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The State of Medical Monitoring Damages in Michigan after *Henry v. Dow Chemical Co.*

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

In *Henry v. Dow Chemical Co.*, 473 Mich. 63 (2005), the Michigan Supreme Court placed a limitation upon who can claim medical monitoring as damages but did not absolutely eliminate medical monitoring as damages. Prior to *Henry v. Dow Chemical*, the law in Michigan concerning medical monitoring had been described in *Meyerhoff v Turner Construction Co (On Remand)*, 210 Mich App 491, 534 NW2d 204 (1995). In *Meyerhoff*, the Court of Appeals ruled that "medical monitoring expenses are a compensable form of damages where the proofs demonstrate that such surveillance to monitor the effect of exposure to toxic substances, such as asbestos, is reasonable and necessary." 210 Mich App 491, 495; 534 NW2d 204 (1995). The court then enumerated factors to be considered in determining whether they are reasonable and necessary. These factors were: (1) the significance and extent of the exposure; (2) the toxicity of the substance; (3) the seriousness of the diseases for which the individuals are at risk; (4) the relative increase in the chance of onset of disease in those exposed; and (5) the value of early diagnosis. This is the same test for medical monitoring that was earlier applied in *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287 (1987). The Third Federal Circuit interpreted Pennsylvania law *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (1990), as requiring plaintiffs seeking medical monitoring expenses to prove the following elements to a reasonable degree of medical certainty: (1) plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; (2) as a proximate result of exposure, plaintiff suffers an increased risk of contracting a serious latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. See Boston & Madden, *Law of Environmental and Toxic Torts: Cases, Materials and Problems*, (St. Paul, Minn: West Publishing Co. 1994). p. 186; *Eggen, Toxic Torts in a Nutshell*. (St. Paul, Minn.: West Publishing Co. 1995), pp 213-22.

In 1998, the Michigan Supreme Court made the following ruling in *Meyerhoff v. Turner Constr Co.*, 456 Mich 933 (1998): "The factual record

is not sufficiently developed to allow a [sic] medical monitoring damages. Accordingly, that portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages is vacated.” (Emphasis added). Although the second sentence indicated that Meyerhoff had been vacated in terms of allowing for medical monitoring damages, because of the first sentence, many plaintiffs, including the Henry plaintiffs, had continued to argue that a factual record could, in some circumstances, be “sufficiently developed” such that a medical monitoring damage claim would be supported.

Henry v. Dow Chemical Co. was a case where the plaintiffs sought medical monitoring damages but they had no present manifestation of disease.

“The only injury alleged by the putative representatives of the medical monitoring class - and, consequently, the only injury that might satisfy the damages requirement of a negligence claim - is ‘the losses they have and will suffer as they are forced to monitor closely their health and medical condition because of their exposure to Dow’s Dioxin [sic] pollution.’ From this description, however, it is apparent that plaintiffs do not claim that they suffer from *present* injuries. Rather, they allege that they *may* develop dioxin-related illnesses in the future. At best, then, the only injury from which plaintiffs suffer at present is a *fear of future illness*. They seek an ‘equitable remedy’ of a medical monitoring program not in order to redress actual or present injury to their persons, but instead to screen for possible future injury. In this way, plaintiffs’ claims depart from the principles articulated by Justice Cooley and by Prosser and Keeton.”

Henry, 473 Mich at 477 (underlined emphasis added). The Michigan Supreme Court insisted that “actual harm - an injury that is manifest in the present-is required in order to state a viable negligence claim.” Id. It was concerned that allowing persons without a present injury or evidence of disease to seek and receive medical monitoring costs “would create a potentially limitless pool of plaintiffs.” Henry, 473 Mich at 483. Plaintiffs (and the dissent) argued that the economic expense associated with a need to monitor one’s health due to an increased risk of disease was a sufficient damage or injury with respect to a common law negligence claim.¹ However, the majority insisted (citing Larson v. Johns-Manville Sales Corp., 427 Mich 301, 314; 399 NW2d 1 (1986) (an asbestosis case)) that “Michigan law permits recovery in a negligence-based tort only when the plaintiff can demonstrate a present injury in addition to economic losses that result from the injury.” 473 Mich at 478.

The Henry plaintiffs argued specifically that they were not seeking compensation for physical injury or “for the enhanced risk of future physical injury.” In Michigan, the lead case allowing recovery for fear of cancer or serious disease is Stites v Sunderstrand Heat Transfer, Inc, 660 F Supp 1516, 1527 (WD Mich 1987). In order to recover such *non-economic* damages, the plaintiff must demonstrate some present manifestation of disease attributable to their exposure or to the anxiety arising from their exposure. This is consistent with section 436A of the Restatement 2nd of Torts which proposes the following general rule:

“If the actor’s conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.”

It is also consistent with Daley v. LaCroix, 384 Mich 4, 12-13; 179 NW2d 390 (1970), and Wargelin v. Sisters of Mercy Health Corp, 149 Mich App 75, 81; 385 NW2d 732 (1986) (negligent infliction of emotional distress case), cited by the Henry majority.

Again, in Henry v. Dow Chemical Co., the plaintiffs had not suffered any *present manifestation* of disease but rather only exposure causing *increased risk* of disease. As noted by the Henry Court:

Here, the only noneconomic injury alleged by plaintiffs is their fear of future physical injury. This fear, however reasonable, is not enough to state a claim of negligence. Our common law recognizes emotional distress as the basis for a negligence action only when a plaintiff can also establish *physical* manifestations of that distress. Thus, even taking into account these economic losses, plaintiffs have not established a present, legally cognizable injury.

Henry has, therefore, fully clarified that it is impossible to claim economic, Meyerhoff-type medical monitoring damages where there is an increased risk of disease but no present manifestation of the disease or illness. In the absence of any present, physical manifestation of a disease or illness, those types of prospective medical monitoring costs are clearly no longer recoverable under Michigan case law. Of course, in their presence, the former damages were already allowed (prior to Meyerhoff) as *expenses for future treatment* of disease or illness. However, based upon a careful reading of Henry, it also appears that Michigan law would allow for *economic* medical monitoring damages in a toxic tort case sounding in negligence, without physical manifestation of a disease or illness due to

exposure, as long as the first prong of the test for *non-economic* fear of cancer damages is met, i.e., present manifestation of fear or distress attributable to an exposure.

In conclusion, under Michigan law, economic, “medical monitoring”² damages are allowed in Michigan in toxic tort cases as long as plaintiffs can demonstrate that there has been some physical manifestation of either (1) illness or disease due to exposure or (2) any emotional distress related to an increased risk of disease from exposure. On the other hand, Meyerhoff-type medical monitoring damages, which eliminated any need to show current physical injury or manifestation, but included multiple factors in determining whether medical monitoring, a current economic injury, was reasonable and necessary, are gone.

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¹ Among other things, the dissent argued that “merely because an illness is latent does not meant that plaintiffs have not been injured and suffered damages.” Citing to a California case, the dissent pointed out that when someone is an auto accident, many diagnostic tests may be ordered with respect to checking for unobservable internal injuries. Even if it later turns out that those tests are negative, the costs of those tests are recoverable because they would not have been ordered but for the accident. The dissent argued that

diagnostic tests that otherwise would not be necessary should also be recognized as items of damages in the context of a toxic exposure and the accompanying increased risk of disease or illness.

² Practice Tip: In order to avoid a knee-jerk dismissal of a medical monitoring damage claim, it might be a good idea to refer to “medical surveillance” and/or “future medical treatment (including surveillance or monitoring)” in the “Damages” or “Relief” section of a complaint and avoid using only “medical monitoring.”

Alternative Dispute Resolution in Environmental Law
Michigan Department of Environmental Quality vs. Vreba-Hoff Dairy LLC
A Case Study

By Paul Zugger

INTRODUCTION

Alternative dispute resolution (ADR) has not traditionally been used to resolve environmental disputes, but that is now changing. This paper will review the mediation process used in a recent case involving the Michigan Department of Environmental Quality (DEQ) and Vreba-Hoff Dairy LLC, Hudson, Michigan (Vreba-Hoff).

THE RULES

All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule. MCR 2.410(A)(1). ADR is any process designed to resolve a legal dispute in place of court adjudication, and includes settlement conferences, case evaluation, mediation, and other procedures provided by local court rule or ordered on stipulation of the parties. MCR 2.410(A)(2).

At any time, after consultation with the parties, a court may order that a case be submitted to the appropriate ADR process. MCR 2.410(C)(1). The order will generally specify the ADR provider, set time limits for the ADR process, and make provision for the payment of the ADR provider. MCR 2.410(C)(2).

In Mediation, a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no decision-making power. MCR 2.411(A)(2). If the mediation process does not result in an agreement, the parties are free to pursue resolution through the court. In this event, all discussions that took place during the mediation sessions are to be held confidential and cannot be used in any subsequent legal proceedings. MCR 2.411(C)(5). Likewise, by agreement of the parties any written notes or other documents developed throughout the process are usually destroyed. A mediator may be selected by agreement of the parties, or appointed by the court from the approved list of mediators. MCR 2.411(B).

THE CASE

On December 22, 2004, the DEQ and Vreba-Hoff entered a Consent Judgment in the 30th Judicial Circuit Court, in settlement of alleged violations of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 P.A. 451, as amended, MCL 324.3101 et seq. The settlement placed certain obligations on Vreba-Hoff relative to its waste treatment operations. On January 19, 2007, the court granted DEQ's motion to require Vreba-Hoff to appear on January 19, 2007 and show cause why it should not be held in contempt for alleged violations of the December 22, 2004 Consent Judgment.

The hearing was adjourned to January 29, 2007 and then again to February 15, 2007. In lieu of proceeding with the hearing, a scheduling conference was held in which Circuit Judge James R. Giddings, suggested the dispute proceed through an ADR process. Judge Giddings also used this opportunity to give his perspective on the case and the benefits of mediation. The parties agreed to mediation, resulting in a March 9, 2007, Order Referring Case to Facilitative Mediation. (See Appendix A.) The parties stipulated that retired Circuit Court Judge Larry Glazer should be requested to mediate the dispute. Judge Glazer was contacted and agreed to mediate the case.

Judge Glazer arranged a conference call during which dates were established for the first mediation sessions and the mediator fee was set. At his request both parties submitted documentation consisting of position papers and relevant court documents. While the Order Referring Case to Mediation provided an opportunity for the parties to stipulate to conduct discovery before proceeding with mediation, the parties elected to proceed directly to mediation.

The first mediation session, held February 26, 2007, was a joint session with mediator Glazer, the parties and legal counsel present. The DEQ was represented by Richard Powers, DEQ Water Bureau Chief, and various Water Bureau staff. Legal counsel for the DEQ was provided by Assistant Attorney General Alan Hoffman. Vreba-Hoff was represented by Willie van Bakel, with legal counsel by Jack A. VanKley (VanKley and Walker, LLC, Columbus, OH) and Francis J. O'Donnell (Honigman, Miller, Schwartz & Cohn).

Judge Glazer outlined how the mediation process would function and established the ground rules. The discussions were to be held in an informal manner, with all participants encouraged to engage in the discussions. The mediator outlined his view of the issues based on his review of the documents, and provided the parties with opportunity to clarify the issues he had identified and add additional issues.

The issues suggested by the mediator and agreed to by the parties included:

- Compliance Activities related to the Land Application of Liquid Agricultural Waste (Paragraph VIII of the December 22, 2004 Consent Judgment)
- Wastewater Treatment Construction and Implementation (Paragraph IX of the December 22, 2004 Consent Judgment)
 - Enhanced Wastewater treatment with the Press Treatment System
 - Enhanced Wastewater Treatment with the EarthMentor Treatment Systems
 - Remedies for Failures of Treatment Systems
- Reporting (Paragraph XI of the December 22, 2004 Consent Judgment)
- Notices (Paragraph XIV of the December 22, 2004 Consent Judgment)
- Delays in Performance, Extension Requests and Force Majeure (Paragraph XVI of the December 22, 2004 Consent Judgment)
- Dispute Resolution (Paragraph XVII of the December 22, 2004 Consent Judgment)
- Reimbursement of Costs and Payment of Civil Fines (Paragraph XVIII of the December 22, 2004 Consent Judgment)
- Stipulated Fines (Paragraph XIX of the December 22, 2004 Consent Judgment)

The mediator and the parties proceeded to discuss the issues in detail through a series of face-to-face meetings. Without the constraints of legal proceedings, and with knowledge that the discussions could not be used in litigation or any other proceedings,

the parties, legal counsel and the mediator were able to engage in free and open discussions. The mediation sessions were generally at least a full day in length, and at times continued over two or three consecutive days. The mediator began each session as a joint session. During the course of discussions, he would suggest separate sessions with one party or the other when he thought that would be beneficial. Examples included upon reaching impasse or when the mediator determined that a specific idea could be further developed more easily in the privacy of a separate session. Discussions and information exchanged in the separate sessions would be held confidential unless the participating party agreed to share it with the other party.

The parties also found it beneficial on occasion to meet without the mediator to discuss and clarify specific points, usually of a technical nature.

Using this process, substantive agreement was reached on a number of the issues, and the mediator would capture these in a written summary. However, there were several critical issues which remained in dispute. To help move these to resolution, the parties agreed to have Judge Glazer develop a potential resolution for each one, and compile these along with the agreed-to issues into a proposed settlement. Judge Glazer provided this proposed settlement to both parties and to Judge Giddings, with the understanding that any points that were not acceptable to either party would be taken to the judge for disposition.

After reviewing the proposed settlement, the DEQ and Vreba-Hoff agreed to the proposed settlement, which was incorporated into a June 6, 2007 Interim Order of the Court.

APPENDIX A

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NATURAL RESOURCES
DIVISION

STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Plaintiff(s),

ORDER REFERRING CASE
TO FACILITATIVE
MEDIATION

-vs-

VREBA-HOFF DAIRY, LLC,
Defendant(s)

Docket No. 03.1662.CE

At a session of said Court held in the
County of Ingham on the 9 day of
March, 2007.

PRESENT: HONORABLE JAMES R. GIDDINGS
Circuit Judge

NOW, THEREFORE, IT IS ORDERED that the above entitled matter be referred for Alternative Dispute Resolution pursuant to MCR 2.410 and MCR 2.411. The appointed Mediator is LAWRENCE GLAZER. The attorneys shall contact the Mediator within fourteen (14) working days.

IT IS FURTHER ORDERED that with the Mediator's input, the parties may stipulate to conduct discovery before proceeding with mediation, if it would be advantageous to do so.

IT IS FURTHER ORDERED that if the parties undertake discovery prior to mediation any dispute regarding discovery be addressed to the mediator before they are formally presented to

the Court.

IT IS FURTHER ORDERED that attorneys attending the ordered mediation proceedings shall be thoroughly familiar with the case and shall have full authority to participate. In addition, parties to the action or their agents, employees or representatives with full authority to settle, shall personally appear at the proceeding.

IT IS FURTHER ORDERED that failure of a party or party's attorney to attend a scheduled ADR proceeding without good cause, may constitute a default under MCR 2.603 if applicable, and/or result in dismissal pursuant to MCR 2.501(B).

IT IS FURTHER ORDERED that the parties shall submit to the mediator any documents or summaries pertaining to the case prior to mediation. These documents may be brought to mediation with the prior approval of the Mediator.

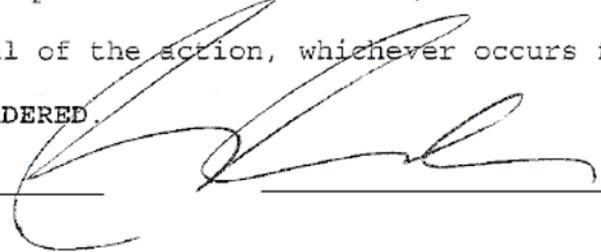
IT IS FURTHER ORDERED that, subject to amendment by the Court for good cause shown, the parties shall complete the mediation process not later than sixty (60) days from the date that Facilitation commenced. Within seven (7) days after completion of the mediation process, the Mediator shall advise the Court only of the fact of completion, the date of completion, who participated in the mediation, whether settlement was reached and whether further ADR proceedings are contemplated.

IT IS FURTHER ORDERED that within twenty-one (21) days following resolution through mediation, the attorneys shall prepare and submit to the Court the appropriate documents to conclude the case.

IT IS FURTHER ORDERED that the appointed Mediator is entitled to reasonable compensation based on an hourly rate commensurate with the Mediator's experience and usual charges for services provided; the Mediator's compensation is deemed a cost of this action which the parties shall equally share. The Mediator's fees shall be paid no later than forty-two (42) days after the mediation process is concluded, the entry of judgment, or dismissal of the action, whichever occurs first.

IT IS SO ORDERED.

3-9-07



Date

JAMES R. GIDDINGS

Circuit Judge

PROOF OF SERVICE

I certify that I mailed a true copy of the above order upon the Mediator, all attorneys of record or parties by placing said copy in the first class mail with postage prepaid from Lansing, Michigan on

3 9, 2007



Marilyn K. Reed
Judicial Assistant

ENVIRONMENTAL LAW ESSAY CONTEST 2007 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 2007 winning environmental law essay, published below, was written by Carolyn Krieger, a law student at Ave Maria Law School, Ann Arbor, Michigan.

The Regulation of Ballast Water Discharges in the Great Lakes

By Carolyn Krieger

INTRODUCTION

Few environmental threats pose a larger risk to Michigan than that of aquatic invasive species (AIS) in the Great Lakes. Sometimes called biological pollutants, AIS are considered by some experts to be “the most serious threat to the ecology and health of the Great Lakes today.”¹ Yet the threat posed by AIS is not limited to ecological harm; a great number of individuals, businesses, industries, local and state economies are dependent upon the health and viability of the Great Lakes, making AIS a threat of enormous economic impact as well.

Essential to minimizing this risk posed by AIS is preventing the introduction of new invasive species into the Great Lakes ecosystem. Ballast water discharges from oceangoing freighters are widely considered to be the primary source of AIS introductions in the Great Lakes and the rest of the world.² The magnitude and severity of the AIS problem in the Great Lakes has thus brought the issue of ballast water regulation to the forefront of environmental law in Michigan.

Federal efforts to regulate ballast water discharges in the Great Lakes have been in place since 1993. However, these regulations do not appear to have solved the problem as new invasive species are still being found in the Great Lakes at the rate of one approximately every eight months.³ Motivated by what it perceived to be an inadequate response by the federal government, the Michigan legislature recently took matters into its own hands, and became the first Great Lakes state to pass ballast water discharge regulations in 2005.⁴ These regulations just went into effect on January 1, 2007.⁵

Then, on March 15, 2007, a group of shipping associations filed suit against the Michigan Department of Environmental Quality (MDEQ) in the U. S. District Court for the Eastern District of Michigan, asking the court to declare Michigan’s new ballast water discharge regulations unconstitutional.⁶ The outcome of this litigation has important implications for the future of the Great Lakes and the region’s economy. Accordingly, it

is an apt time to revisit the debate over the regulation of ballast water in light of recent changes in the legal landscape.

Part I of this paper will proceed by first giving an overview of the impact that invasive species have had on the Great Lakes to put the legal issues in perspective. Part II will then discuss the history of federal regulations of ballast water discharges. Part III will cover Michigan's efforts to regulate ballast water discharges under state law, and Part IV will evaluate the constitutionality of Michigan's ballast water discharge regulations.

I. THE IMPACT OF AQUATIC INVASIVE SPECIES IN THE GREAT LAKES

As mentioned earlier, ballast water is considered to be the primary means by which new AIS are introduced into the Great Lakes. Ballast water is water that is carried by ships in tanks and cargo holds in order to give them greater stability and maneuverability when traveling with little or no cargo.⁷ Ships generally fill their ballast tanks while still in port after they have finished delivering cargo and are departing with less cargo or no cargo.⁸ This water is then released when the ship reaches the next port where it takes on cargo.⁹ In this way, living organisms picked up along with the ballast water in one port are deposited in another port when the water is discharged, and the introduction of an invasive species in the port of discharge may result.¹⁰

The National Oceanic and Atmospheric Administration (NOAA) has to date identified 186 aquatic non-indigenous species in the Great Lakes.¹¹ Of these, NOAA definitively attributes 58 of them to introduction through ballast water, including many of the most problematic species: the infamous zebra mussel, the round goby, the Eurasian ruffe and the spiny waterflea.¹²

When nonnative species arrive in the Great Lakes, they often have no natural predators or diseases to limit their population, and so they are able to out-compete native species and take their food and habitat space, or even become a predator of native species.¹³ For these reasons, invasive species have the potential to seriously decrease, or even eliminate, a native species, with resulting harm to the rest of the ecosystem as well as economies dependant on that species (such as commercial fishing).¹⁴ In addition, foreign species often carry with them foreign viruses, bacteria, fungi and parasites, all of which can have devastating effects on native species.¹⁵

In addition to damaging the ecosystem, invasive species in the Great Lakes have enormous economic impacts as well. The income generated from water-related business in the Great Lakes, including recreational activities and tourism, is valued at \$15 billion per year, of which \$6.89 billion is related to the fishing industry.¹⁶ Sport fisheries in the Great Lakes support approximately 75,000 jobs, and commercial fisheries provide an additional 9,000 jobs.¹⁷ Invasive species, which pose a threat to all of these industries, could potentially have broad economic and societal impacts on the entire Great Lakes region.

Another cost associated with aquatic invasive species in the Great Lakes is the damage they cause to property. One prominent example is the zebra mussel, which colonizes on all types of submerged surfaces, including boats, docks, piers, buoys, and pipes. Zebra mussel fouling is expected to cost \$5 billion over the next ten years.¹⁸ Of particular concern is the zebra mussels' tendency to clog water intake and discharge pipes, and to damage submerged structures and equipment. The cost of zebra mussel prevention

and remediation for electrical generation, water treatment, and industrial facilities alone is estimated at \$100 million a year.¹⁹

Yet the impact of aquatic invasive species in the Great Lakes does not end there. Invasive species also pose a threat to public health through the introduction and spread of disease, contamination of drinking water, fouling of swimming waters and beaches, and other harmful human health effects.²⁰ Invasive species also impact the quality of life for Great Lakes residents and visitors by altering water quality and clarity, causing weed infestations in swimming areas, and littering beaches and shorelines with zebra mussel shells.²¹

The necessity of preventing any further introduction of invasive species in the Great Lakes cannot be over emphasized. Once an aquatic invasive species establishes itself in a large ecosystem like the Great Lakes, eradication is next to impossible.²² All that can be done is to attempt to keep the population low, prevent it from spreading, and limit the damage as much as possible.²³ However, these measures are extremely difficult and rarely effective.²⁴ Moreover, the enormous expense associated with management and control efforts places a huge burden on our state budget. During the 1999 fiscal year alone, the State of Michigan spent \$4.2 million on invasive species activities, \$3.4 million of which was spent just on controlling invasive species.²⁵

The cumulative impact of aquatic invasive species on the Great Lakes is obviously profound. The Michigan Department of Environmental Quality has even said that, “[t]his biological form of pollution has altered the ecosystem more than pollution by chemical contaminants ever has.”²⁶

With these facts in mind, it is time to turn to the law.

II. FEDERAL REGULATIONS OF BALLAST WATER DISCHARGES

a. The Coast Guard

Ballast water discharges in the United States were almost entirely unregulated until the 1990s, when the U.S. Congress finally took action and passed the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA), as reauthorized and amended by the National Invasive Species Act of 1996 (NISA). Under these statutes, the Secretary of Transportation is authorized to issue regulations “to prevent the introduction and spread of aquatic nuisance species into the Great Lakes through the ballast water of vessels.”²⁷ The Secretary of Transportation has delegated this responsibility to the U.S. Coast Guard.²⁸

The Coast Guard has set regulations which require that vessels carrying ballast water and operating in the Great Lakes or on the Hudson River employ one of the following ballast water management options: (1) carry out an exchange of ballast water in waters more than 200 miles from shore (beyond the U.S. Exclusive Economic Zone) and more than 2,000 meters deep; (2) retain ballast water on board; or (3) use an alternative environmentally sound method of ballast water management that has been approved by the Coast Guard.²⁹ However, the Coast Guard has yet to approve any alternative ballast water management methods.³⁰

Unfortunately, these regulations suffer from two prominent inadequacies. First, they only apply if a vessel “carries ballast water.” Thus vessels that declare to have “no ballast on board” (called “NOBOBs”) are not required to perform the ballast water exchange or any other ballast water treatment. The Coast Guard has recently established voluntary best management practices for NOBOB vessels, but these guidelines are not mandatory.³¹ This is problematic because NOBOB vessels can still carry aquatic invasive species in their ballast tanks. While their ballast water tanks are pumped out to the extent possible, there is still some residual water and sediment left in the tanks, and it is often a significant volume. A recent NOAA survey of NOBOB vessels in the Great Lakes found ballast residuals (water plus sediment) as large as 200 metric tons.³² When this residual water was tested by NOAA, it was found to contain large numbers of live or viable organisms.³³ Thus, NOBOB vessels clearly have the capability of introducing aquatic invasive species into the Great Lakes, and permitting them to go unregulated is a significant deficiency in the Coast Guard regulations. This deficiency is of even greater concern considering NOAA’s estimate that over 90% of the overseas vessels that enter the Great Lakes are characterized as NOBOBs, and many of those vessels with declarable ballast had some empty (and thus unregulated) tanks as well.³⁴

The second deficiency in these regulations is that open ocean ballast water exchange is not necessarily an effective means for eliminating aquatic invasive species in the ballast water. The requirement that vessels exchange their ballast water 200 miles from shore at a depth of more than 2,000 meters is based on research showing that organisms living in the open ocean, where salinity levels are high, are typically not suited to live in freshwater.³⁵ Vessels typically take in ballast water while still in port, and this coastal water tends to have a lower salinity. Consequently, the organisms living in this environment have a better chance of successfully making the transition to a freshwater habitat than those accustomed to living in high salinity water. Thus, exchanging low salinity ballast water for high salinity ballast water is thought to reduce the risk of transporting aquatic invasive species capable of surviving into the Great Lakes.

However, this process is of questionable effectiveness, because some of the original water and sediments can remain in the tank.³⁶ While the higher salinity level will kill most remaining organisms, it does not kill them all. A study conducted by the Canadian government found live zooplankton capable of living in the Great Lakes in 33% of the ballast water samples from vessels that had conducted a mid-ocean exchange.³⁷

A. The Environmental Protection Agency

While the Clean Water Act (CWA) appears to give the Environmental Protection Agency (EPA) the authority to regulate ballast water discharges, the EPA has never done so. The CWA prohibits the discharge of pollutants from a point source into the navigable waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit.³⁸ Vessels which discharge ballast water into waters of the United States are expressly included within the CWA’s definition of a “point source,” which is broadly defined as, “any discernible, confined and discrete conveyance, including but not limited to any pipe...or vessel or other floating craft, from which pollutants are or may be discharged.”³⁹ However, in 1973, the EPA issued a regulation exempting from the NPDES permit requirements discharges “incidental to the normal operation of a vessel.”⁴⁰ Because the discharge of ballast water falls within this exemption, the EPA has never chosen to regulate ballast water discharges.

But this could be changing shortly. In January 1999, a number of environmental groups petitioned the EPA to repeal this exemption, arguing that it conflicted with the CWA. In response, the EPA acknowledged that ballast water could be covered by the CWA, and promised to “explore options” for regulating ballast water.⁴¹ However, the EPA ultimately denied this petition in September 2003, citing policy considerations and Congress’ preference that the Coast Guard regulate ballast water discharges.⁴²

In response, several environmental groups and six states, one of which was Michigan, filed a citizen suit against the EPA pursuant to the CWA.⁴³ In 2005, a federal district court in California held that the EPA must regulate ballast water discharges under the CWA, and ordered the EPA to repeal the ballast water exception, after concluding that ballast water discharges do constitute a “discharge” of “pollutants” (because it can contain biological materials) into the navigable waters of the U.S. from a “point source.”⁴⁴ The court also found that although NISA directed the Coast Guard, and not the EPA, to oversee the development of regulatory requirements for ballast water, NISA was clearly not intended to limit the CWA with respect to ballast water discharges.⁴⁵ In fact, NISA explicitly states that “the regulations issued under this subsection shall...not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act.”⁴⁶ The court set a two-year deadline for EPA action, and thus the exemption for ballast water will be set aside as of September 30, 2008.⁴⁷ Although the EPA has filed an appeal⁴⁸, it also appears to be complying with the court’s order, as it recently issued a notice that it is developing NPDES permits for the discharge of pollutants incidental to the normal operation of vessels.⁴⁹

III. MICHIGAN STATE LAW REGULATIONS OF BALLAST WATER DISCHARGES

In 2005, the Michigan Legislature amended Part 31 of the Michigan Natural Resources and Environmental Protection Act—the section regulating water pollution—so as to include the regulation of ballast water discharges as a water pollutant.⁵⁰ Under this statute, the MDEQ is responsible for developing and managing the ballast water discharge permits.⁵¹ To obtain a permit, the statute requires the applicant to either: (1) “demonstrate that the oceangoing vessel will not discharge aquatic nuisance species,” or (2) “if the oceangoing vessel discharges ballast water or other waste or waste effluent, that the operator of the vessel will utilize environmentally sound technology and methods, as determined by the [MDEQ], that can be used to prevent the discharge of aquatic nuisance species.”⁵²

In accordance with this statute, the MDEQ issued a Ballast Water Control General Permit in October 2006. The permit, which as of January 1, 2007 is required before oceangoing vessels are authorized to engage in port operations in Michigan,⁵³ requires that vessels either (1) certify that they do not discharge ballast water into Michigan waters and comply with notification and reporting requirements, or (2) discharge ballast water treated by one or more of the ballast water treatment methods determined by the MDEQ to be environmentally sound and effective in preventing the discharge of aquatic nuisance species.⁵⁴

The MDEQ pre-approved methods for treating ballast water are: (1) Hypochlorite treatment; (2) Chlorine Dioxide treatment; (3) Ultra Violet Light Radiation treatment preceded by suspended solids removal; and (4) Deoxygenation treatment.⁵⁵ These

treatment methods were selected for approval by the MDEQ based on findings that they “have the highest success rates among available treatment methods of destroying aquatic nuisance species.”⁵⁶ Each of these pre-approved methods was carefully studied and rigorously tested to ensure that it is consistently effective at killing at least 95% to 99% of certain “indicator” organisms in the ballast water.⁵⁷ However, a vessel owner is not limited to these methods. The owner may apply for an individual permit to use other treatment methods as long as the owner demonstrates that they are at least as effective in preventing the discharge of aquatic nuisance species.⁵⁸

Unlike the Coast Guard regulations, NOBOB vessels are not exempt from regulation under the Michigan statute. Furthermore, Michigan’s regulations do not rely on open ocean ballast water exchanges to purify ballast water. Instead, the Michigan regulations require vessels to use treatment methods which have been shown to be an effective means of preventing the discharge of aquatic invasive species. Thus the Michigan statute addresses the major shortcomings of the Coast Guard’s regulations.

IV. THE CONSTITUTIONALITY OF MICHIGAN’S BALLAST WATER REGULATIONS

While Michigan’s ballast water regulations appear to be the long-awaited protection from invasive species that the Great Lakes so desperately need, there remains the question of whether a state even has the authority to enforce such regulations. While states generally have broad discretion to enact laws regulating the introduction of exotic species, there are two constitutional limitations to states’ authority which could cause Michigan’s ballast water regulations to be struck down by a federal court: the Supremacy Clause and the Commerce Clause.⁵⁹

A. The Supremacy Clause

It is well established that each state has the authority to enact laws regulating areas affecting the health, safety and welfare of its citizens pursuant to the police powers of the state.⁶⁰ However, because the Supremacy Clause of Article VI of the U.S. Constitution declares that federal law is the supreme law of the land, states’ laws may be preempted by federal law.⁶¹ State laws are preempted by federal law if: (1) Congress expressly stated an intent to preempt state law, (2) Congress implicitly indicated an intent to preempt state law by occupying a given field of regulation, or (3) the state law actually conflicts with federal law.⁶²

It is unlikely a court would find that Michigan’s law conflicts with any federal law. Conflict preemption occurs “when compliance with both state and federal law is impossible, or when the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.’”⁶³ However, compliance with both the Coast Guard’s and Michigan’s ballast water discharge regulations is not impossible, as Michigan simply requires a similar, but more stringent, version of the Coast Guard’s requirements. Neither is the Michigan statute an obstacle to the accomplishment and execution of the full purposes and objective of Congress. Courts deciding whether a state statute is an obstacle consider both whether the ultimate goal of the state and federal laws are the same and whether the state law “interferes with the methods by which the federal statute was designed to reach this goal.”⁶⁴ Both Congress and the Michigan legislature have the same goal of preventing the introduction of non-native species in the Great Lakes through ballast water discharges. Moreover, Michigan’s

regulations do not interfere with the Coast Guard's regulations, but rather supplement them.

It is likewise unlikely a court would find that the field of ballast water discharge regulation is occupied exclusively by federal law, thus preempting Michigan's statute. A field of regulation is considered to be preempted by Congress when "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"⁶⁵ However, the Coast Guards' ballast water discharge regulations, which arguably preempt Michigan's regulations, were promulgated under NISA; and NISA specifically provides for concurrent federal and state regulation. Evidence of this is most clearly found in the statute's savings clause, which states that "nothing in this title shall affect the authority of any State or political subdivision thereof to adopt or enforce control measures for aquatic nuisance species, or diminish or affect the jurisdiction of any State over species of fish and wildlife."⁶⁶

In addition, NISA also specifically reserves the authority of the EPA to regulate ballast water discharges under the Clean Water Act where it states that no regulations promulgated by the Coast Guard may "affect or supersede any requirement or prohibitions pertaining to the discharge of ballast water into waters of the United States under the [Clean Water Act]."⁶⁷ This provision has the effect of reserving the States' authority under the Clean Water Act as well, because the Clean Water Act contains its own savings clause which allows a State to "adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (b) any requirement respecting control or abatement of pollution" as long as the standard is no less stringent than any standard in effect under the Clean Water Act.⁶⁸

Further evidence that NISA was not intended to preempt state regulations of ballast water discharges can be found in the Coast Guard's 2004 notice announcing mandatory ballast water requirements nationwide, where it stated that, "Congress clearly intended for a Federal-State cooperative regime and not for Federal preemption of State requirements. Thus, each state is authorized under NISA to develop its own regulations, including its own research programs, if it believes that Federal regulations or programs are not stringent enough."⁶⁹ Similarly, in the Coast Guard's "Notice to Mariner" for the first week in March 2007, the Coast Guard advised vessel owners of ways in which they could comply with both the new Michigan ballast water discharge regulations and NISA's existing requirements.⁷⁰

It is my opinion that the Michigan's ballast water regulations are not preempted by federal law, and would be upheld in a challenge brought under the Supremacy Clause.

B. The Commerce Clause

The Commerce Clause of the U.S. Constitution provides that Congress has the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁷¹ In addition, the U.S. Supreme Court has repeatedly held that the Commerce Clause also contains "a further, negative command, known as the dormant Commerce Clause," which prohibits states from discriminating against non-residents or unduly burdening interstate commerce.⁷²

State laws which discriminate on their face against out-of-state entities are subject to strict scrutiny, and will only be upheld if they are directed toward achieving legitimate

legislative goals, rather than economic protectionism of in-state entities, and if “such goals cannot adequately be achieved through nondiscriminatory means.”⁷³ However, where the state regulation in question is not facially discriminatory, but only creates an incidental effect on interstate commerce, the Court applies a less-scrutinizing balancing test, as summarized in *Pike v Bruce Church, Inc.*⁷⁴:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Michigan’s ballast water legislation will most likely be subject to the *Pike* balancing test because it regulates even-handedly by requiring permits of all oceangoing vessels that engage in port operations in Michigan. Thus the first question will be whether Michigan’s ballast water regulations serve a legitimate local public interest.

Given the wealth of data demonstrating the severe environmental and economic harm already caused by aquatic invasive species in the Great Lakes, and research indicating that ballast water is the primary vector by which these species are introduced, a court is almost certain to find that Michigan’s ballast water statute serves a legitimate local public interest. A similar argument was accepted by the Supreme Court in *Maine v Taylor*.⁷⁵ In that case, the Court upheld a Maine statute which prohibited the importation of live baitfish into the state out of fear that non-native fish would disrupt Maine’s aquatic ecology and harm the state’s “unique and fragile fisheries” by introducing foreign parasites.⁷⁶ The Court concluding that Maine has a legitimate interest in protecting its waters from foreign baitfish, even despite a lack of conclusive evidence that these fish posed a serious environmental threat to Maine’s waters, reasoning that, “Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible.”⁷⁷

If Michigan’s ballast water statute is found to serve a legitimate purpose, the question then becomes whether the burden placed on interstate commerce is “clearly excessive in relation to the putative local benefits.”⁷⁸ This determination depends on “the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”⁷⁹

The gravity of the local interest involved here is difficult to overstate. It is well documented that aquatic invasive species in the Great Lakes have already impacted everything from the ecology of the lakes to the economy of the region and the ability of citizens to enjoy recreational water activities. Unlike the uncertain environmental impact at stake in *Maine v Taylor*, here the impact of aquatic invasive species in the Great Lakes is well known, and it is reasonable to infer that future introductions of invasive species would have similarly devastating results.

The question of whether this interest could be promoted as well in a way that is less burdensome to interstate activities is more speculative, but is it certainly relevant that the Coast Guard’s regulations have been in place for over a decade, and yet invasive species continue to be introduced through ballast water. This is rather convincing

evidence that stricter ballast water discharge regulations are in fact necessary to achieve the state's legitimate interest.

While it could be argued that some other method for ballast water treatment could be developed that would be less burdensome but equally effective at killing living organisms in ballast water, this alone would not invalidate Michigan's statute. As the Supreme Court held in *Maine v Taylor*, the mere possibility of developing a new method does not qualify as an available, less-burdensome alternative for purposes of the Commerce Clause.⁸⁰ While "[a] State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, ...it is not required to develop new and unproven means of protection at an uncertain cost."⁸¹

The burden placed on interstate commerce by Michigan's ballast water discharge regulations does not appear to be "clearly excessive" compared to the enormous benefit they provide. First of all, the regulations only apply to ocean-going vessels that engage in port operations in Michigan, which is only a small subset of the ships traveling the Great Lakes.⁸² The statute requires these vessels to obtain a permit which requires submitting a three-page application and paying a \$75 application fee.⁸³ A Certificate of Coverage is then issued, usually within ten to thirty days (although the MDEQ has issued a Certificate in one to two days when needed by a vessel owner).⁸⁴ Thereafter, the vessel owner only needs to pay a fee of \$150 annually.⁸⁵

The vessels affected by Michigan's ballast water discharge regulations can further be broken down into two categories: those which certify that they will not discharge ballast water at Michigan ports, and those that do plan to discharge. The vast majority of affected ships fall into the first category; the MDEQ expects that only four or five vessels per year will need to discharge ballast water at Michigan ports.⁸⁶

For ships certifying that they will not discharge ballast water at Michigan ports, the burden imposed by Michigan's statute is quite small. The only thing the permit requires them to do is to provide ten simple pieces of information on their status to the State of Michigan twenty-four hours before port operations.⁸⁷ This information allows the State of Michigan to track vessels capable of discharging ballast water to help ensure that they do not in fact discharge, and to evaluate the risk of invasive species introductions if they do.⁸⁸ While some of this information is also required by the Coast Guard, and thus presents a slight burden for vessel owners because they must submit this information twice, it is still a relatively minor inconvenience.⁸⁹ Moreover, it is the only way for Michigan to gather this information, as the Coast Guard currently does not permit states to access its database.⁹⁰

In light of these facts, it seems highly unlikely that a court would find that the burden imposed by Michigan's statute on non-discharging vessels to be "clearly excessive" in relation to the local benefits. An Ohio statute that imposed a very similar burden on interstate commerce was upheld by the Sixth Circuit Court of Appeals in *Ferndale Laboratories, Inc v Cavendish*.⁹¹ At issue in that case was a statute requiring wholesalers of prescription drugs to register with the State of Ohio by paying a \$100 fee and submitting a two-page application.⁹² The Court found that Ohio had a "legitimate interest in keeping track of prescription drugs entering the State," and concluded that "the burdens, if any...are not substantially in excess of the benefits that Ohio derives from" the information gathered.⁹³ In reaching this decision, the Court looked to the fact that the information required to complete the application "should be readily available

without an extensive search or study ... to anyone familiar with an applicant's business operations," that "[r]egistration does not require the applicant to change its business practices in any way," and that the \$100 fee was not burdensome at all.⁹⁴

With respect to the approximately four or five vessels that do discharge at Michigan ports each year, the burden imposed by Michigan's permit requirements is more significant. Before discharging ballast water at a Michigan port, these vessels are required to treat their ballast water with one or more of the treatment methods determined by the MDEQ to be environmentally sound and effective in preventing the discharge of aquatic nuisance species.⁹⁵ Compliance with these regulations will require ballast discharging vessels to install new equipment, retrofit existing equipment, and train personnel, in addition to the cost of purchasing the new equipment. Of the four MDEQ pre-approved treatment methods, Michigan estimates that the cost of these systems ranges from \$177,000 to \$450,000.⁹⁶ A court could potentially find that all of these costs rise to the level of a significant burden on interstate commerce.

However, while these systems are by no means cheap, they do not require changes to the structural design of the vessel, and can be installed without removing the vessel from the water.⁹⁷ They are also all currently commercially available, and three of the four have already been installed on oceangoing vessels.⁹⁸ In addition to these four methods, vessel owners are free to use an alternative treatment method of their choice upon approval by the MDEQ.⁹⁹

The ultimate inquiry is whether the burden on interstate commerce is "clearly excessive in relation to the putative local benefits."¹⁰⁰ Here, the costs incurred by ballast discharging ships are certainly significant; but compared to the potential costs that would be incurred by the entire Great Lakes region if more invasive species were introduced, this burden is not likely to outweigh the statute's benefit. Moreover, given the relatively small number of vessels expected to discharge ballast water at Michigan ports, the overall burden on interstate commerce is likely to be quite small.

In light of the great importance of protecting the Great Lakes from invasive species, and the relatively low burden placed on interstate commerce, it seems highly unlikely that a court would conclude that Michigan's ballast water discharge regulations violate the Commerce Clause. As the Supreme Court stated in *Maine v Taylor*:

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.¹⁰¹_[A1]

CONCLUSION

The regulation of ballast water continues to be a difficult task. While the Coast Guard has made a noble effort to regulate ballast water discharges in the Great Lakes, these regulations do not appear to be adequately preventing the introduction of new AIS. If Michigan's ballast water regulations are upheld in federal court, these regulations could pave the way for stronger protections for the Great Lakes ecosystem.

The peculiar nature of the invasive species problem supports the necessity of tough ballast water regulations, even if they come at a high economic cost to society. Unlike many other environmental hazards, invasive species are virtually impossible to eradicate once they become established in an environment. Dioxins become dilute when added to large quantities of water, and oil breaks down over time, but invasive species only multiply the longer they remain in an environment. Moreover, the extremely high costs associated with efforts to keep their populations in check, attempting to prevent them from migrating, and repairing the damage they cause is astronomical compared to the relatively small cost of preventing their introduction in the first place.

¹ Jude, et al., *Non-Indigenous Species in the Great Lakes: Ecology, Interactions, Impacts, and Future Research Directions*, <<http://www.miseagrant.umich.edu/symposium/papers/AQUATI.pdf>> (accessed May 10, 2007).

² *Id.* (stating that, “[b]allast water introductions remain the greatest threat to the Great Lakes ecosystem”); The National Oceanic and Atmospheric Administration Great Lakes Environmental Research Laboratory, *Exotic, Invasive, Alien, Nonindigenous, or Nuisance Species: No Matter What You Call Them, They’re a Growing Problem* <<http://www.glerl.noaa.gov/pubs/brochures/invasive/ansprimer.pdf>> (accessed May 10, 2007) (stating that, “ballast tanks of cargo ships have been identified as the largest single contributor to the global movement of aquatic species in recent decades”).

³ Alexander, *Shippers Suing Over Invader Barrier Laws*, *The Muskegon Chronicle* (March 22, 2007).

⁴ MCL 324.3101 *et seq.*

⁵ MCL 324.3109(5).

⁶ Complaint for Declaratory and Injunctive Relief at 2, *FedNav Limited v Chester*, No. 2:07-cv-11116 (ED Mich, March 15, 2007).

⁷ TEACH Great Lakes, *Non-native Invasive Species: How Do Invasive Species Get Here?* <http://www.great-lakes.net/teach/pollution/ans/ans_4.html> (accessed May 10, 2007).

⁸ MIT Sea Grant Center for Coastal Resources, *Marine Bioinvasions Fact Sheet: Ballast Water* <<http://massbay.mit.edu/exoticspecies/ballast/fact.html>> (accessed May 10, 2007).

⁹ *Id.*

¹⁰ *Id.*

¹¹ The National Oceanic and Atmospheric Administration, *Great Lakes Aquatic Nonindigenous Species List* <<http://www.glerl.noaa.gov/res/Programs/invasive/>> (follow hyperlink to view the Excel spreadsheet) (accessed May 10, 2007).

¹² *Id.*

¹³ MIT Sea Grant, *National Ballast Survey* <<http://massbay.mit.edu/resources/pdf/NABSdatasheet.pdf>> (accessed May 10, 2007).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Glassner-Shwayder, *Briefing Paper: Great Lakes Nonindigenous Invasive Species*, <<http://www.glc.org/ans/pdf/briefpapercomplete.pdf>> (accessed May 10, 2007).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Pimentel, et al., *Environmental and economic costs of nonindigenous species in the United States*, *BioScience*, 53-65 (Jan. 2000).

²⁰ Michigan Department of Environmental Quality, *Great Lakes Aquatic Invasive Species*, <http://www.michigan.gov/deq/0,1607,7-135-3313_3677_8314-18366--,00.html> (accessed May 10, 2007).

²¹ Great Lakes Commission, *Great Lakes Aquatic Invasions*, <<http://www.glc.org/ans/aquatic-invasions/>> (accessed May 10, 2007).

²² Jude, *supra note 1* (stating that, “[e]radication of well established, reproducing [aquatic invasive species] from large aquatic ecosystems is impossible without unacceptable consequences”).

²³ *Id.*

²⁴ MIT Sea Grant, *Marine Bioinvasions Fact Sheet: Ballast Water* <<http://massbay.mit.edu/exoticspecies/ballast/fact.html>> (accessed May 10, 2007).

- ²⁵ United States General Accounting Office, *Invasive Species: Federal and Selected State Funding to Address Harmful, Nonnative Species*, <<http://www.gao.gov/new.items/rc00219.pdf>> (accessed May 10, 2007).
- ²⁶ MDEQ, [supra note 26](#).
- ²⁷ 16 USC 4711(b)(1).
- ²⁸ Showalter and Bowling, *Michigan's New Ballast Water Regime: Navigating the Treacherous Waters of States' Rights, Federal Preemption, and International Commerce*, <<http://www.olemiss.edu/orgs/SGLC/National/Ballast%20Water.pdf>> (accessed May 10, 2007).
- ²⁹ 33 CFR 151.1510
- ³⁰ Showalter and Bowling, [supra note 34](#).
- ³¹ *Id.*
- ³² Johengen, et al., *Assessment of Transoceanic NOBOB Vessels and Low-Salinity Ballast Water as Vectors for Non-indigenous Species Introductions in the Great Lakes*, <<http://www.glerl.noaa.gov/res/projects/nobob/products/NOBOBFinalReport.pdf>> (accessed on May 10, 2007).
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ Reeves, *Exotic politics: An analysis of the law and politics of exotic invasions of the Great Lakes*, 2000 Tol J Great Lakes' L Sci & Pol'y 125, 141 (2000).
- ³⁶ Zellmer, *Enjoy the donut: A regulatory response to the white paper preventing invasion of the Great Lakes by exotic species*, 2000 Tol J Great Lakes' L Sci & Pol'y 207, 210 (2000).
- ³⁷ Reeves, [supra note 41](#), at 146.
- ³⁸ 33 USC 1342.
- ³⁹ 33 USC 1362(14).
- ⁴⁰ 40 CFR 122.3(a).
- ⁴¹ Zellmer, [supra note 42](#), at 211.
- ⁴² EPA Decision on Petition for Rulemaking to Repeal 40 C.F.R. 122.3(a), 68 Fed Reg 53,165 (Sept. 9, 2003).
- ⁴³ *Northwest Environmental Advocates v EPA*, unpublished opinion of the United States District Court for the Northern District of California, issued March 30, 2005 (Docket No. C 03-05760 SI).
- ⁴⁴ *Id.*
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*, citing 16 USC 4711(b)(2)(C).
- ⁴⁷ *Northwest Environmental Advocates v EPA*, unpublished opinion of the United States District Court for the Northern District of California, issued September 18, 2006 (Docket No. C 03-05760 SI).
- ⁴⁸ Opening Brief for the Federal Defendant-Appellant, *Northwest Environmental Advocates v EPA*, Nos. 03-74795, 06-17187, 06-17188 (CA 9, March 13, 2007).
- ⁴⁹ EPA Development of Clean Water Act National Pollutant Discharge Elimination System Permits for Discharges Incidental to the Normal Operation of Vessels, 72 Fed Reg 34,241 (June 21, 2007).
- ⁵⁰ MCL 324.3101 *et seq.*
- ⁵¹ MCL 324.3103.
- ⁵² MCL 324.3112(6).
- ⁵³ "Port operations" are defined in the permit as engaging in fueling, loading and offloading cargo, and loading and unloading passengers in port. State Defendants' Response to Shipping Plaintiffs' Motion for Summary Judgment at 9, *FedNav Limited v Chester*, No. 2:07-cv-11116 (ED Mich, April 27, 2007).
- ⁵⁴ State of Michigan Department of Environmental Quality, *Ballast Water Control General Permit: Port Operations and Ballast Water Discharge*, <<http://www.deq.state.mi.us/documents/deq-water-npdes-generalpermit-MIG140000.pdf>> (accessed May 10, 2007).
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ State Defendants' Response to Shipping Plaintiffs' Motion for Summary Judgment at 11, *FedNav Limited v Chester*, No. 2:07-cv-11116 (ED Mich, April 27, 2007).
- ⁵⁸ *Id.* at 10.
- ⁵⁹ Complaint for Declaratory and Injunctive Relief at 2, *FedNav Limited v Chester*, No. 2:07-cv-11116 (ED Mich, March 15, 2007).

⁶⁰ See *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 503; 107 S Ct 1232; 94 L Ed 2d 472 (1987).

⁶¹ US Const, art. VI.

⁶² *Crosby v Nat'l Foreign Trade Council*, 530 US 363, 372-73; 120 S Ct 2288; 147 L Ed 2d 352 (2000).

⁶³ *California v ARC America Corp*, 490 US 93, 100-101; 109 S Ct 1661; 104 L Ed 2d 86 (1989), quoting *Hines v Davidowitz*, 312 US 52, 67; 61 S Ct 399; 85 L Ed 581 (1941) (citation omitted).

⁶⁴ *International Paper Co v Ouellette*, 479 US 481, 494; 107 S Ct 805; 93 L Ed 2d 883 (1987).

⁶⁵ *Cipollone v Liggett Group*, 505 US 504, 516;

(1992) (quoting *Fidelity Fed. Sav. & Loan Ass'n v De la Cuesta*, 458 US 141, 153 (1982)).

⁶⁶ 16 USC 4725.

⁶⁷ 16 USC 4711(b)(2)(C), 4711(c)(2)(J).

⁶⁸ 33 USC 1370.

⁶⁹ Mandatory Ballast Water Management Program for U.S. Waters, 69 Fed Reg 44,952, 44,959 (July 28, 2004).

⁷⁰ State Defendants' Response to Shipping Plaintiffs' Motion for Summary Judgment at 25, FedNav Limited v Chester, No. 2:07-cv-11116 (ED Mich, April 27, 2007).

⁷¹ US Const, art I, § 8.

⁷² *Oklahoma Tax Comm'n v Jefferson Lines, Inc*, 514 US 175, 179-80; 115 S Ct 1331; 131 L Ed 2d 261 (1995).

⁷³ *United Haulers Ass'n v Oneida-Herkimer Solid Waste Mgmt Auth*, 127 S Ct 1786, 1809; 167 L Ed 2d 655 (2007).

⁷⁴ 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970) (citations omitted).

⁷⁵ 477 US 131, 148; 106 S Ct 2440; 91 L Ed 2d 110 (1986).

⁷⁶ *Id.* at 140-41.

⁷⁷ *Taylor, supra* at 148.

⁷⁸ *Pike, supra* at 142.

⁷⁹ *Id.*

⁸⁰ *Taylor, supra* at 147.

⁸¹ *Id.*

⁸² MCL 324.3112(6).

⁸³ MCL 324.3112(6); MCL 324.3120(1)(c).

⁸⁴ State Defendants' Response to Shipping Plaintiffs' Motion for Summary Judgment at 17, FedNav Limited v Chester, No. 2:07-cv-11116 (ED Mich, April 27, 2007).

⁸⁵ MCL 324.3112(6); MCL 324.3120(5)(b)(i).

⁸⁶ State Defendants' Response to Shipping Plaintiffs' Motion for Summary Judgment at 10, FedNav Limited v Chester, No. 2:07-cv-11116 (ED Mich, April 27, 2007).

⁸⁷ *Id.*, at 16.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 79 F3d 488, 496 (CA 6, 1996).

⁹² *Id.* at 490-91.

⁹³ *Id.* at 495-96.

⁹⁴ *Id.*

⁹⁵ State of Michigan Department of Environmental Quality, *Ballast Water Control General Permit: Port Operations and Ballast Water Discharge*, <<http://www.deq.state.mi.us/documents/deq-water-npdes-generalpermit-MIG140000.pdf>> (accessed May 10, 2007).

⁹⁶ State Defendants' Response to Shipping Plaintiffs' Motion for Summary Judgment at 18, FedNav Limited v Chester, No. 2:07-cv-11116 (ED Mich, April 27, 2007).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Pike, supra* at 142.

¹⁰¹ *Id.* at 151, quoting *Baldwin v GAF Seelig, Inc*, 294 US 511, 527; 55 S Ct 497; 79 L Ed 1032 (1935).

ENVIRONMENTAL LAW SECTION COUNCIL MEETINGS

MEETING MINUTES – September 14, 2006

Present:

Chuck Barbieri, Kurt Brauer, John Byl, Mike Caldwell, Chris Dunsky, Peter Holmes, Scott Hubbard, Steve Huff, Lee Johnson, Anna Maiuri, Dustin Ordway, Pat Paruch, Bob Schroder, John Tatum, and Grant Trigger.

1. **Minutes.** Minutes of the June 18, 2006 meeting were approved.
2. **Secretary-Treasurer's Report:** Peter Holmes presented the Secretary-Treasurer's Report. He reported that there is a balance in the Section's account of approximately \$52,000.
3. **Standing Committee Reports:**
 - A. **Membership.** Dustin Ordway reported that the Environmental Law Section directory will be available shortly. He also requested approval for a survey website known as "monkeysurvey.com" for purposes of conducting and recording the results of a survey for members. A motion was unanimously passed to approve the \$20 per month expenditure for this website service.
 - B. **Program Committee.** Kurt Brauer reported that there will be a 25th year celebration on November 9 that will include Governor Milliken, Attorney General Frank Kelley, Professor Joseph Sax, and MDEQ Director Steve Chester. It will be held at 2:00 p.m. on November 9 at the Kellogg Center in East Lansing. More information will follow. Kurt also reported that there will likely be an Environmental Boot Camp in February at a ski resort in northern Michigan.
 - C. **Michigan Environmental Law Journal.** Bob Schroder introduced the winner of the essay contest, Tara Spoon, who joined us for the meeting and the dinner following the meeting. Bob Schroder also transferred responsibility for editing the Environmental Law Journal to Lee Johnson.
4. **Subject Matter Committee Reports.** Ernest Chiodo reported that the Environmental Litigation and Administrative Practice will hold a program on Wednesday, September 20 from 12:00 to 1:30 at his office, which is located at 35770 Harper Avenue, Clinton Township, Michigan. It will be a program on carbon monoxide and an industrial hygiene company will bring instruments that are used to test for the presence of carbon monoxide.

5. **Proposed Bylaws Amendments.** Chairperson Peter Holmes summarized the proposed bylaws. A motion to approve the amendments to the bylaws was passed unanimously. The current bylaws, as revised by these amendments, are attached to the Minutes. Please be sure to replace your existing bylaws with the attached bylaws for your records. Note that the amendments do not become effective until they are approved by the Board of Commissioners of the State Bar.
6. **Nominating Committee Report.** Chairperson Holmes first presented plaques to outgoing Council members: Tom Phillips, Lee Johnson, and Chuck Barbieri. Chairperson Holmes then summarized the Nominating Committee report. A motion was passed unanimously to approve the recommendations in the Nominating Committee report, which includes: Susan Topp for Chairperson-elect; Chuck Barbieri for Secretary/Treasurer; Christopher Dunsky, Scott Hubbard and Timothy Lozen for a second three-year terms as members of the Council; and Ernest Chiodo and James O'Brien for their first three-year terms as members of the Council.
7. **Meeting Adjourned.**

ENVIRONMENTAL LAW SECTION COUNCIL MEETINGS

MEETING MINUTES – February 3, 2007

Present: Anna Maiuri, John Byl, Scott Hubbard, Chris Dunsky, John Tatum, Charles Toy, Dustin Ordway, Steve Kohl, Ernest Chiodo, Grant Trigger, Lee Johnson, Chris Bzdok

On Phone: Pat Paruch, Tim Lozen, Joe Quandt, Dennis Donohue, Susan Topp, Steve Huff

Meeting called to order at 10:30 a.m.

1. MINUTES:

The minutes of the November 9, 2006 meeting as corrected were approved.

2. SECRETARY-TREASURER'S REPORT:

Chuck Barbieri presented the Secretary-Treasurer's Report. He reported that Section's account as of this meeting had a balance of over \$51,000 based on the State Bar records.

3. STANDING COMMITTEE REPORTS:

A. Membership.

Report by Dustin Ordway. Ordway passed out a summary of survey responses of Environmental Law Section Council members. Ordway indicated that the survey provided positive feedback on the programs offered by the Section. The survey also revealed that members were generally pleased with communications through Listserve. He also reported that the members which responded were primarily members of law firms. Discussion focused on increasing membership of government attorneys and students. Several participants urged the adoption of a new fee structure which would require bylaw changes for membership. A consensus developed on establishing a student fee of \$10.00, a fee for nonprofit and governmental attorneys of \$20.00, and a \$30.00 fee for all other practitioners. During this discussion, the participants also recommended that the treasurer prepare a budget.

Discussion then turned to Listserve. John Tatum outlined some of the options for providing announcements and procedures for subscribing and unsubscribing to the Listserve.

B. Program Committee.

Susan Topp reported that a winter environmental seminar would include a number of topics, including environmental due diligence, administrative law, environmental insurance, dispute resolution, water quality, mineral extraction, citizen suits, natural resource damages and other topics was planned for March 2, 2007 at the Otsego Club in Gaylord. President John Byl noted that the annual Higgins Lake meeting would occur on June 16-17 and that a program was being developed.

C. Michigan Environmental Law Journal.

Lee Johnson reported that he did not have enough articles yet for the next issue. Johnson also raised the possibility of reviving the State of the Law Summary which has been abandoned in recent years. Johnson proposed that he would secure commitments from the Section's subject matter committees and the State's law schools to help in reviving the State of the Law Summary.

D. Technology.

This topic was discussed during the membership committee report.

E. Desk Book.

Council members were told that a few chapters of the Desk Book have been submitted. Consideration is being given for blogs and podcasts to be added as a feature of the Desk Book effort.

4. SUBJECT MATTER COMMITTEE REPORTS:

A. Air.

Lee Johnson reported that the program of February 3, 2007 would focus on several significant United States Supreme Court cases, Massachusetts v EPA (regulation of greenhouse gases) and Environmental Defense Fund v Duke Energy Corp, and would include several guest speakers.

B. Environmental Litigation.

Report was provided by Ernest Chiodo and Steve Huff. Chiodo reported that the last presentation on law and medicine concerned asbestos which was held in Detroit and Grand Rapids. He indicated that the next presentation on law and medicine related to lead would be held in Detroit, Grand Rapids and one of the state law schools. Huff also discussed the topic of expert witness testimony in light of a new Court of Appeals decision.

C. Hazardous Substances and Brownfields.

No report.

D. Natural Resources.

No report was offered.

E. Water.

Dennis Donohue indicated that his group recently had a meeting focusing on the Nestle case. That case recently involved a Supreme Court argument on the standing issue and an MDEQ determination of no adverse impact for groundwater extraction.

5. LIAISON REPORTS.

A. Real Estate Section.

Pat Paruch indicated that the legislative session at the end of the year was quiet. She indicated that real estate section was having a winter conference in March.

6. CHAIRPERSON'S REPORT.

Report by John Byl. President Byl reported that he had been contacted about participating in a legal milestone recognition of Ray v Mason County, a Supreme Court case which was one of the first cases involving the interpretation of the Michigan Environmental Protection Act. President Byl also reported on possible legislation to adopt the Uniform Environmental Covenants Act which has been introduced by Senator Patterson. The Council recommended that discussions with the DEQ and Senator Patterson's office be pursued. The Council also considered a request to provide funds for a scholarship to a student through the Office of Administrative Hearings. Finally, President Byl reported that the State Bar meeting will be in Grand Rapids on September 27th, the meeting will be at DeVos Place.

7. VICE-CHAIRPERSON'S REPORT.

No Report.

8. OTHER NEW OR OLD BUSINESS.

None.

Meeting adjourned at approximately 12 noon.

MEETING MINUTES – June 16, 2007

Present : John Byl, Susan Topp, Lee Johnson, Kurt Brauer, Ernest Chiodo, John Tatum

On Phone: Chuck Barbieri, Dustin Ordway, Mike Caldwell, Matt Eugster, Anna Maiuri, Charles Denton, Scott Hubbard, Dennis Donohue

Meeting called to order at 10:00 a.m.

1. MINUTES:

The minutes of the February 3, 2007 meeting as corrected were approved.

2. SECRETARY-TREASURER'S REPORT:

Chuck Barbieri presented the Secretary-Treasurer's Report. He reported that Section's account as of this meeting had a balance of over \$49,000 based on the State Bar records.

3. STANDING COMMITTEE REPORTS:

A. Membership.

Report by Dustin Ordway. Ordway advised that he and his committee have made law school contacts with the idea of attracting law student membership. He was hopeful that additional contacts will trigger increased participation in the fall. Discussion focused on the topic of what fee should be charged for students who join the section. After additional discussion, the Council decided that no charge should be required for membership through the remainder of the Council's fiscal year. The Council may look at a bylaw change after researching whether other sections assess any charge for student members.

John Tatum then mentioned advancements in the Listserve, which may allow the Section to cut down on the costs of mailing and distributing the Michigan Environmental Law Journal.

B. Program Committee.

Susan Topp advised that 22 persons attended the program conducted at Higgins Lake on Friday, June 15, 2007. Persons in attendance heard a presentation on the Michigan Department of Environmental Quality's Part 201 Work Groups. Bob Wagner of the Department discussed the

administration subcommittee's findings; Barb VanDaly of the Department and John Byl discussed Brownfield subcommittee findings; Pat McKay of the Department discussed the findings of the Liability/Compliance subcommittee; and Sharon Newlon discussed the findings of the Complexity subcommittee. Bill Schikora provided an overview of the Uniform Environmental Covenants Act, which is being considered by the legislature.

Kurt Brauer indicated that planning is already underway for the September annual meeting, at which time the Program Committee hopes to have a program developed on climate change. Several suggestions were made for possible speakers. Topp suggested that part of the program be focused on the trading of credits which is one of the likely ways climate change will be addressed.

C. Michigan Environmental Law Journal.

Lee Johnson reported that he now has enough articles and that he intends to issue another version of the Law Journal next month. He also indicated that planning is underway for the succeeding issue.

D. Technology.

In addition to the discussion that occurred regarding the Listserve during the membership committee report, Tatum reported that a new website for the section should be complete by July 1. He indicated that the new website would have a Google search function that would allow persons to search for topics found in ethics opinions, bar journal articles, and e-journal articles. He also reported on the development of an electronic directory. Tatum expressed the hope that these new developments will make distribution of the desk book and state of law summaries easier to accomplish. Charles Denton agreed during this discussion to examine the possibility of including old Act 307 opinions and orders in the new website.

E. Desk Book Committee.

Although no report was offered, John Byl encouraged the authors of various chapters to submit them to Jeff Haynes as soon as possible.

4. SUBJECT MATTER COMMITTEE REPORTS:

A. Air.

Lee Johnson discussed the February 2007 program held at the Cooley Law School at which time Massachusetts v EPA and Environmental Defense Fund v Duke Energy Corp were summarized and critiqued by an expert panel. The Supreme Court later issued decisions in both matters.

B. Environmental Litigation and Administration Practice.

Ernest Chiodo reported that this Committee has conducted a series of presentations on various chemicals and their hazards in Detroit and Grand Rapids. He indicated that members of the Michigan Industrial Hygiene Association have participated in these meetings. Chiodo said that the Committee is exploring the possibility of coordinating future programs with the Illinois Bar Association or Chicago Bar Association. He also indicated that they would consider the opportunity to invite other sections in the future.

C. Hazardous Substances and Brownfields.

Denton informed the Council that the Hazardous Substances and Brownfield Committee met to review the progress of the Part 201 subcommittees that were organized by the MDEQ to consider Part 201 reforms. He also indicated that the group had a discussion on Uniform Environmental Covenants Act.

D. Natural Resources.

No report was offered.

E. Water.

Dennis Donohue indicated that the Committee over the past year had discussed water withdrawal issues and expected to focus on that topic again in the fall. He also predicted that any future program will cover the development of the Groundwater Advisory Council.

5. LIAISON REPORTS.**A. Real Estate Section.**

No report was offered.

6. CHAIRPERSON'S REPORT.**A. Nominating Committee Report.**

Byl offered an overview of the Nominating Committee Report which is attached to these minutes. After discussion, the group approved the Nominating Committee Report. The Section's meeting during the Annual Bar session will be in Grand Rapids on September 27, 2007, at 2 p.m. in the DeVos Place.

B. Law Practice Economics Survey.

Byl asked Topp, who participated in a recent conference call regarding the State Bar's Law Practice Economic Survey, to provide a report on this topic. Topp reported that the survey would be conducted by the bar association and that a

draft of the survey has been circulated. She invited persons to share comments with her about the draft survey.

7. VICE-CHAIRPERSON'S REPORT.

No further report was provided.

8. NEW BUSINESS.

None.

9. OLD BUSINESS.

None.

Meeting adjourned at approximately 11:20 a.m.

MEETING MINUTES – September 27, 2007

Present: John Byl, Susan Topp, Kurt Brauer, Ernest Chiodo, John Tatum, Dustin Ordway, James O'Brien, Craig Hupp, Scott Hubbard, Chuck Barbieri, Chris Dunsky, Pat Paruch, Dennis Donohue

Meeting called to order at 4:15 p.m.

1. MINUTES:

The minutes of the June 16, 2007 meeting were approved.

2. SECRETARY-TREASURER'S REPORT:

Chuck Barbieri presented the Secretary-Treasurer's Report and advised that the Section's account as of the meeting had a balance of over \$47,000 based on State Bar records.

3. NOMINATING COMMITTEE REPORT:

John Byl as outgoing President announced that Susan Topp would become Chair of the Section by operation of the By-Laws. The report of the nominating committee proposed Charles Barbieri as Chairperson-Elect; Christopher Dunsky as Secretary-Treasurer; Christopher Bzdok, Michael Cadwell, Anna Maiuri and Dustin Ordway for a second three-year term on the Council; Craig Hupp for his first three-year term on the Council and Jeff Haynes to fill the remaining term of Christopher Dunsky's term which expires in 2009. After nominations were closed, a motion to approve the nominating committee proposal was made, seconded and then unanimously approved by a voice vote.

4. STANDING COMMITTEE REPORTS:

A. Membership Committee.

A report by Dustin Ordway. Ordway informed members of the Section that Council has elected to waive dues or fees for students during the next year. This Section has the option under its current By-Laws to waive the annual fee requirement. A By-Law change to eliminate any due requirements for law students altogether has been deferred.

B. Program Committee.

A report by Kurt Brauer. He reported that approximately 50 persons attended the Section's State Bar program on September 27, 2007. John Byl praised the efforts of the speakers who in many cases were added at last minute because of conflicts affecting the schedules of the original speakers. Kurt Brauer indicated that programs for November 2007 and February 2008 would be planned.

C. Environmental Law Journal.

John Byl announced the winners of this year's Michigan Environmental Law Journal Essay Contest. Carolyn Krieger of Ave Maria Law School received top prize of \$2,000 for an essay on The Regulation of Ballast Water Discharges in the Great Lakes. Thomas J. Florip of Ave Maria Law School was awarded second prize of \$1,000 for his essay on the Moral Underpinnings of American Environmental Law Statutes: Did Sixties Revolutionaries Embrace Traditional Christian Values. Finally, Kevin Bernardo of Ohio State University received an award of \$500 for his essay on The Law of the Dunes.

D. Technology.

No report was made.

E. Desk Book Committee.

No report was offered.

4. SUBJECT MATTER COMMITTEE REPORTS**A. Air.**

No report was offered.

B. Environmental Litigation Administrative Practice.

A report by Ernest Chiodo. Chiodo indicated that a discussion of vapor intrusion would take place in October-November and that presentations would be made at the University of Detroit Law School and Wayne State University.

C. Hazardous Substances.

Craig Hupp indicated that he would be planning a fall meeting with Charles Denton in the near future.

D. Natural Resources.

No report was offered.

E. Water.

Dennis Donohue reported that a joint program was being developed with the Grand Rapids Bar to discuss water assessment tools in October or November.

5. LIAISON REPORTS.**A. Real Estate Section.**

Pat Paruch advised the Section that new chairs had been elected for the environmental energy subcommittee of the Real Estate Section. She further informed the Section that the Real Estate Section was developing a young lawyer program on basic real estate law, which would be conducted in December or January. She also indicated that a winter program would be held by her Section in Chicago.

6. CHAIRPERSON'S REPORT

John Byl mentioned Draft House Bills 4953 and 5037, which if passed would require payment of attorney fees if a private party is successful in litigation with the Michigan Department of Environmental Quality. The Section followed past practice and agreed that it would not deviate from its policy of neutrality and would not take any position regarding the legislation. Byl also recognized the outgoing members of the Council: Steve Huff, Joe Quandt, and Charles Denton. Plaques were distributed to these members for their service. Byl closed his term by thanking the Council members, committee chairs and the general membership for their assistance.

7. NEW CHAIRPERSON'S REPORT

Susan Topp praised and recognized John Byl for his service as President during the 2006/2007 year.

8. NEW BUSINESS.

None.

9. OLD BUSINESS.

None.

Meeting adjourned.