

Michigan Environmental Law Journal

ENVIRONMENTAL LAW SECTION

State Bar of Michigan

Vol. 19, No. 1, 2001

Winter/Spring 2001

Issue 60

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Cite this publication as 19 *Mich Env L J*, No 1, p ____ (2001)

The text of the *Journal* is also at the Environmental Law Section's page at www.michbar.org. The views expressed in the *Michigan Environmental Law Journal* are those of the authors and do not necessarily reflect the position of the State Bar of Michigan, the Environmental Law Section, or any governmental body. The publication in the *Journal* of articles, committee reports and letters do not constitute an endorsement of opinions or legal conclusions which may be expressed. The *Journal* is published with the understanding that the Environmental Law Section is not engaged in rendering legal or professional services.

Readers are invited to submit articles, comments or opinions to the editors. Publication and editing are at the discretion of the editors. Because of time constraints, galley or proofs are not forwarded to the authors.

The *Journal* is published three times per year, to inform members of Section activities and other matters of interest to environmental lawyers. Subscription is without charge to members and law student members of the Environmental Law Section. Subscription price is \$40.00 (U.S.) per year for non-members. Single issues, as available, may be purchased for \$14.00 per issue. To subscribe or purchase single issues please remit funds directly to: State Bar of Michigan, *Michigan Environmental Law Journal*, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083. Copyright © 2001 by the Environmental Law Section of the State Bar of Michigan. All rights reserved.

NOTE FROM THE CHAIRPERSON

by Charles R. Toy

During this year as the Chair of the Environmental Law Section, I am attending as many committee meetings as possible. I am impressed by the diligent work performed by and educational opportunities offered in committee meetings. One member of the Superfund Committee told me after a recent meeting that he does not attend one meeting where he does not learn important substantive information about his practice area. Committees not only benefit their members and members of the Section, but some committee programs are intended to benefit attorneys outside the Section and the general public.

The Environmental Law Section has had a tradition of strong committee work from both the standing committees and the subject-matter committees. In this, the 20th Anniversary of the Environmental Law Section, I urge you to become active in a committee. You will reap far more benefits than the few hours invested. To become active in a committee, contact a committee Chair for the particular committee:

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UNITED STATES SUPREME COURT RESTRICTS ARMY CORPS OF ENGINEERS' JURISDICTION OVER ISOLATED WATERS

By Saulius K. Mikalonis
Butzel Long, PC

On January 9, 2001, the United States Supreme Court issued its long awaited decision in the case of **Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers**, __ US __; 121 S Ct 675 (2001). The Supreme Court determined that the United States Army Corps of Engineers' (Corps) Migratory Bird Rule¹ exceeded its authority to regulate the filling of navigable waters pursuant to the Clean Water Act (CWA), 33 USC 1344(a). Having determined that the Corps exceed its Congressionally-delegated authority, the Supreme Court did not consider whether Congress would have the authority under the Commerce Clause to regulate isolated bodies of water.

The petitioner, the Solid Waste Agency of Northern Cook County (SWANCC), attempted to develop a non-hazardous solid waste landfill on a 533-acre tract of property that had formerly been a sand and gravel mine. In the years after the mine operation ceased, the remaining excavation became inundated with water and various seasonal and permanent ponds existed on the site. SWANCC successfully navigated various state and local permits and received an initial determination from the Corps that it had no jurisdiction because the site contained no wetlands.

After the Corps initially rejected jurisdiction, it received information that 121 migratory bird species were observed at the site. The Corps reconsidered its position and exercised jurisdiction, determining that the existence of the migratory birds made the isolated ponds "waters of the United States" by virtue of the Migratory Bird Rule. The Corps ultimately refused to issue a fill permit under 33 USC 1344(a).

The "Migratory Bird Rule" refers to discussion in the preamble of the Corps' reassessment of its definition of "waters of the United States" found at 33 CFR 328.3(a)(3). In the publication of the new rule, the Corps gave several examples of what types of waters the rule intended to bring under the Corps' jurisdiction. Among the examples given, the Corps identified waters used as habitat by migratory birds as those that the rule would include as "waters of the United States".²

SWANCC filed suit against the Corps in federal district court. The federal district court ruled in favor of the Corps on

the issue of the exercise of its regulatory jurisdiction and the merits of the denial. On appeal, the Seventh Circuit Court of Appeals concurred with the lower court, finding that the Commerce Clause of the United States Constitution allowed Congress to regulate isolated waters used by migratory birds under "the cumulative impact doctrine" and that the Migratory Bird Rule was a reasonable interpretation of the CWA by the Corps.³ SWANCC then appealed to the United States Supreme Court.

The majority opinion of the Supreme Court did not reach a decision on the issue of whether Congress could, if it chose to, regulate isolated waters under its Commerce Clause powers. Instead, it focused on whether Congress under the CWA had actually delegated to the Corps the authority to regulate such waters. Having determined that Congress had not delegated to the Corps the authority, it did not reach the issue of whether Congress could do so.

The Corps supported its position by noting that in 1977 it had expanded its more restrictive definition of "navigable waters" by including "isolated wetlands and lakes". 33 CFR 323.2(a)(5). According to the Corps, Congress had tacitly accepted this expansion of jurisdiction when it failed to adopt more restrictive language during its 1977 amendments of the CWA. The majority remain unimpressed, however, finding that the Corps presented no tenable evidence that Congress had acquiesced to the more expansive definition presented in the Corps' 1986 Migratory Bird Rule when it amended the CWA some nine years earlier.

The Corps also argued that under the Supreme Court's decision in **Chevron USA, Inc v Natural Resources Defense Council**, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984), the Court should give due deference to the Corps' interpretation of the CWA. The Supreme Court rejected that argument, as well. It found that to sustain an agency's determination of its jurisdiction that "invokes the outer limits of Congress' power",⁴ the Court required a clearer indication from Congress that it intended to grant such jurisdiction, which was lacking here. This determination of jurisdiction would require even greater scrutiny "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a tradition state power."⁵ Thus,

the Supreme Court ruled that the Corps exceeded its Congressionally-delegated authority by attempting to regulate isolated waters.

The **Northern Cook County** decision continues a line of federal court cases that have eroded what the Corps believed to be the breadth of its regulatory authority. Federal circuit courts have determined that the Corps cannot regulate wetlands that have no direct or indirect surface connection to either navigable or interstate waters,⁶ that the redeposit of dredged materials cannot be considered fill for the purposes of the CWA,⁷ and that the draining of wetlands is not a regulated activity pursuant to the CWA.⁸ In fact, the **Northern Cook County** case represents a continuation of the Supreme Court's hard look comparing the exercise of agency jurisdiction with the power delegated to a particular agency by Congress as exemplified by the Supreme Court's decision in **FDA v Brown & Williamson Tobacco Corp**, 529 US 120; 120 S Ct 1291; 146 L Ed 2d 121(2000).⁹

In its decision in **Northern Cook County**, the Supreme Court appeared to be concerned that the federal government was encroaching upon areas where states traditionally maintained jurisdiction. The Supreme Court stated that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the State's traditional and primary power over land and water use." 121 S Ct at 684 (citing **Hess v Port Authority Trans-Hudson Corp**, 513 US 30, 44; 115 S Ct 394; 130 L Ed 2d (1994)). The Supreme Court acknowledged that the isolated waters could be regulated by the state, even though the Corps could not.

In the aftermath of the decision, numerous commentators discussed the ramifications of how the Supreme Court ruled. For example, the Detroit Free Press in an editorial proclaimed that "[t]he U.S. Supreme Court has torn a gaping hole in this country's ability to protect its water quality and natural habitat . . ." ¹⁰ According to the Free Press, states can no longer count on the Army Corps of Engineers to "hold the line on isolated ponds and wetlands."¹¹ It is ironic that the Free Press and others critical of the Supreme Court's decision see the Corps as the savior of the nation's waters when the National Wildlife Federation has identified the Corps as being in need of reform for its wasteful and environmentally destructive projects.¹²

Regardless, the State of Michigan possesses ample authority and ability to regulate isolated bodies of water. For

example, Part 301 of the NREPA governs activities in and around inland lakes and waters. MCL 324.30101 - .30113 Prior to the passage of the Inland Lakes and Streams Act, regulations governing inland lakes and streams were much more lax. In 1972, however the Michigan legislature expanded the scope of protections of such waterways. According to the statute,

"Inland lake or stream" means a natural or artificial lake, pond, or impoundment; . . . ; or any other body of water that has definite banks, a bed, and visible evidence of continued flow or continued occurrence of water Inland lake or stream does not include . . . a lake or pond that has a surface area of less than 5 acres. MCL 324.30101(e).

Unlike the CWA, navigation is not an issue with respect to waters regulated under Part 301.

The dredging or filling a bottomland or diminishing an inland lake requires a permit from MDEQ. MCL 30102. The failure to comply with Part 301 may subject a party to a civil action in which the court may impose a fine of not more than \$5,000 per day of violation. A guilty party may be charged with a misdemeanor and fined up to \$10,000 per day of violation. There is a provision for "minor" violations and the imposition of \$500 per day of violation. MCL 324.30112.

Similarly, Part 303 of the NREPA provides the State of Michigan the authority to regulate wetlands. MCL 324.30301 - .30323. The State's jurisdiction over wetlands is concurrent with the Corps in some instances, but also regulates wetlands that are not regulated by the Corps. State law requires a permit for the following activities: (1) filling, (2) dredging, (3) development in a wetland; and (4) drainage of surface water from a wetland. In addition to wetlands that are contiguous to navigable waterways, Part 303 also regulates wetlands that are not contiguous to any navigable waterways that are in excess of five acres in size. MCL 324.30301(d). If the wetland in question is less than five acres in size, it may still be regulated if MDEQ determines its protection is essential to the preservation of natural resources. *Id.*¹³

At least in Michigan, the reports that the United States Supreme Court has eviscerated protections of isolated waterways and wetlands in its recent opinion are vastly overstated. It is true that the Corps cannot exercise its jurisdiction over isolated waters and wetlands. Yet, Michigan

has a long tradition of protecting those areas that are not regulated by the federal government. Those protections remain in place. Those who believe that they may now have a free hand to develop their property because the Corps cannot exercise its authority should do so carefully and with an eye to complying with the strict requirements under Michigan law. Those who believe that the lack of federal protection over isolated waters will result in unfettered development would be better served to make sure that state regulators remain vigilant, rather than wring their hands over the lack of federal oversight.

¹ The rule provides that the Corps may exercise jurisdiction under 33 USC 1344(a) for filling in intrastate waters under the following circumstances:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce. 51 Fed Reg 41 206, 41217.

² 51 Fed Reg 41206, 41217 (1986).

³ SWANCC did not appeal the district court's determination with respect to the merits of the CORPS's decision, limiting its appeal to jurisdictional issues.

⁴ 121 S Ct at 683.

⁵ *Id*

⁶ *United States v Wilson*, 133 F3d 251 (CA 4, 1997).

⁷ *American Mining Congress v US Army Corps of Engineers*, 145 F3d 251 (CA 4, 1997).

⁸ *Save Our Community v EPA*, 971 F2d 1155 (CA DC, 1992).

⁹ In *FDA v Brown & Williamson Tobacco Corp*, the United States Supreme Court found that the Food and Drug Administration (FDA) exceeded the scope of its Congressionally delegated authority under the Food, Drug, and Cosmetic Act when it attempted to regulate cigarettes as nicotine delivery "devices".

¹⁰ "U.S. Supreme Court's ruling snatches protections," *Detroit Free Press* editorial, January 16, 2001.

¹¹ *Ibid*

¹² In March 2000 the National Wildlife Federation and the Taxpayers for Common Sense released a report entitled **TROUBLED WATERS: Congress, the Corp of Engineers, and Wasteful Water Projects**. In it, the authors question the CORPS's commitment to the environment:

[N]umerous Corps projects have demonstrated an overreaching will to control nature, and a naïve belief that engineering has the capacity to fundamentally replumb and reshape the nation's rivers, floodplains and coastlines. Countless ecosystems and billions of dollars continue to be wasted in the continuation of traditional Corps policies and programs, which often fall short of their objectives and too often disregard fundamental fiscal and environmental responsibilities. Executive Summary at p 3. (A copy of the report may be downloaded at the Taxpayers for Common Sense web site at www.taxpayer.net/corpswatch/index.htm).

¹³ Areas that have additional protections under state law that are not afforded by federal statutes include flood plains under Part 31 of the NREPA. MCL 324.3104.

COMMITTEE REPORTS

ENVIRONMENTAL LITIGATION COMMITTEE

By Steven H. Huff & Jeffery A. Magid, Co-Chairs

ELC MEETING MINUTES

(by Jeffrey A. Magid)

A meeting of the Environmental Litigation Committee was held on Saturday, February 17, 2001, 1:00 p.m. at Trebilcock Davis & Foster, P.C., 1000 Michigan National Tower, Lansing, MI.

Attending the meeting:

1. Mike Caldwell
2. Ernest Chiodo
3. Steve Huff (Co-Chair)
4. Jeffrey Magid (Co-Chair)
5. Mike Perry
6. John Tatum

Item 1

The meeting marks the first meeting of the ELC membership in a formal setting in quite some time. A discussion was made to set a meeting schedule and seek to expand the committee through personal contact. Mr. Tatum explained the availability of the Section conference call number.

Item 2

Featured at this meeting was Ernest Chiodo, a physician/attorney who works as an expert witness. The primary focus of the presentation was the application of statistical analyses to a variety of litigation areas, including potential applications in environmental and toxic tort cases.

A case study (a paternity suit) was used to illustrate how expert testimony challenging the basis for statistical assumptions can change the results and conclusions. According to Dr. Chiodo, the basic presumptions made by the expert in calculating a statistical analysis can be challenged. The counter-expert, using the same mathematical formulas and calculation steps used by the opponent, can demonstrate drastically different conclusions with a relatively small shift in focus regarding the assumptions made.

For example, in the test-case, when starting with the presumption that there is a 50/50 chance that the subject is the father, the DNA statistical results is a 99.01% positive probability. However, if other factors can be brought into evidence to reduce the 50/50 presumption (i.e. he never met her, they were not alone together, etc.) then the initial presumption may be altered. If the initial presumption is altered to 60/40, then the results would not be high enough to automatically infer paternity under Michigan law.

Other applications were discussed including medical malpractice, toxic exposure and contamination cases.

Item 3

Steve Huff gave a presentation and update on the changes in Rules 701, 702 and 703 of the Federal Rules of Civil Procedure.

Item 4

New Business - The next meeting will be scheduled for the April/May time frame on a Saturday morning. Members will be encouraged to attend in person or via telephone (if travel distances are prohibitive).

MEETING NOTICE

Our next featured speaker is Asst. U.S. District Attorney Chris Dighe who will discuss environmental crimes enforcement, as well as the Multi-agency Environmental Crimes Task Force. He is heavily involved with both. He may be joined by one or more other speakers with special knowledge in these areas. The meeting is tentatively scheduled for 10:00 a.m. on Saturday, June 2, 2001.

Updated notices will be emailed/mailed as the meeting day approaches.

EXPERT (AND “NON-EXPERT”) TESTIMONY: FEDERAL COURT

Effective December 1, 2000, Federal Rules of Evidence (FRE) 701, 702 and 703 were all amended. FRE 701 now reads (with the new language in bold for emphasis):

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, **and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.**

The purpose of this change appears to be to prevent “backdoor” expert opinion testimony from lay witnesses. In other words, if you have a lay witness who you want to opine based on scientific, technical or specialized knowledge, he or she is clearly going to have to first meet FRE 702's standard for the admissibility of expert testimony.

As recently amended, FRE 702 now reads (with the new language bolded for emphasis):

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or otherwise may testify thereto in the form of an opinion or otherwise, **if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.**

This new language is apparently an attempt to incorporate *Daubert's* suggested factors.¹ As clearly stated in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 124 L Ed 2d 469 (1993); *Kumho Tire Company, Ltd v Carmichael*, 119 S Ct 1167 (1999) and elsewhere, the factors were not meant to be definitive. The big problem is that, by inserting the word “and” before item 3, the court rule has converted non-definitive factors “to be considered” by a court into mandatory elements. On its face, the new FRE 702 language, therefore, goes beyond *Daubert/Kumho* and many of their progeny.

On the other hand, the three elements are much more open-ended than the four scientific-based factors set forth in *Daubert*. This is likely due, in part, to the fact that certain of those science-based factors would obviously not apply to certain *Kumho*-type, non-scientific but technical or specialized opinion evidence. The drafters of the rule, therefore, had to say, for example, that the testimony must be “the product of reliable principles and methods” rather than “accept[ed] in the scientific community.” The ultimate question is: “If a scientific expert meets all of the new Rule 702 elements, does she or he still have to worry about establishing any of the *Daubert* factors in order for her or his opinion testimony to be *admissible*?” A similar question can be asked as to non-scientific expert testimony.²

As to the new FRE 703 (effective December 1, 2000), it states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. **Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.** (New language in bold)

The apparent idea behind the changes to Rule 703 is that this will prevent the “backdoor” admission of hearsay evidence. This may lead, however, to some interesting situations and lengthy proceedings.

The party proffering the expert witness testimony will say that the witness may testify to any opinions he or she is otherwise qualified to present, even based on such inadmissible facts or data, but that he or she simply cannot disclose the underlying facts or data. The downside, of course, is that without all of the pieces providing the foundation for the expert's opinion before it, a jury may feel that the expert's opinion is not as persuasive as the opposing expert's opinion. The upside is that the expert may avoid being cross-examined on certain bases because

otherwise it would become necessary to disclose those to the jury.

On the other hand, the party opposing the expert testimony may say that if you cannot provide a complete basis for your expert opinion, upon witness *voir dire* or otherwise, the court should exclude all of your testimony which depends on those undisclosed facts and/or data. Otherwise, opposing parties will argue, their right to fully cross-examine a witness will be curtailed. This position, however, would seem to contradict the explicit language of the second sentence which affirmatively states that whether or not the underlying facts or data are admissible, an expert witness' opinions and inferences may be admitted. Of course, under such circumstances, it may be necessary for a court to conduct one or more evidentiary hearings outside the presence of the jury to ensure that the inadmissible facts or data at issue are "of a type reasonably relied upon by experts in the particular field" before allowing the expert to testify at all. That would enable a full opportunity by opposing counsel to cross-examine the witness.

One unanswered question is who has the burden of preventing "otherwise inadmissible" facts or data from being disclosed. Certainly, as to the direct examination of an expert, an attorney can instruct the expert in advance that he or she is not to disclose such information. However, what about upon cross-examination? Should the opposing counsel be instructed to avoid any such questions which would require the revelation of such information in order for the expert to provide a complete answer? Should the expert be instructed by the proponent's counsel to not answer questions which would result in the revelation of the otherwise inadmissible information? Perhaps the expert should be instructed to give as much of an answer as possible and then say something like, "That is all I can say in response without being forced to disclose facts or data which are otherwise not admissible by themselves but upon which I am allowed and all other experts are allowed to base our opinions under the court rules." In order to prevent a situation where it looks like an expert might be hiding something, it would probably be better to have the court tell the jury something like the above in advance of any such expert testimony. Multiple sidebars as to expert opinion testimony and multiple evidentiary hearings appear to be foregone conclusions.

In addition, of course, the final clause in the new Rule 703 allows the court to let the jury hear the "otherwise inadmissible" facts or data if their probative value will assist the jury in a way which substantially outweighs any prejudicial effect. In other words, if all else fails, we essentially go back to the system under the prior FRE 703. Of course, determining whether the prejudicial effect will be substantially outweighed by the probative value will likely require an *in camera* review, sidebar and/or evidentiary hearing by the court . . .

Weisgram v Marley Co, 528 US 440 (2000).

This case involved the death of Bonnie Weisgram as a result of carbon monoxide poisoning during a fire in her home. Her son, individually and on behalf of her heirs, brought a wrongful death action in federal district court based on diversity jurisdiction. At trial, plaintiffs proffered the testimony of three experts in order to prove that an alleged heater defect led to the fire. The district court overruled defendant's objections that the proposed testimony was unreliable and, therefore, inadmissible under FRE 702 pursuant to **Daubert**. During and after trial, defendant unsuccessfully moved pursuant to FRCP 50 for judgment as a matter of law. On appeal, the Eighth Circuit determined that defendant's motion for summary judgment should have been granted because the testimony of plaintiffs' experts was speculative and not shown to be scientifically sound. Thus, since the testimony was incompetent to prove plaintiffs' case, and since that testimony was the sole evidence supporting the product defect claim (even considering the remaining evidence in the light most favorable to plaintiffs), the appellate court directed judgment as a matter of law for defendant. The issue on appeal to the U.S. Supreme Court was, where the record is insufficient to justify a plaintiff's verdict when shorn of erroneously admitted expert testimony, "[m]ay the court of appeals then instruct the entry of judgment as a matter of law for defendant, or must the tribunal remand the case, leaving to the district court's discretion the choice between final judgment for defendant or a new trial of plaintiff's case?" **Weisgram**, at 443. In a *unanimous* opinion written by Justice Ginsburg, the Supreme Court held that Rule 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that the evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case. **Id.** at 457.

EXPERT TESTIMONY: STATE COURT

The Michigan Court of Appeals recently reiterated the standard for the admission of expert testimony in Michigan's state courts. In *Stitt v Holland Abundant Life Fellowship*, No. 192208 (Dec 8, 2000) (On Rem) (a case involving expert testimony on the issue of lighting in a parking lot), the Court explained:

Expert testimony is admissible under MRE 702 if "recognized scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *Anton v State Farm Mutual Ins Co*, 238 Mich App 673, 677; 607 NW2d 123 (1999). Novel scientific evidence is admissible only if it is demonstrated that the evidence has gained general acceptance in the scientific community. *Id.* at 678. This test, known as the *Davis-Frye* test, places on the proponent of the evidence the burden of showing acceptance. *Id.* at 679.

Plaintiffs pointed to conflicting portions of the expert testimony at issue in an effort to show the expert's "lack of qualifications", but (citing *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987)), the Court explained that those "claims went only to the weight of the testimony, not whether it should have been admitted." The Court found that there was no abuse of discretion in admitting the expert testimony at issue. It further stated that, even assuming the evidence should not have been admitted, the admission was harmless and not a cause for reversal (citing MRE 103). Citing *Bourdon v Read*, 30 Mich App 681, 685-686; 186 NW2d 737 (1971), the Court explained that it "has found in the past that the testimony of experts for the party opposing introduction of expert evidence may dilute the improper introduction of that testimony."

TRESPASS-NUISANCE LAW

For a succinct but complete statement of current trespass-nuisance law in the State of Michigan (all of which may change soon . . .), see *Amir v City of Oak Park*, No. 219325 (Mich App, March 30, 2001) (unpublished) (finding a trespass-nuisance) and *Martini v Homepro*, No. 213970 (Mich App, Nov 14, 2000) (unpublished) (granting summary disposition to governmental entities with respect to a trespass-nuisance claim in a sewer back-up case).

In the meantime, U.S. District Court Judge John Feikens, who is overseeing federally ordered repairs of

Downriver's sewer system, recently asked the Michigan Supreme Court to clarify Michigan trespass-nuisance law. His specific certified question of law is:

Whether political subdivisions as defined under the governmental tort liability immunity act, MCLA 691.1401 et seq.; MSA 3.996(101) et seq., are absolutely immune under the act from tort liability when engaged in the exercise or discharge of a governmental function, except as provided in the five following statutory exceptions: the highway exception, MCLA 691.1402; MSA 3.996(102); the motor vehicle exception, MCLA 691.1405; MSA 3.996(105); the public building exception, MCLA 691.1413; MSA 3.996(113); and the governmental hospital exception, MCLA §691.1407(4), MSA 3.996(107)(4).

See Certification of Question Michigan Supreme Court, *United States v Wayne County*, No. 87-70992 DT, slip op at 11 (Jan 9, 2001). Attorneys for some homeowners who have cases over which Judge Feikens assumed jurisdiction (*via* a Limited Order of Consolidation in the same matter, dated Jan 9, 2001) requested the Sixth Circuit to order Judge Feikens off the case, arguing he has no jurisdiction over them.

Moreover, legislation is currently pending which could do away with or at least substantially change trespass-nuisance law in the context of sewer back-ups. In a nutshell, the legislation would require sewer systems to be inspected and certified when a property is sold; establish design and siting standards; create a statewide monitoring system to gauge the effects of untreated sewage on water quality; and protect municipalities from most sewer back-up lawsuits and/or if they were complying with a state-approved plan to correct a sewage system violation.

¹The factors are:

- a. whether the theory or technique can be and has been tested;
- b. whether the theory or technique has been subjected to peer review and publication;
- c. the known or potential rate of error in the technique, and the existence and maintenance of standards controlling the technique's operation; and
- d. the degree of acceptance in the scientific community. *Daubert*, at 593.

²Thus, the new FRE 702 does not necessarily render moot any question as to whether *Daubert/Kumho* would be applied in Michigan federal court proceedings based on diversity jurisdiction.

PROGRAM COMMITTEE

By John Byl, Chair

The Program Committee held a meeting on Wednesday, April 18, 2001. Attendees included Kurt Brauer, Joe Quandt, Marc Shaye, John Tatum, Stuart Weiss, and John Byl.

1. Committee Liaison Reports

No reports.

2. Planning Programs for 2001

a. **Fall Program.** The Fall program will likely be a one-day program sometime in October. Joe Quandt and Kurt Brauer will be the co-chairs for the Fall program. They will check into possible East Lansing locations, including the Kellogg Center and the University Club. East Lansing was viewed as a better alternative than downtown because of the ongoing construction. Joe and Kurt will explore a variety of possible topics, including some of the topics listed in the March 20 minutes of the Program Committee meeting. In addition to the topics listed in the March 20 Minutes, a possible topic might include a discussion by Richard LaCasse and Mike Leffler on "standing." Additionally, we may be able to get speakers from the various task forces involved in coordinating the investigation and prosecution of environmental crimes, including speakers from the FBI, Coast Guard, Attorney General's office, U.S. Attorney's office, etc.

b. **Program on Part 201 Rules.** The Superfund Committee (with assistance from the Program Committee) will likely do a half-day program on the Part 201 rules when a public comment draft is available.

c. **Annual Program.** Robert Kennedy has been confirmed, and will be the sole speaker at the Annual Program on September 12 in the afternoon. We should provide a notice on the listserve on a couple of occasions regarding the presentation by Mr. Kennedy. He is a dynamic and well-known speaker and we want to have a good showing for the Annual Meeting.

3. Regional Roundtables

a. **Detroit.** Everyone agreed that the Oakland County Bar Association is a good location for a Detroit area roundtable. Stuart Weiss will follow up with Bill Burton to discuss possible topics and speakers for a roundtable in late May or June.

b. **Higgins Lake.** No management personnel from DEQ will be available for a roundtable at Higgins Lake on June 8. Instead, arrangements have been made to have someone from the Attorney General's office speak on the AG's perspective on the Part 201 rules (Bob Reichel and Kathy Cavanaugh). Additionally, we will have speakers from the private sector discuss the draft rules as well (possible speakers include Richard Barr, Gene Smary and Grant Trigger). If time permits, Mike Leffler may also discuss some other hot topics.

4. Next Meeting

The next meeting will be held on Wednesday, May 16, 2001 at 5:30 p.m. The call in number will be 312-461-9197, code #298963.

MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from September 1, 2000 through February 28, 2001.

Kalamazoo River Study Group v Rockwell International Corp, 228 F3d 648 (CA 6, 2000)

Plaintiff Kalamazoo Study Group brought suit against a number of corporations to recover cleanup costs for contamination by polychlorinated biphenyls in the Kalamazoo River. In considering the liability issue only under CERCLA, the district court ruled that the defendant's liability was dependant upon plaintiff's showing that the particular defendant's responsibility was of sufficient significance to justify the response costs. The district court applied a threshold of significance standard and found that plaintiff had not met its burden under this liability standard. Plaintiff appealed.

On appeal, the court reasoned that the district court's requirement of causation was erroneous in a private contribution action. According to the appellate court, the standard used in a contribution action is the same as that used in a cost recovery action, and that standard does not require the plaintiff to show causation to prove liability. The court stated that causation could only be properly considered when allocating response costs. Therefore, the appellate court reversed and remanded.

Seifman v Kuhn, unpublished opinion per curiam of the Court of Appeals, decided October 3, 2000 (Docket Nos. 214538, 214539, 214540)

In the early 1970s, the Oakland County Drain Commissioner's office constructed the Edwards Relief Drain to provide storm water relief to West Bloomfield Township. Plaintiffs' property was located downstream of the drain. Plaintiffs brought suit claiming that they had suffered severe erosion on their property because of the high velocity of water that flowed from the drain. The trial court granted defendants summary disposition and plaintiffs appealed.

On appeal, plaintiffs argued that the trial court erred in granting defendants' motion for summary disposition on their nuisance-trespass claims because defendants set in motion the force that caused the damage to plaintiffs' property when the drain was built. The court disagreed and held that the evidence was insufficient to establish that the water intrusion was caused by, or was under the control of the defendants.

Plaintiffs also argued that the trial court erred in granting the motion for summary disposition of their inverse condemnation claim. Again, the court held that plaintiffs had failed to show that the government's actions were a substantial cause of the decline in property value. Therefore, the court affirmed the trial court's decision.

United States v Meyer, 120 F Supp 2d 637 (WD Mich, 1999)

The United States brought suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to recover response costs against Meyer, individually, the owner of a contaminated industrial park in Cadillac, Michigan. Two private sewer lines had been constructed at the industrial park but they had subsequently leaked. After the sewer lines were built, the site was leased to Northernaire, an electroplating business. Northernaire discharged industrial wastes into these sewer lines, which resulted in contamination of the site. Thereafter, Northernaire went out of business. Meyer filed a motion for summary judgment, and the United States filed a motion for partial summary judgment. The court granted the government's motion.

The district court found that Meyer was a potentially responsible party under CERCLA because he had operated the sewer lines before Northernaire. The court further found that the sewer lines qualified as a facility under CERCLA because a facility includes any place where a hazardous substance comes to be located. The court also found that Meyer was personally liable as an operator for a third party's release of hazardous waste into the sewer because he had exercised some control over the sewer lines that contributed to the release of the hazardous waste. Finally, the court determined that the corporate veil should be pierced because Meyer was personally involved in the operation of the sewer lines.

Meyer argued that the innocent landowner defense should apply, but the district court ruled that the defense was not applicable because the third party's releases were foreseeable to Meyer and he did not take any preventative action. Therefore, the court granted the United States' motion for partial summary judgment and denied defendant's motion.

Attorney General v Michigan Public Service Comm,
____ Mich ____; 618 NW2d 904 (2000)

Peninsular Gas Company (Peninsular), a small utility company in the Upper Peninsula, was ordered by the Michigan Department of Environmental Quality to pay environmental remediation costs for decades-old contamination found on its property and the surrounding wetlands. Peninsular then filed a rate increase application with the Michigan Public Service Commission (PSC) to cover these costs. The Michigan Attorney General intervened to oppose the application. The PSC approved a rate increase to cover the environmental costs to prevent Peninsular from going bankrupt and affecting consumer service. Peninsular was allowed to surcharge its customers 75% of the remediation costs. The Attorney General appealed to the Michigan Court of Appeals, which affirmed the PSC's action. The Attorney General then appealed to the Michigan Supreme Court. Although the Court denied leave to appeal, several justices wrote opinions explaining the Court's decision.

Concurring with the denial, Justice Corrigan opined that the Attorney General's argument that the rate increase was contrary to the Michigan Environmental Response Act (MERA)(now Part 201 of the Natural Resources and Environmental Protection Act, MCL 324.20101 et seq.) was not persuasive because MERA does not affect the PSC's authority in these matters. Consequently, the PSC has the authority to approve the rate increase based on Peninsular's costs of doing business.

In the dissenting opinion, Justice Kelly stated that leave should be granted to determine whether the PSC gave full consideration to MERA's intent of making the polluter pay for the remediation costs and whether Peninsular was inappropriately permitted to pass those costs on to its customers.

United States v Rapanos, 235 F3d 256 (CA 6, 2000)

To make his land more attractive to a developer, defendant cleared the land and filled the wetlands with sand. About that same time, he also submitted development plans to the Michigan Department of Resources (DNR). The DNR inspected the land and determined that it contained wetlands. The DNR advised defendant that he would need a permit to develop the land, and before one would be granted, a wetlands delineation was needed. Defendant then hired a wetland consultant. The consultant tested and determined that about 50 acres of the property were wetlands and reported this to

defendant. Defendant fired the consultant and told the consultant to destroy the data. Defendant also continued to develop the land.

Defendant was later convicted of knowingly discharging pollutants into wetlands. In this appeal, defendant claimed there were errors in the jury instructions, prosecutorial misconduct, and insufficiency of evidence. The government claimed the sentence given to defendant was inappropriate because he was given two one-level downward departures from the Sentencing Guidelines and a two-level decrease for accepting responsibility.

The Sixth Circuit held that the district court erred in applying the two one-level downward departures because it inappropriately considered the materials used by defendant, which is already considered in the guidelines. The court reasoned that the lower court abused its discretion because its stated reason for departing from the guidelines was disagreement with them. The court held that a disagreement with the law is not a permissible factor in granting downward departures. The court affirmed the district court's departure in sentencing based on the nature and quantity of the substance and the associated risk, but found that defendant did not accept responsibility for his conduct, based on his pre-trial statements and actions, a condition required to qualify for a further reduction.

Organic Chemicals Site PRP Group v CDU Holding, Inc Liquidating Trust, unpublished opinion of the US District Court, Western Dist of Mich, decided Oct 30, 2000 (Docket No. 1:96-CV-233); 2000 US Dist LEXIS 17147

In this case, plaintiffs Organic Chemicals Site PRP Group (Group), filed suit against several defendants seeking contribution costs for clean up of a Superfund site in Grandville, Michigan. In March 1999, the parties entered into a settlement agreement that required Uniroyal Chemical Company, Inc. (UCCI), to join the Group and pay its share of costs to be determined through arbitration proceedings. In August 1999, an arbitrator found that UCCI's share of response costs was 15% of the shared costs of the Group. Thereafter, the Group and UCCI disagreed as to the exact amount of shared costs and brought suit asking the court to determine the amount of the arbitration award.

The Group claimed that the shared costs included amounts that had previously been paid to the Group in settlement of claims owed by Group members whose share was 1% or less of the total costs. The court held that those

amounts were not shared costs and stated that the settlement agreement indicated that UCCI, as a Group member, could not be assessed costs that had not been assessed to other Group members. The Group also claimed that UCCI owed interest to the Group on costs incurred in bringing third-party claims. The court concluded that UCCI was liable for this interest because these interest costs had been assessed against other Group members.

Solid Waste Agency of Northern Cook Co v US Army Corps of Engineers ___ US ___; 121 S Ct 675; 148 L Ed 2d 576 (2001)

The Solid Waste Agency of Northern Cook County (SWANCC) purchased an abandoned mining site for disposal of non-hazardous waste. The site contained an abandoned mine and permanent and seasonal ponds that would be filled. SWANCC applied for various permits, including one from the U.S. Army Corps of Engineers (Corps). The Corps claimed jurisdiction over the land because it contained waters and wetlands that provided habitat for over 121 migratory bird species. The Corps denied the permit pursuant to the Migratory Bird Rule (MBR) it had previously issued under the Clean Water Act (CWA). The lower courts affirmed the Corps' denial. The Supreme Court granted certiorari to examine whether the Corps had jurisdiction to deny the permits based on the MBR.

The Court held that the Corps' attempt to extend the control of the CWA to cover these isolated waters was contrary to clear Congressional intent, and that the Corps had exceeded its authority under the CWA when it adopted the MBR. The Court reasoned that when Congress passed the CWA, it intended to provide the Corps with authority to control navigable waters. Thereafter, the Corps issued the MBR, which was intended to extend the control of the CWA to include intrastate waters that are or would be used as habitat for migratory birds. The Court stated that the Corps' enactment of the MBR was contrary to congressional intent and, therefore, unenforceable. Thus, the holding of the lower court was reversed.

In dissent, several Justices reasoned that the broad intent of Congress in enacting the CWA was to prevent degradation of the environment. Because the MBR worked to fulfill that intent, they would find that the Corps was acting within its authority in issuing the MBR and in denying the permit.

Carter-Jones Lumber Co v LTV Steel Co & Dixie Distributing Co, 237 F3d 745 (CA 6 2001)

Dixie Distributing Company (Dixie) was incorporated by its sole shareholder, defendant Denune, and two others. Under the direction of Denune, Dixie conducted both legal and illegal business practices. The illegal practices involved the purchase, concealment, and sale of ten PCB-filled transformers. The district court held Dixie liable under CERCLA and it held Denune personally liable under a corporate veil-piercing theory.

On appeal, Denune claimed that the district court erred in considering only his control of the illegal transaction instead of using Ohio's multi-factor balancing test to pierce the corporate veil, and that it inappropriately applied a direct liability test to impose personal liability under CERCLA. The circuit court disagreed and upheld the lower court's decisions. It reasoned that the list of factors used to pierce the corporate veil was not exhaustive and that the veil should be pierced to prevent injustice. The court stated that piercing the corporate veil, in this case, would prevent injustice because the defendant had been so personally involved in all of the illegal activities. The court also stated that preventing this injustice would allow the court to meet the legislative intent of making those responsible for any damage or environmental harm bear the costs of their actions under CERCLA. The court also reasoned that if the veil could be pierced, derivative liability under CERCLA was appropriate.

Richfield Landfill, Inc v State of Michigan, unpublished opinion per curiam of the Court of Appeals, decided Jan 26, 2001 (Docket Nos 202774, 202777)

Plaintiff Richfield operated a sanitary landfill in Genesee County. As the original landfill (cell 1) was approaching the end of its useful life, plaintiff applied for a permit to construct a second landfill (cell 2) adjacent to the first. The Department of Natural Resources (DNR) was concerned that contaminants might be leaking from the first landfill. The DNR and plaintiff eventually entered into a consent order that set forth the steps required to close cell 1. The consent order further provided that an operating license for cell 2 would be granted when plaintiff redesigned it to satisfy the DNR's requirements for monitoring groundwater. After this consent order was entered, the DNR informed plaintiff that it was not in compliance with the consent order and that an operating license would not be granted until plaintiff complied with additional DNR requirements. The DNR demanded that plaintiff substantially reconstruct cell 2 before it would issue an operating license.

Thereafter, plaintiff filed suit requesting an order of mandamus or, alternatively, an appeal of the administrative decision. The trial court ruled that mandamus was improper, but that the DNR's actions were arbitrary and capricious in denying the license for cell 2. The court also dismissed plaintiff's damages claims under several theories of liability. Both sides appealed.

The Court of Appeals agreed that the DNR's actions were arbitrary and capricious. The court reasoned that the DNR's subsequent demands for changes, after it had given approval for cell 2, were unreasonable, arbitrary, and capricious. The court also held that there was no basis for the plaintiff's §1983 action, and that the consent order was not a contract because the DNR had not given any legal consideration; therefore, plaintiff could not recover any damages. However, the court did find that there had been a taking by the DNR because the DNR's actions caused plaintiff to suffer a substantial decrease in property value. The case was remanded to the trial court to determine the amount of plaintiff's damages.

Whitman v American Trucking Ass'ns, Inc, ___ US ___;
121 S Ct 903; 149 L Ed 2d 1 (2001)

Under the Clean Air Act (CAA), the Environmental Protection Agency (EPA) must determine national ambient air quality standards (NAAQS) for all air pollutants and must review these standards every five years. These cases arose after the EPA issued revisions to the NAAQS for particulate matter and ozone. The District of Columbia Circuit Court held that the CAA unconstitutionally delegated power to the EPA because the statute did not provide the EPA with sufficient guidance in exercising its authority. Instead of declaring the CAA unconstitutional, however, the court remanded the matter to the EPA instructing that the EPA could not consider implementation costs in setting NAAQS. It also held that subpart 2 of the CAA constrained the EPA's method of revising standards, but did not prevent it from revising the standards or designating additional nonattainment areas. Finally, the court held that it had jurisdiction to hear the claims. Both sides appealed and the Supreme Court granted certiorari.

The Court held that the lower court erred in holding that implementation of an unconstitutional provision could be cured by the agency's interpretation of the statute. It further held that the CAA was constitutional because, at a minimum, it required the EPA to establish standards to protect the public health with "an adequate margin of safety." The Supreme Court upheld the lower court's ruling that barred cost considerations from the NAAQS process, and it upheld the lower court's ruling that it had jurisdiction to review the claims

because there was a final agency action that was ripe for review. The Court also held that the EPA's interpretation of subpart 2 of the CAA was unreasonable because the minor conflicts between subpart 1 and subpart 2 should not result in nullifying subpart 2. The case was remanded for additional proceedings consistent with the Court's decision.

Franklin Co Convention Facilities Authority v American Premier Underwriters, Inc, 240 F3d 534 (CA 6, 2001)

In 1973, the City of Columbus exercised its eminent domain authority over land owned by Penn Central and paid the railroad for the land. In 1990, during construction on the land, a contractor hired by Franklin County Convention Facilities Authority (CFA) struck a wooden box containing creosote and benzene. The box split open and some of the mixture seeped into the ground. CFA sued American Premium Underwriters, Inc. (APU), Penn Central's successor in interest to the land, to recover response costs incurred in remediating the land. The trial court held for CFA and APU appealed.

On appeal, APU argued that the material released was not a hazardous substance, that CFA's costs were not consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and that retroactively applying CERCLA violated substantive due process and was an unconstitutional taking.

The Court of Appeals affirmed the district court's judgment and held that the evidence the lower court relied on was sufficient to find that the creosote/benzene mixture was a hazardous substance. The court also held that CFA was entitled to recover response costs because it had substantially complied with the NCP by meeting the NCP's requirement of documenting recovery costs and providing for worker safety. The court further stated that assigning liability to APU fulfilled Congress's goal of spreading costs to responsible parties. The court also noted that when the land was transferred, APU's predecessor retained liability for claims against the property. Therefore, under these circumstances, there was no due process violation or unconstitutional taking.

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

Brett Donaldson, Danielle Vaz, Justin Zarcone, Lina Farris, Yolanda Nowlin, Dirk LeGate and Jennifer Sadecki

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

January 20, 2001

Call to Order at 10:09 a.m.

Present:

Charles Toy, David Tripp, Chuck Barbieri, Rich Patterson, Sharon Feldman, S. Lee Johnson, Mike Leffler, John Tatum, Chris Dunsky, Tom Phillips, Steve Huff, Todd Dickinson, Susan Hlywa Topp.

Present via telephone:

Tom Wilczak, Mike Ortega, Peter Holmes, Jeffrey Magid, Sue Johnson, John Byl, Beth Gotthelf, Ken Gold, Paul Bohn.

Absent:

Sharon Newlon, Edward Reilly Wilson III, Grant Trigger, John Dunn, Salius Mikalonis, Robert Schroeder, Patricia Paruch.

Minutes:

The minutes of the November 11, 2000 Council meeting were approved on motion by Leffler and seconded by Dickinson, as amended by Tom Wilczak to correct the spelling of Paul Bohn in members "absent", and motion by Charles Toy to correct the State Bar of Michigan Board of Commissioners Liaison Report to correctly reflect Charles Toy as presenting the report and Tom Ryan as being president rather than representative.

Secretary/Treasurer's Report:

Tom Wilczak reported that the Section now has audited financials for the 12 month period ending September 30, 2000, and that the audited figures match the figures reported at the November 11, 2000 meeting, with a net Section balance of \$25,763.75. For September to December 31, 2000, the Section earned \$20,439.00, consisting of \$17,664.00 in dues and \$2,775.00 in seminar income, and incurred \$8,157.58 in expenses for a net income of \$12,281.42. When added to the fund balance, it results in a net remaining Section balance of \$38,045.17 as of December 31, 2000.

Program Committee Report:

John Byl reported on a possible program on Part 201 rules with the Superfund Committee. He also noted that he needs chairs for the Annual Meeting Program and is looking for a speaker. Robert F. Kennedy, Jr., professor at PACE University is available. Waiting to hear if he will accept. Discussion whether he should speak at the Section dinner and meeting and possibly a State Bar lunch. Also discussed having some past chairs and early Michigan environmental practitioners, such as Joe Sax or Mark Van Puten speak. Thought is to have Kennedy speak at the meeting and past chairs/practitioners speak at the dinner. Possible MDEQ Roundtables at: (1) Northwest Detroit area in April or May, and (2) at Higgins Lake in June.

Journal Report:

A report was sent by Linda Blais via email. Linda reported that Issue 59 was recently mailed and should have been received by all members. Issue 60 which is designated as the Winter/Spring Issue will be published in late March or early April. The deadline for submissions for Issue 60 is March 1, 2001. The Solid & Hazardous Waste/Insurance Committee has been assigned with responsibility for submitting an article for that issue. The remaining deadlines for the other two issues to be published this year are July 1, 2001 for Issue 61 (State of the Law Issue) and November 1, 2001 for Issue 62 (Superfund Committee assigned for article). Our procedure for circulating the casenotes via the listserv with direct links to the cases is going smoothly. Based on the positive feedback Linda Blais has received, it appears that this continues to be a valuable service to our members.

Technology Committee Report:

Todd Dickinson reported that the Waste Information & Management Services legislative update is being provided to all Section members via email. John Tatum reported that approximately 650 Section members are on the listserv. Charles Toy suggested that the Committee request that Linda Blais add a box to the Journal alerting members to the service and suggesting that they submit their email address to the Section if not currently on the listserv.

Todd Dickinson reported that he will explore having the meet-me-conference call pass codes assigned to each committee to use for their conference call meetings. An invitation for members to join a Section Committee will be placed on the listserv.

Membership Report:

No report.

Publications:

No report on desk book. Toy reported that the Section has nine months for articles for the December 2001 Journal to be finalized. Toy noted that the ad hoc committee (Toy, Schroder and Haynes) are working with the Publications Committee of the Section on soliciting authors and articles.

Subject Matter Committee Reports:

(a) **Air Committee:** Lee Johnson reported that a meeting will be scheduled in the near future.

(b) **Environmental Ethics:** No report. Beth Gotthelf said she would call Hilda Gurley for an update on the Committee's activities.

(c) **Environmental Litigation:** Jeff Magid reported that the Committee has 12 new members and a meeting is tentatively set for Saturday, February 17, 2001 at 1:00 p.m. at a location to be announced, either Lansing or Grand Rapids. Topics will include expert testimony in federal court proceedings.

(d) **Natural Resources/Wetlands:** Rich Patterson is looking for a list of Committee members. They are actively soliciting new members and hope to have a meeting next month. Paul Bohn will send Rich Patterson his former list.

(e) **Real Estate:** No report.

(f) **Solid/Hazardous Waste:** Sue Johnson reported that a conference call/meeting will be held at a date in February when Steve Slyer is available to speak. The Committee needs to also come up with an idea for an article for the Journal, due March 1, 2001.

(g) **Superfund:** Chuck Barbieri reported the next meeting of the Committee will be on January 27 and that Grant Trigger will speak on the draft Part 201 rules. Richard

Barr will also be invited to give an update on Brownfields. Craig Hupp will be speaking on Natural Resource Damages issues.

Surface/Groundwater:

Ken Gold reported that the Committee intends to schedule a conference call in February to discuss topics for a meeting in the late Spring.

Liaison Reports:

(a) **State Bar Michigan Board of Commissioners:** Charles Toy reported that the new Executive Director, John Berry, and the Commissioners are concentrating on member services in anticipation that the Bar may become a voluntary bar. The Bar is looking at possibly needing to drop or scale back the annual meeting and/or the printed Journal. As to the annual meeting, Toy noted that \$8.00 of each member's annual dues is used to put on that meeting and that it has historically had low attendance.

(b) **Real Estate:** Pat Paruch sent a report to Charles Toy noting that the Real Property Law Section is partnering with Habitat for Humanity to build a house in Detroit. That Section has raised \$15,000.00 of its \$50,000.00 goal, and has asked the Environmental Law Section to participate. After discussion, it was decided that the Section will not adopt this as one of its projects.

(c) **Administrative Law Section:** Sharon Feldman, liaison to our Section, reported that the Administrative Law Section's last program was a two-day program in the Fall 2000. The next meeting of the Section is scheduled for early February 2001 to discuss programs for the upcoming year.

(d) **Oil and Gas Law Committee:** Sue Topp reported that the Committee met last month. She noted that the Committee's main topic has been to produce an oil and gas workshop. However, due to poor attendance, the Committee is struggling with whether to continue, possibly in a different form. The Committee intends to meet next month to discuss these issues.

Chairperson's Report:

Toy reported that the Multi-Disciplinary Practice Committee will be making a presentation at the February 10 meeting of the Representative Assembly. Draft APA rules are on the website; Magid stated that the Environmental Litigation Committee is looking at possible comments at their

next meeting. Toy further reported that the Annual Judges College has been contacted by Beth Gotthelf, who is speaking with several judges for ideas on possible topics at their annual conference. It has been suggested by the judges that the Section submit in writing what we would propose to present on the topic of environmental law at the Annual Judges College. Gotthelf and Toy will work on that submittal. Possible topics include environmental science for lawyers, and particular legal topics/areas of law of interest to the judges. The intent is to provide resources for the judges to educate themselves on environmental law. Toy noted that a comment was submitted on the webpage in response to the possibility of the Section selling some of the Russ Colbane prints that the Section set up an environmental law foundation. The money from the sale of such items would be turned over to the foundation which would then distribute the monies to charities. After discussion, it was decided not to pursue a foundation at this time.

Old Business:

Toy reported that Grant Trigger has commissioned a painting from Russ Colbane for the 20th Anniversary Celebration of the Section at this Fall's annual meeting. A list of several possible topics and themes was submitted to Colbane and he was given artistic license to choose from among them. Toy reminded the Council that although we are listed for a morning meeting at the annual meeting, we had promised to switch with the Real Estate Section. Therefore, our program will be in the afternoon on Wednesday, September 12 from 2:00 p.m. to 4:30 p.m. and it was decided that the dinner would be moved from the traditional Tuesday evening to Wednesday evening starting at approximately 5:30 p.m. to make it easier for outstate participants to attend both the Section meeting and the annual dinner. It was further decided not to use the State Historical Library due to a lack of kitchen facilities. Toy stated that they are looking at the possibility of using the MSU University Club, Walnut Hills Country Club or Lansing Country Club. First preference is the MSU University Club if it is available.

New Business:

John Tatum reported that progress is being made at getting all of the DEQ Office of Administrative Hearings ALG opinions on the DEQ website. Leffler briefly reported that an Environmental Crimes Coordinating Committee is being established on the western side of the state like the one that was previously established in eastern Michigan. It too will be a joint effort among various state and federal agencies. Leffler further reported that criminal cases will be filed soon on the eastern side of the state.

Next Meeting:

March 24, 2001.

Adjourned at 11:33 a.m.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

March 24, 2001

Call to Order at 10:05 a.m.

Present:

Tom Wilczak, John Tatum, Ken Burgess, Pat Paruch, Chuck Barbieri, Rich Patterson, John Dunn, Sharon Feldman, Grant Trigger, Charles Toy.

Present via telephone:

Peter Holmes, Saulius Mikalonis, Sharon Newlon, Mike Robinson, John Byl, Steve Huff, Susan Hlywa-Topp.

Absent:

Edward Reilly Wilson III, Robert Schroeder, Ken Gold, S. Lee Johnson, Mike Leffler, Chris Dunskey, Tom Phillips, Todd Dickinson, Beth Gotthelf, Paul Bohn.

Minutes:

The minutes of the January 20, 2001 Council Meeting were approved on motion by John Tatum and seconded by Ken Burgess.

Secretary/Treasurer's Report:

Tom Wilczak reported that the Section has a balance of \$33,019.30 as of February 28, 2001. He further noted that the only expense item that needs to be watched is the cost of Production Conference Calls being undertaken by the call in number. He noted what appeared to be a single conference call expenditure of \$342.25. Wilczak stated that he will attempt to get back up documentation regarding that item.

Program Committee Report:

John Byl reported that the Program Committee met on January 17, February 14, and March 20, 2001. The Committee is planning a possible Fall Update to be held in Lansing in October or November 2001. The Committee also is looking at a possible program on the draft Part 201 Rules this summer. A MDEQ Roundtable is planned for

mid-May in conjunction with the Oakland County Bar. That meeting may possibly be held at MDEQ's Detroit office. A second MDEQ Roundtable is planned for the afternoon of June 8 at the Environmental Law Section Council Meeting retreat at Higgins Lake if a meeting of the Advisory Committee, currently scheduled for the same date, can be moved.

Journal Report:

Charles Toy reported for Linda Blais that the Journal was not sent to the printer for the scheduled deadline due to the lack of materials being received from Section members. The Solid and Hazardous Waste/Insurance Committee reported that an article was being sent in for publishing. John Tatum proposed a writing contest for law schools sponsored by the Section, with the winners being published in the Journal. He stated he will look at the possibility of setting up such contest for next year. Sharon Feldman reported that the Administrative Law Section had looked into a similar concept a couple of years ago, but did not received a very good response. She suggested that it might be possible to undertake such an endeavor with both Sections jointly. Peter Holmes volunteered to contact all the environmental law professors at the Michigan law schools who have courses that require papers. He and John Tatum will also contact the Environmental Law Societies at the law schools.

Technology Committee Report:

John Tatum noted that Todd Dickinson had emailed a report indicating that the Technology Committee had received three to four favorable comments regarding the Waste Information & Management Services legislative update report being provided to all Section members via email. Dickinson reported no unfavorable comments being received.

Membership Committee Report:

Grant Trigger reported that the Committee had been making phone calls to major law firms suggesting that their new environmental practice group associates join the section. The Committee also will look at undertaking similar

endeavors with governmental agencies and in-house legal departments. The Committee also will urge both the new members and current members to become more active in the Section.

Publications:

There was no report regarding the Michigan Environmental Law Desk Book. As to the December 2001 edition of the Michigan Bar Journal, which will feature the Environmental Law Section, a working task group consisting of Bob Schroeder, Jeff Haynes, John Tatum and Charles Toy is beginning the process of soliciting articles from members of the Section and from prior Section Chairs. Possible articles include an article on natural resources damages by Charlie Denton and Steve Huff and an article on Part 201 Due Care Obligations by Chris Dunsky. Articles are due by September 15, 2001.

Subject Matter Committee Reports:

(a) **Air Committee:** Ken Burgess reported that he met with Kyle Jones to discuss a possible seminar for general practitioners and other future activities by the Committee.

(b) **Environmental Ethics:** Sharon Newlon reported that she spoke with Hilda Gurley-Highgate regarding a possible program that would address several issues, possibly including: 1) how attorneys can give technical advice without stepping out of the bounds of legal representation; 2) whether a lawyer can write a Phase I or a BEA report; and 3) issues regarding multi-disciplinary practice.

(c) **Environmental Litigation:** Steve Huff reported that the Committee held a brief program on February 17 on new FRCP 701, 702 and 703. A follow up meeting is tentatively planned for May 2001 with a possible topic including the new multi-agency environmental taskforces. The program will be announced on the listserv.

(d) **Natural Resources/Wetlands:** Rich Patterson reported that the Committee is still trying to locate a list of members. Paul Bohn is trying to locate the prior list. A possible program may be held in the fall.

(e) **Real Estate:** No report.

(f) **Solid/Hazardous Waste:** No report.

(g) **Superfund:** Chuck Barbieri reported that the

Committee hosted a program on January 27, 2001 which was attended by approximately 15 people. Barbieri reported that Chris Dunsky reported on the Shields case, Grant Trigger reported on the status of the Part 201 Rules and the members discussed possible articles for the upcoming Environmental Law Journal. The next meeting was scheduled for April 21, 2001 and Bob Reichold was invited to speak in Lansing at Barbieri's office.

Surface/Groundwater:

Ken Gold reported via email that efforts are being made to reorganize the Committee.

Liaison Reports:

(a) **State Bar Michigan Board of Commissioners:** Charles Toy reported that the Section needs to report back to the Board of Commissioners on what we would like to see the State Bar do for our Section. Toy reported that the next meeting was scheduled for April 20, 2001.

(b) **Real Estate:** Pat Paruch reported that the Real Estate Section was working on fundraising for purposes of building a home with Habitat for Humanity for the Detroit Tri-Centennial. She reports that the Section is soliciting contributions from law firms.

(c) **Administrative Law Section:** Sharon Feldman reported that the Section has a meeting scheduled for April 4, 2001. She stated that the Section is endeavoring to increase pro bono work from members of that Section via the Access to Justice program.

(d) **Oil and Gas Law Committee:** Sue Topp reported that the Committee held a meeting on March 13, 2001. Harold Fitch, Chief of MDEQ's Geological Services Division, spoke on the February 6, 2001 Oil and Gas Rule revisions.

Chairperson's Report:

(a) **Administrative Rules:** Charles Toy turned over the discussion to Rich Patterson who noted that Dick Lacasse and Brian Harrison are examining the effect of the APA rule that states that the Administrative Procedures Act overrules other inconsistent rules. He further reported that the office of Regulatory Reform wants to repeal those rules and that Lacasse and Harrison are examining how best to identify such rules and repeal them.

(b) **Judges “College”:** John Tatum reported that he and Beth Gotthelf are continuing to examine a possible environmental law primer for the Annual Trial Judges College. Charles Toy stated that he will raise the issue at an upcoming conference to determine what topics the judges would like addressed, if any.

Vice Chairperson’s Report:

Charles Toy stated that this will be a new agenda item and then turn the discussion over to John Tatum. Tatum discussed the Section undertaking outreach to communities typically not represented or under-represented by the Environmental Law Section. He specifically noted academics, local governmental attorneys and environmental advocacy groups. He stated that he will work to make sure that the Section contacts these constituencies to determine what services the Section may be able to provide and at least make sure that the Environmental Law Section Journal is being distributed to these communities.

Old Business:

(a) 20th Anniversary Celebration:

(i) **Print:** Grant Trigger reported that a number of topics were given to Russell Colbane to consider for purposes of the environmental theme Print.

(ii) **Program:** Charles Toy reported that Robert Kennedy Jr. had been confirmed as a speaker for the Wednesday, September 12, 2001, luncheon at the Annual Meeting of the State Bar. Mr. Kennedy will then attend the

Section Council program. The State Bar will pay for Mr. Kennedy’s \$15,000 speaking fee and our Section will pick up the costs of his transportation, which will be approximately \$1,200. In order to accommodate Mr. Kennedy’s schedule, the program portion of our Section’s Annual Meeting will be conducted prior to the business portion. It was noted that Mr. Kennedy has been invited to attend our Annual dinner later that evening, but that it is not likely that he will attend. Charles stated that a possible panel program is being discussed with Mr. Kennedy for the program portion of the meeting. As to the dinner, it will be held that same day, at approximately 5:30 p.m. to make it easier for out state participants to attend both the Section meeting and the dinner. The dinner will be at the MSU University Club.

(b) **Office of Administrative Hearings, PFD Project:** John Tatum reported that approximately 110 ALJ opinions have been made web-ready, with another 78 opinions needing additional work. The first 110 opinions should be posted on DEQ’s website in the very near future, with the last 70 opinions being posted by the fall of 2001.

New Business:

None reported.

Next Meeting:

June 9, 2001 at Higgins Lake.

Adjourned at 11:38 a.m.

CALL FOR NOMINATIONS FOR OFFICERS AND COUNCIL MEMBERS OF THE ENVIRONMENTAL LAW SECTION

Pursuant to Article IV, Section 1 of the Bylaws of the Environmental Law Section of the State Bar of Michigan, a Nominating Committee, appointed by the Chairperson, shall solicit suggestions for nominations for officers and Council members in the **Michigan Environmental Law Journal**. The Nominating Committee requests nominations for officers and Council members of the Environmental Law Section. To be eligible for election as an officer of the Section, a member shall have served not less than four full years as a voting member of the Section Council. To be eligible for

election to the Section Council, the member shall have served for no less than two years as an active member of a Section committee. Please submit all nominations for officers and Council members of the Environmental Law Section to Charles R. Toy, Chairperson, via mail at Farhat & Story, P.C., 4572 South Hagadorn Road, Suite 3, East Lansing, MI 48823, via facsimile at (517) 332-4122 or via e-mail at crtoy@farhatandstory.com. Nominations should be submitted by **June 1, 2001**.



CALL FOR ARTICLES

Pending approval by the Bar Journal Advisory Board, the December 2001 issue of the **Michigan Bar Journal** will include an Environmental Law theme. This theme is in partial celebration of the 20th Anniversary of the State Bar of Michigan Environmental Law Section.

Any person interested in submitting an article for publication in the December 2001 issue of the **Michigan Bar Journal** should submit their idea for an article to the Section's Publication Committee at the following address:

Attn: Jeffrey K. Haynes, Esq.
Beier Howlett
200 E. Long Lake Road, Ste. 110
Bloomfield Hills, MI 48304

Phone: (248) 645-9400 Fax: (248) 645-9344
E-mail: jhaynes@beierhowlett.com

Article ideas must be submitted by **June 15, 2001**. The Section's Publication Committee will respond to the proposed article submissions by **June 29, 2001**. Articles must be completely written and submitted by **September 1, 2001**. The deadline for article submissions is firm and cannot be extended under any circumstances. Article length can be no longer than 5 pages, double spaced. Additional article requirements will be communicated later. Articles that are not chosen for publication in the **Michigan Bar Journal** may appear in the Environmental Law Section's Newsletter, the **Michigan Environmental Law Journal**.

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