report.
- B. **Real Estate Section.** Pat Paruch reported that the Real Estate Section has an environmental law committee. She noted that there are opportunities for publishing environmental articles in the real estate section publication, titled Real Property Review. Susan Topp and Craig Hupp will have articles published in the next publication of the Real Property Review.
- C. **Administrative Law Section.** We currently do not have an administrative law section liaison. This issue will be discussed at a future meeting.

## 6. **Chairperson's Report.**

- A. **ABA/Seer Regional Advisory Council.** Mr. Trigger distributed the state and regional environmental corporate committee newsletter for the benefit of council members. He encouraged council members to get involved in the ABA and to get articles published in ABA/Seer publications.
- B. **Potential Committee Members and Listserve Notice.** Mr. Trigger will ask chairs and vice chairs of the standing and subject matter committees if they want to continue in their current roles.
- C. **Stew Freeman Tribute.** As noted above, a motion was passed to name this year's essay contest after Mr. Freeman.
- D. **Proposed Change to Court Rule 2.403.** A copy of a proposal to change Rule 2.403 was distributed.
- E. **List of Committee Members, Officers, and Council Members.** It was noted that the list of committee members, officers and council members is on our web site. Mr. Trigger distributed a memorandum regarding this as well.
- F. **Articles for Michigan Bar Journal.** The November 2005 Michigan Bar Journal will feature environmental articles. Articles will need to be submitted to the editor by June. We decided that this will be placed on the Agenda for the February Council meeting. It will be necessary to get some Section member to take the lead on ensuring that articles are contributed for this publication. The Section has a

total of 10,000 words for all the environmental section articles for that particular publication.

7. **Vice Chairperson's Report.** No Report.
8. **New Business.** Todd Dickinson followed up on his previous e-mail regarding a request for a proposal from the Environmental Section to recognize an important legal milestone in environmental law. The first significant MEPA decision, *Ray v. Mason County*, will be the subject of this particular proposal. Mr. Dickinson will continue to take the lead on this issue.
9. **Old Business.**
  - A. **Ad Hoc Committee on ADR.** Craig Hupp agreed to follow up on this issue.
  - B. **Model Environmental Covenants Act.** Mr. Trigger reported that there is EPA guidance on institutional controls.
10. **Next Meeting.** The next meeting will be held on February 26 at the Bengel Wildlife Center in Bath, which is just northeast of Lansing. The Chair would like to add a short educational program in the afternoon, particularly one that might attract younger lawyers. There would then be opportunities to take advantage of the wildlife center (cross country skiing, hiking, etc.). The Chair would also like to see an informal gathering in the evening with dinner and wine and fireplace discussions.

### MEETING MINUTES - February 26, 2005

#### Present:

In Person: Chuck Barbieri, Ken Burgess, John Byl, Chris Bzdok, Peter Holmes, Scott Hubbard, Craig Hupp, Lee Johnson, Anna Maiuri, Dustin Ordway, Pat Paruch, Tom Phillips, Joe Quandt, Bob , and Grant Trigger.

Also present: Dennis Donohue.

By Phone: Sharon Newlon and Susan Topp.

Absent: Charlie Denton, Todd Dickinson, Chris Dunskey, Beth Goffhelt, Steve Huff, Susan Johnson, Mike Leffler, Tim Lozen, Mike Robinson, John Tatum, Charles Toy and Tom Wilczak.

1. **Special Agenda Item:** Court of Appeals Chief Judge William Whitbeck gave a presentation on the court system. Judge Whitbeck requested input on methods to improve the court system. Specifically, he requested that any proposals to make changes to improve the court system be submitted to Judge Whitbeck by June 1, 2005.
2. **Minutes:** The minutes of the November 20 meeting were approved.

3. **Secretary-Treasurer's Report:** John Byl presented the Secretary/Treasurer's report. He reported that there is a balance in the Section's account of \$39,667.36 as of January 31, 2005. The attached budget was also approved. It reflects anticipated income of \$4,030.
4. **Standing Committee Reports:**
  - A. **Membership.** Chris Bzdok and Dustin Ordway talked about Outreach to young members. Thirty people were expected at the afternoon program, including young environmental attorneys and law students. Peter Holmes and Anna Maiuri noted that the Section should consider reaching out to environmental law societies at law schools in the State. Among other things, members of the Environmental Law Section could give presentations to such environmental law societies. Grant Trigger appointed the following ad hoc group to explore this concept: Peter Holmes, Anna Maiuri, Chris Bzdok and Joe Quandt.
  - B. **Program Committee.** A couple of ideas were floated for Higgins Lake, including Sarbanes Oxley issues, water issues (particularly the administrative side), and the possibility of having someone such as Tom McCormick from Dow talk about their career.
  - C. **Environmental Law Journal.** Bob reported on the Environmental Law Journal. The next issue will be done when the article with tributes to Stew Freeman is completed. Deadlines for future issues of the ELJ are: May 2, September 5 and December 5. The next issue of the ELJ will consider the future of environmental law. Please contact Bob if you are interested in contributing articles for that publication. Bob also reported that the electronic version of the ELJ has been well received. There have been only a few requests for printed copies.
5. **Desk Book.** Jeff Haynes reported that publication of the new desk book is somewhat behind the original schedule. Jeff sent an e-mail to all the authors the week preceding the February 26 meeting. We expect that the desk book will be published next year. Full rights to copyright were received from ICLE. Additionally, the State Bar is very supportive of this effort. It is anticipated that this desk top will be web based--that is, it will be available electronically and updates will likely be more timely.
6. **Subject Matter Committee Reports.**
  - A. **Water.** Dennis Donohue gave the water committee report. He noted that water quantity legislation is hot, but that there has not been much development on water quality issues. A water policy committee has been formed by the DEQ in the wake of the Water Legacy Act. Apparently, there is the possibility of legislation to amend the Inland Lakes and Streams Act to regulate surface water withdrawals. Dennis also reported that tribal laws may evolve soon.
  - B. **Natural Resources.** Joe Quandt reported that he is working with the water committee on a possible joint program to discuss ILSA and other issues. Secondly, Joe noted that they are considering an environmental boot camp, which would be entry level training. They are looking at getting co-sponsors for such a program, including the real estate section, ICLE, and possibly the business section. Among other things, this program would include a discussion

on transactional issues. Finally, Joe commented on the jurisdictional issue pending in the criminal wetlands case before the Michigan Supreme Court.

- C. **Ethics Committee.** Sharon Newlon reported that the committee has provided materials to the Section on a variety of ethics issues. She also commented on a New York State Bar Association opinion, issued in December, 2004, concerning electronic discovery and specifically meta data disclosure. This involves the electronic transmission of documents, whereby the receiving party can review the last edits made to a document. The December, 2004 opinion indicated that a lawyer shall not knowingly transmit confidences of a client. Lawyers will need to make a judgment on whether meta data has such confidences. Sharon also noted that there are new ethical rules being considered for adoption at the state level. Finally, she said that the Ethics Committee is looking at opportunities to participate in a resource improvement activity (e.g., adopt a highway, planting cedar trees, landscaping a portion of a home for Habitat for Humanity, etc.). Grant appointed a committee of Kurt Brauer, Sharon Newlon, Pat Paruch and Grant Trigger to evaluate possible options for such activity by the Section.
7. **Liaison Reports.** Pat Paruch reported that the real estate section has an environmental committee. She noted that articles for the winter issue are needed for the real estate section publication. Such articles are due in September. Anyone interested in preparing such an article should contact Pat.
8. **Chairperson's Report.**
  - A. **Michigan Bar Journal.** After considerable discussion regarding possible topics and authors, the following topics and authors were selected for the publication of articles in the Michigan Bar Journal that will feature the Environmental Section: (a) Tom Phillips and Anna Maiuri will author an article regarding the state of the Michigan environment; (b) Scott Hubbard will author an article on water rights; (c) Craig Hupp will write an article on navigable waters; (d) Sharon Newlon will author an article on the impact of Sarbanes Oxley; and (e) Joe Quandt will write an article on the standing issue in the Cleveland-Cliffs case. Note that these articles must be submitted by July 28 to the editor (Robin Luce and Gary Maveal). The articles should be approximately 2,000 words in length.
  - B. **Policy on Sharing Mailing List with Other Sections and Lawyers.** Grant Trigger received a request for our Section's mailing list from another lawyer in Michigan, who wants to use it for an ABA program. The group made a decision to provide a hard copy only of the list to the attorney with a request that it be used for a single purpose. The Council will consider developing a policy on this issue in the future.
9. **Vice-Chairperson's Report.** Peter Holmes reported that he attended the Section Leaders Advisory Council Meeting that included a number of Section leaders and Bar staff. Strengths and weaknesses were discussed by those present, including listserves, newsletters, etc. Like our section, other sections reported that attendance by young lawyers is low at Section events. Peter also noted that the Bar can provide support at Section programs.

10. **New Business.** Grant Trigger reported that the ABA is accepting nominations for names of individuals to receive the Environmental Stewardship Award.
11. **Annual Meeting.** The Annual Meeting will be held on Thursday, September 22, in the afternoon, and the dinner will be held that evening.