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John L. Tatum, Chairperson
P.O. Box 252764
5745 W. Maple Road, Suite 215
West Bloomfield, Michigan 48325-2764
(248) 203-7030

Linda L. Blais, Editor
Johnson, McNally & Blais, P.L.L.C.
222 Franklin Ave.
Grand Haven, Michigan 49417
(616) 842-1661

Steven E. Chester, Assistant Editor
Miller, Canfield, Paddock &
Stone, P.L.C.
One Michigan Ave., Ste. 900
Lansing, Michigan 48933-1609
(517) 483-4904

Table of Contents

Articles:	Natural Resources Damages Assessments and Claims in the Great Lakes Basin	
	Part 1: The Law of Natural Resources Damages Assessments	3
	The Supreme Court Revisits the "Takings" Question	14
	The Persistence of Local Wetland Ordinances in Michigan	17
Committee Reports:		
	Program Committee	23
	Michigan Environmental Casenotes	24
	Environmental Law Section Annual Meeting Minutes, September 12, 2001	27

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NATURAL RESOURCES DAMAGES ASSESSMENTS AND CLAIMS IN THE GREAT LAKES BASIN

PART I THE LAW OF NATURAL RESOURCES DAMAGES ASSESSMENTS

by

Charles M. Denton, Esq.
R. Craig Hupp, Esq.

INTRODUCTION

This is the first of a two-part article which reviews the law and practice of assessment, calculation and settlement of Natural Resources Damages (“NRD”) claims in Michigan. This first part of the Article describes how NRD claims have developed under Michigan State law and under federal law (as applied in U.S. Environmental Protection Agency (“EPA”) Region V),¹ including statutory, regulatory, and case law developments. While the scientific and economic issues of how to assess injuries to natural resources and calculate NRD damages is beyond the scope of this article, a brief discussion of some of the valuation issues is provided. Part II of this article will review and comment on a number of the NRD settlements that have occurred in the Great Lakes Basin, and provide a digest of NRD settlements identified by the authors.² Part II of this article closes with a practical commentary on negotiating and resolving NRD disputes based on past settlements and the authors’ experiences in negotiating NRD settlements.

Claims for NRD were created by federal legislation in the late 1970s and early 1980s,³ and in Michigan in 1990 with the amendment of former Act 307.⁴ Typical NRD claims in Michigan arise from discrete oil and chemical spills to surface water, sediments contamination from past industrial and municipal discharges, and pollution from historical mining operations, all of which are relevant within Michigan. NRD Assessments and settlements did not become common in Michigan until the latter half of the 1990s, although there were earlier settlements under the Michigan sport fishing statute⁵ which recovered what were essentially natural resources damages. Considering the number of “Superfund” sites (Federal and State) and International Joint Commission designated Areas of Concern in the Great Lakes adjoining Michigan, as well as the Great Lakes Water Quality Agreement and Great Lakes Basin

Compact efforts for many years, NRD claims could reasonably be expected to be more prevalent than they have been.⁶

I. OVERVIEW OF NRD LAW

A. Michigan Statutes Authorizing NRD Claims

Until the amendment to Act 307 in 1990,⁷ Michigan statutes provided little authority for the recovery of natural resources damages. Settlement decrees and agreements before 1990⁸ involved pollution to streams that killed fish and relied on the sport fishing statute⁹ to assess damages. That statute provides that illegal taking of fish shall be penalized based on the weight of fish “taken.”¹⁰ These fish “taking” claims evolved in the early 1990s, as the Michigan Department of Natural Resources (“MDNR”, now Michigan Department of Environmental Quality or “MDEQ”) began to rely on §6(1) of the Water Resources Commission Act (“WRCA”),¹¹ which prohibited discharges into waters of the State that were injurious to the public health, safety, or welfare. The WRCA also prohibited discharges that affected uses of the waters, injured the value of riparian lands, or became injurious to animals, fish, birds, aquatic life, or plants. The WRCA provided for civil and criminal penalties.¹² For example, in one Administrative Consent Order entered in 1991, the defendant agreed to restock the affected waterway, pay \$28,000 for loss of fisheries resources, and pay a civil penalty of \$25,000, with both payments made to the General Fund of Michigan.¹³

Michigan’s Act 307 was amended in 1990 to permit the recovery of natural resources damages,¹⁴ similar to those under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (“CERCLA”)¹⁵. It was amended again and recodified as Part 201 of the Natural Resources

and Environmental Protection Act (“NREPA”),¹⁶ and contains the most complete provisions for natural resources damages among Michigan’s laws. Natural resources damages under Part 201 include “damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release.”¹⁷ The State may recover interest from the date of either a written demand for payment of NRD or the filing of a suit to recover, whichever is earlier.¹⁸ Sums recovered for NRD must be used only to restore, repair, replace, or acquire the equivalent of the natural resources injured or acquire substitute or alternative resources.¹⁹ This section also prohibits double recovery for NRD.²⁰ It does not appear that the State may recover enforcement costs for NRD, because the defined term “response activity” does not include reference to NRD assessments, as compared to health assessments, which are included.²¹

When Part 201 was amended in 1995,²² the controversy over an NRD assessment technique known as the contingent valuation method (“CVM”) was underway. Because of concerns with regard to the validity of CVM, and the effect it could have on the magnitude of damages, the Legislature added §104²³ to Part 201 which provided limitations on the methods for NRD assessments. Under §104, contingent valuation or other valuation methods to quantify “non-use” values in natural resource damage calculations are not permitted until MDEQ promulgates by rule, valuation techniques that “satisfy principles of scientific and economic validity and reliability.”²⁴ Although Part 201 requires that the State promulgate rules controlling assessment of NRD,²⁵ it has not yet done so. There is no present schedule for developing such rules.²⁶

Beginning in the mid-1990s, natural resources damages or NRD mitigation claims were introduced into a number of Michigan’s other environmental statutes. These statutes included NREPA Part 55, Air Pollution Control;²⁷ NREPA Part 91, Soil Erosion & Sediment Control;²⁸ NREPA Part 31, Water Resources Protection;²⁹ NREPA Part 115, Solid Waste Management;³⁰ NREPA Part 213, Leaking Underground Storage Tanks;³¹ NREPA Part 111, Hazardous Waste Management Act;³² and NREPA Part 315, Dam Safety.³³ There is some variation among these statutes and thus they should be reviewed individually if potentially applicable to a specific site or event.

In addition, the Michigan Environmental Protection Act (“MEPA”)³⁴ provides an alternative approach to mitigating NRD in certain circumstances, although money damages

are not available under MEPA. MEPA provides that a person may bring suit to protect natural resources injured or threatened with injury by another person, as well as to seek declaratory or injunctive relief to protect or restore the threatened or injured resource.³⁵ Under recent caselaw, attorneys’ fees may not be recovered by a successful MEPA plaintiff.³⁶

B. Federal Statutes Authorizing Recovery of NRD

Three federal statutes provide the basis for most federal NRD claims.³⁷ The first of these is CERCLA. Section 107 of CERCLA addresses “hazardous substances” and provides for the recovery of “injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss....”³⁸ Determination of both direct and indirect injury, destruction, or loss and must consider a variety of factors including “replacement value, use value and ability of the ecosystem or resource to recover.”³⁹ When NRD assessments are performed pursuant to the regulations they “shall have the force and effect of a rebuttable presumption on behalf of the trustee” in any proceeding to recover NRD.⁴⁰ Implementing regulations promulgated by the U.S. Department of the Interior (“DOI”) are found at 43 CFR 11 and DOI performs the NRD assessment, not USEPA. In an NRD action under CERCLA, the natural resources trustee is the plaintiff. In most circumstances, the federal trustee is DOI.

The basic format for DOI’s assessment approach is laid out in CERCLA §151,⁴¹ which provides for (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short and long-term injury, destruction, or loss.⁴² Section 151 requires that the regulations identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss, and take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

The second federal NRD authority is the Oil Pollution Act of 1990 (“OPA”).⁴³ It provides recovery for injury to and loss of use of natural resources due to oil pollution, including reasonable costs of assessing the damages.⁴⁴ The United States, State, Indian Tribe, or Foreign Trustee of the affected resource may bring NRD claims under OPA.⁴⁵

Damages include loss of subsistence use by any one who uses natural resources, loss of revenue from taxes, royalties and fees, loss of profits or impairment of earning capacity due to the injury, and cost of increased public services as a result of injury.⁴⁶ Measures of damages include costs of replacing, acquiring, or repairing the injured resource; diminution of resource value pending restoration; and reasonable costs of assessing damages.⁴⁷ Damages determined pursuant to regulations promulgated under the OPA have a rebuttable presumption of accuracy.⁴⁸ At sites with mixed oil and hazardous substances contamination, OPA will defer to the DOI process. Recovered funds are held in trust for restoration of the injured resource, with any excess going to the Oil Spill Liability Trust Fund.⁴⁹

The third federal statutory program authorizing NRD is the Clean Water Act ("CWA").⁵⁰ Under the CWA, owners and operators of vessels and on-shore facilities are liable for costs of removal of pollutants, which include federal and State costs for the restoration or replacement of natural resources damaged or destroyed.⁵¹ The CWA assessment process follows the DOI regulations.

II. DEVELOPMENTS IN THE LAW

A. Michigan

1. NREPA Part 201

Only one case has been decided with direct application to NRD claims under Part 201. The application of the statute of limitations under Part 201 was addressed in **Shields v Shell Oil Company**⁵² in a cost-recovery context, but the holding applied to NRD claims as well. Part 201 as amended in 1995 provided that the limitations period for filing cost-recovery and NRD actions that accrued prior to July 1, 1991, was July 1, 1994, and for costs and damages accrued after July 1, 1991, within 6 years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility: except subsequent actions for recovery of response activity costs may be brought at any time during the response activity, if begun not later than 3 years after the date of completion of all response activity at the facility.⁵³

In **Shields**, plaintiff appealed the trial court's order dismissing his third-party complaint against defendant Shell Oil company to recover response activity costs for environmental contamination. Defendant's tanks were removed in 1987 pursuant to a property sale and the area around them was later found to be contaminated. The trial

court concluded that a cause of action accrues "when the wrong on which the claim was done regardless of the time the damage results."⁵⁴ Because it concluded that all of the elements of plaintiff's claim accrued in 1987 when Shields purchased the property, regardless when the damages (*i.e.*, the response costs) occurred, the court held that the action was barred. The Michigan Court of Appeals affirmed the trial court.

The Supreme Court peremptorily reversed the court of appeals, vacated the trial court's June 2, 1997 order, and remanded the **Shields** case back to the trial court.⁵⁵ The Court held that under both the former and amended versions of §140, Part 201's statute of limitations,⁵⁶ only response activity costs incurred before July 1, 1991, were subject to the July 1, 1994 limitation period.⁵⁷ Likewise, claims for NRD which were incurred by 1991 were time-barred in 1994. For most older sites in the State, this means that the claims under Part 201 for NRD damages which had occurred by July 1, 1991 were thus time-barred if not asserted by July 1, 1994.

2. MEPA

Although damages *per se* are not awarded under the Michigan Environmental Protection Act ("MEPA"),⁵⁸ it is relevant because part of the relief which can be granted under MEPA is mitigation, restoration, or replacement of damaged natural resources. Hence, while money damages are not provided by MEPA, an injunction requiring restoration of resources will require the unsuccessful defendant to spend an amount roughly equivalent to a damage award for NRD. It should be noted that there are types of natural resource damages under an NRD claim that are not recoverable under MEPA, for example, lost use of the resource.

A recent decision, **Nemeth v Abonmarche Development, Inc.**,⁵⁹ is of interest because it invalidated a court-developed rule that was interpreted to require a showing that the impacted resource was rare, irreplaceable, or of state-wide significance. *See, e.g.*, **Trout Unlimited Muskegon-White River Chapter v City of White Cloud**,⁶⁰ and **Attorney General v Huron County Road Comm'n.**⁶¹ **Nemeth** established a new rule for situations in which there are statutes or rules intended to protect a natural resource. *A prima facie* case is made when a plaintiff shows that the defendant has violated Michigan statutes or rules which are intended to protect natural resources or prevent pollution or degradation of the environment. The Court specifically held that "the MEPA does not require air, water, or other natural resources to be 'scarce' or 'unique' to be protected from actual or likely

pollution, impairment, or destruction.”⁶² This holding will allow more resource impairment and restoration suits under MEPA.

The issue of adequacy of proof of permanent injury under MEPA was addressed in *Cipri v Bellingham Frozen Foods, Inc.*⁶³ The court of appeals, affirming the trial court’s denial of equitable relief, concluded that natural resources restoration was not required because plaintiff had failed to prove that the lake was not recovering naturally. Evidence relied on by the court included expert testimony that the lake now supported fish life, that it posed no threat to health and safety, and that deposits of organic materials creating high oxygen demands occur naturally in all lakes. Plaintiff’s expert could not support his estimate of the quantitative effects that his restoration plan would have on oxygen levels, and the court noted that his plan was still being tested. The court of appeals also agreed with the trial court that the jury’s advisory award of \$90,000 was not indicative (apparently because of its amount) of a finding of long-term damage to the lake.

B. Federal

1. DOI NRD Regulations for CERCLA and CWA

The Department of Interior’s NRD regulations apply to NRD assessments under both CERCLA and CWA.⁶⁴ The DOI original NRD assessment regulations⁶⁵ were subject to a series of court challenges⁶⁶ that lead to substantial revisions to the rules in 1994 and 1996.⁶⁷ DOI’s initial regulations included simplified “Type A” procedures for coastal and marine environments. The coastal and marine procedures were promulgated in 1986⁶⁸ and challenged in *Colorado v DOI*, where the Type A procedures were vacated in part, based on a prior successful challenge to the more detailed “Type B” procedures in *Ohio v DOI*.⁶⁹ Following those decisions, DOI spent almost seven years revising their Type A procedures and adding to them sub-models for assessing NRD in the Great Lakes.⁷⁰ Trustees had the ability to settle cases in the interim without Type A or Type B procedures, because a trustee is not required to use the procedures except to benefit from the rebuttable presumption provided in CERCLA §107(f)(2)(C).⁷¹

2. Summary of DOI Regulations for NRD Assessments

The current DOI NRD assessment regulations were promulgated in 1996.⁷² The 1996 regulations apply to NRD assessments initiated after the effective date of the regulations.⁷³ The regulations establish a planned and phased approach intended to ensure that all analyses are “appropriate,

necessary, and sufficient to assess damages for injuries to natural resources.”⁷⁴ The process begins with a pre-assessment phase that includes notification and coordination activities and a pre-assessment screen. The purpose of the pre-assessment screen is to determine whether NRD injuries exist and are sufficiently large that it is cost-effective to do a full assessment and seek recovery.⁷⁵

If an assessment is merited, the trustee prepares an Assessment Plan and elects to perform a Type A or Type B NRD assessment.⁷⁶ A Type A assessment is a simplified assessment process using procedures set out in Subpart D of the regulations.⁷⁷ Two Type A procedures have been developed, one for coastal and marine environments and one for Great Lakes environments.⁷⁸ Both consist of computer models that have area-wide values for relevant factors built into them. The models are described in technical documents identified in the regulations.⁷⁹ Type B assessments are full-blown, “from-the-ground-up” NRD assessments. The regulations provide extensive guidance for the process and factors to be considered in a Type B assessment.⁸⁰ The Type B process consists of an injury determination phase; an injury quantification phase; and a damage determination phase for calculation of compensation for the injuries quantified in the preceding phase. In the case of either Type A or Type B assessments, use of the procedures and review of results is a matter for NRD assessment experts.

The DOI regulations provide for money damages, including the damages to natural resources calculated in the damages assessment, emergency restoration efforts, reasonable and necessary costs of assessments, administrative costs for and incidental to the assessment,⁸¹ and interest from the date NRD are demanded in writing. Costs and damages from the date of the injury to the date of restoration are expressed in terms of present value as of the date of assessment is performed.⁸² Acceptable damage calculation methodologies are set forth in Subpart E of the rules.⁸³

These DOI regulations provide for notices to PRPs during the preliminary assessment process,⁸⁴ after the damage determination phase when a Restoration and Compensation Determination Plan describing the analysis and selection of either restoration or replacement of injured resources⁸⁵ is completed,⁸⁶ and after the completion and release of the Report of Assessment.⁸⁷ Provisions for public notice and review are also provided in the DOI regulations.⁸⁸

3. Challenges to the Revised DOI Regulations

In 1999, in *National Association of Manufacturers v United States Department of the Interior*,⁸⁹ the National Association of Manufacturers (“NAM”) filed a comprehensive challenge to the regulations establishing the Type A NRD assessment procedures. NAM claimed that the rules violated CERCLA and the Administrative Procedures Act⁹⁰ for several reasons. First, the Type A procedures permitted damages to be calculated without on-site verification that a natural resource had in fact been injured and that the injury was in fact attributable to the particular release in question. Second, the regulations did not require consideration of an alternative to restoration of an adversely affected resource in calculating natural resource damages. Third, the regulations failed to relate selected restoration alternatives to the “services” provided by the resource. Fourth, the regulations allowed for recovery of purely speculative losses regarding the affected resource’s ability to assimilate future releases. Fifth, they also authorized recovery of private losses related to commercial fishing and hunting. Sixth, the databases and computer models were not the “best available procedures” for determining NRD and invalidly relied on outdated studies and information or suspect methodologies. Seventh, the rules permitted the trustee(s) to use both Type A and Type B procedures in combination to assess NRD from a single release. Eighth, the rules provided for calculation of NRD resulting from releases or discharges of oil, notwithstanding the enactment of the OPA which authorizes the National Oceanic and Atmospheric Administration (“NOAA”) to regulate oil releases or discharges. Finally, NAM objected to use of the contingent valuation method (“CVM”) to estimate losses not calculable through market mechanisms. The D.C. Circuit Court of Appeals rejected all of NAM’s objections. It held that trustees could select the assessment method on a case-by-case basis. Addressing the objection to CVM, the Court held that Congress had authorized trustees to recover a range of values for environmental goods and services, even those not traded on the market.

In *United States v ASARCO, Inc.*,⁹¹ the court held that a challenge to an NRD assessment is not limited to the administrative record, in part because the creation of a rebuttable presumption under CERCLA §107(f)(2)(C) implies that Congress expected an evidentiary hearing. Further, defendants were entitled to a jury trial on their challenge because challenges were not limited to record review.⁹²

In a subsequent decision in *ASARCO*, the court addressed the circumstances under which the statute of limitations for NRD claims begins to run.⁹³ The statute of limitations for NRD damages under CERCLA §§113(g)(1)(A) and (B)⁹⁴ is three years after the later of either the discovery of the NRD and its connection with the release in question, or the date on which regulations are promulgated under CERCLA.⁹⁵ However, if the facility is listed on the National Priorities List (“NPL”), then the statute of limitations is three years after the completion of the remedial action (excluding operation and maintenance).⁹⁶ The natural resources trustee in *ASARCO* had failed to file suit within three years of the date of discovery of the NRD loss. The NRD were associated with an area outside of the site as listed on the NPL, but within a much larger area which the USEPA later claimed comprised the site. If, in the context of the suit, the area with NRD was outside the NPL site, then CERCLA §113(g)(1)(A) applied and the trustee’s claim was too late and barred. If the impacted area was within the NPL site, however, the action was timely because the remedial action at the site had not been completed. The trial court held that the USEPA’s action to expand the NPL site did not extend the running of the statute of limitations, because the area for which NRD were sought was outside the site as listed on the NPL but within a much larger area which the U.S. EPA later claimed comprised the site. The court of appeals vacated this decision on the ground that matters related to NPL listings were within the exclusive jurisdiction of the court of appeals for the D.C. circuit, and hence the trial court did not have jurisdiction to determine the site’s boundaries as listed on the NPL.⁹⁷ The defendants were required to raise their challenge to the expansion of the NPL site before the D.C. Circuit Court of Appeals.

In *Kennecott Utah Copper Corp v US Dept of the Interior*,⁹⁸ plaintiffs challenged DOI’s revised Type B regulations released in March 1994, claiming that the regulations violated procedural requirements and were substantively defective on 11 grounds. The court of appeals rejected all of Kennecott’s claims except its claim with regard to the statute of limitations. The court voided the regulation authorizing the DOI to bring suit within three years after regulations would have been promulgated,⁹⁹ because that rule would have provided an indefinite and unacceptable tolling of the statute of limitations. The Court held that the latest date on which DOI’s NRD regulations were “promulgated” for the purpose of triggering the statute of limitations was the date on which the Type A regulations were first published in the *Federal Register*,¹⁰⁰ which was in 1987.¹⁰¹

In **California v Montrose Chemical Corp**,¹⁰² the United States and California sued Westinghouse and Montrose Chemical under CERCLA for clean up of DDT and PCB releases that had harmed the marine environment. As natural resource trustees, plaintiffs sought to recover natural resource damages for the damages to the marine environment. The court of appeals followed **Kennecott** and held the claim was barred because the regulations were promulgated in 1987 and the claims in **Montrose Chemical** were untimely asserted.

On the question of the recoverability of attorneys' fees in NRD actions under CERCLA, the United States has argued recently in a case pending in New Mexico that such fees are not recoverable.¹⁰³ In that case, private attorneys were retained by New Mexico (because its attorney general refused to file suit) to bring an NRD action against a group of PRPs that includes two federal agencies. The United States on behalf of those two agencies contended that sums recovered by New Mexico as trustee could be used only to restore, replace, or acquire the equivalent of such natural resources. The United States noted that CERCLA permits private recovery of attorneys' fees only under CERCLA §106(b)(2)(E) (when a PRP recovers costs incurred responding to an erroneous CERCLA §106 order), 110(c) ("whistle blower" suits), and 310(f) (citizens' suits).¹⁰⁴ The Government further argued that, while attorneys' fees also fall within the definition of "response costs" in removal and remedial actions, NRD were *not* defined as response costs under DOI's NRDA regulations.¹⁰⁵ Finally, relying on **Alyeska Pipeline Service v Wilderness Society**,¹⁰⁶ the United States argued that attorneys' fees are not permitted under the "American Rule" unless expressly authorized by statute.¹⁰⁷

4. NOAA NRD Assessment Regulations for OPA

In 1996, after five years of rule-making, NOAA, pursuant to OPA,¹⁰⁸ promulgated final rules for the assessment of NRD, which are codified at 15 CFR 990 *et seq.*¹⁰⁹ The regulations provide that assessments made in accordance with these regulations have a rebuttable presumption of validity in any administrative or judicial proceeding under OPA.¹¹⁰ The broad purpose of the regulations is to provide an assessment process for both developing a restoration plan for the injured resource and pursuing implementation or funding from responsible parties.¹¹¹ The regulations provide for notice to the public and notice to and involvement by potentially responsible parties ("PRPs").¹¹² The trustee must invite responsible parties to participate in the assessment process, and the regulations specify the timing and process for involving them.¹¹³ Trustees must "objectively" consider comments by responsible parties.¹¹⁴ Responsible parties may

request the use of assessment procedures different than those chosen by the trustee, which procedures must meet the standards set by the regulation.¹¹⁵ In addition, in such a case, the PRPs must advance the costs of the assessment procedure they prefer and agree not to challenge the results of their proposed procedures.¹¹⁶

The OPA regulations supercede the assessment regulations promulgated under CERCLA and the CWA with regard to oil discharges covered by OPA.¹¹⁷ The development of a restoration plan results in a Final Restoration Plan supported by a Record of Decision ("ROD").¹¹⁸ Trustees may settle NRD claims at any time, so long as the settlement is consistent with the OPA, with particular consideration of the settlement's adequacy to restore or replace damaged resources.¹¹⁹ The regulations for acceptable assessment procedures are broad and boil down to procedures that are capable of providing information necessary to analyze the resources impacted, are cost-effective, and are "reliable and valid for the particular incident."¹²⁰

Under the NOAA regulations, "injury" incorporates the terms "destruction," "loss," and "loss of use."¹²¹ "Reasonable assessment costs" include the trustee's costs in performing the assessment; administrative, legal, and enforcement costs to carry out the assessment; monitoring and oversight costs; and public participation-related costs.¹²² Note by comparison, that the definition of "costs" in the DOI regulations includes only administrative costs and not legal or enforcement costs.¹²³ Thus, it is possible that in a case under OPA, the United States could take the position that legal fees incurred to collect an NRD damages claim are recoverable, in contrast to the **New Mexico** case, *supra*, where the United States argued that attorneys' fees are not recoverable under the DOI regulations.

"Restoration" under NOAA's regulations includes "primary restoration," which includes actions that return the injured natural resources or services to baseline conditions, and "compensatory restoration," which is any action taken to compensate for interim losses of natural resources and services until full recovery.¹²⁴ "Services" means the functions performed by the resource for the benefit of another natural resource or the public.¹²⁵ The "value" of a natural resource or service includes "the value individuals derive from direct use of the natural resource, . . . as well as the value individuals derive from knowing a natural resource will be available for future generations."¹²⁶

Restoration planning by NOAA has three phases: pre-assessment, restoration planning, and restoration implementation.¹²⁷ The first two phases set out the steps and minimum activities required to assess the impacts to resources and to develop a plan to restore them. The restoration implementation phase begins with a demand on responsible parties to implement the restoration plan or to provide funds in the amount of the trustee's estimate for the costs of implementing the plan.¹²⁸ Responsible parties have 90 days thereafter to respond. All future costs must be discounted to the date of the demand and past costs must be compounded forward likewise.¹²⁹ The discount rates must approximate the government's cost of borrowing funds. All sums paid in settlement must be repaid to the trustee for its assessment and costs of implementing the Final Restoration Plan.¹³⁰ Actions against responsible parties to recover NRD must be filed within three years after the Final Restoration Plan is made publicly available.¹³¹

Use of the contingent valuation methodology ("CVM") to estimate non-use or passive-use losses under OPA was challenged unsuccessfully in *General Electric Co v US Dept of Commerce*.¹³² Although NOAA's rules as promulgated do not identify CVM as an NRD assessment technique, an appendix to the rule explicitly authorized use of CVM.¹³³ Plaintiff challenged the procedure as arbitrary and capricious because the contingent valuation study done did not consider a NOAA study¹³⁴ which cautioned that strict standards should be used in applying CVM procedures. The court of appeals held that contingent valuation studies, if properly performed, could be used and that, if PRPs wished to challenge the basis or results of a particular study, they could do so at trial. The court declined to decide the challenge that passive-use recovery was inappropriate for temporary losses on the ground that, while consideration of such losses was appropriate, the factual record for calculating such losses at the site in question was not adequate for appellate review.¹³⁵

5. Federal Legislative Developments

Efforts since the Superfund Amendments and Reauthorization Act of 1986 ("SARA")¹³⁶ to amend CERCLA to address perceived problems with the statute have been numerous and almost entirely unsuccessful.¹³⁷ A recent Congressional analysis indicates that one of the biggest stumbling blocks to reforming CERCLA is the failure to achieve a consensus regarding NRD.¹³⁸ The analysis identifies three major areas of disagreement: the methodologies used to calculate NRD,¹³⁹ whether NRD defendants have the burden of disproving an NRD Assessment¹⁴⁰ and whether a challenge to an Assessment must

be limited to the Administrative Record compiled by the Agency or Trustee during the NRD Assessment. The last attempt to address NRD issues in the 106th Congress, S. 1537 introduced by Senators Chafee and Bob Smith, Jr., did not even receive committee consideration.¹⁴¹

C. Potential NRD Issues

With few Michigan or federal decisions interpreting NRD statutory provisions, there are a number of areas open to dispute. First, both NREPA Part 201 and CERCLA provide that sums recovered as NRD must be retained only to restore or replace the equivalent resource, or to acquire substitute or alternative resources.¹⁴² What is unclear is whether the substitute or alternative resources must be located at or proximate to the site of the injured resource. There may be circumstances where there is neither opportunity nor need to replace or substitute resources in the vicinity of the injured resource. Are there recoverable NRD damages associated with substitute or alternative resources acquired at an unrelated or distant location?

In the case of typical groundwater "pump and treat" remedies, where the treated water is not productively used, other questions arise. Is it a defense to an NRD claim for loss of use of an aquifer because the selected remedy wastes the reclaimed natural resources, *i.e.*, the treated water?¹⁴³ Groundwater pump and treat remedies with no use of the treated water direct the treated water to surface waters. If that water were injected into the aquifer or used for drinking water, would it not have the effect of replacing or restoring the injured aquifer? If the ROD considered but rejected this option for non-technical reasons, is it a natural resource loss for which PRPs should be liable? Does CERCLA §107(f)(1) apply only in permit situations or can it be read more broadly to apply to any situation where U.S. EPA has approved the action taken? In the case of groundwater contamination, if NRD are calculated in part based on the costs of replacing and producing water from alternate sources, and the treated water from the remedy is not used, the treated water should be recognized as a cost-savings available to the water authority which, if it were to use the water, would achieve a cost-savings in the avoidance of its own pumping to produce an equivalent amount of water, thereby mitigating the NRD claim.

Under Michigan law, there is a question as to the calculation of interest on NRD. The Federal NOAA regulations permit the use of present value techniques to bring damages since the time of the release causing the injury up to current dollars.¹⁴⁴ Michigan has no similar regulations,

but, at least at the Verona Wellfield site, the State also brought past costs up to current dollars.¹⁴⁵ Where an NRD claim covers damages from a long period pre-suit, this present value calculation can add a very substantial amount to the claim. Under Part 201, interest runs on NRD claims from the date a written demand for recovery is made or from the filing of suit, whichever is earlier.¹⁴⁶ This is generally consistent with Michigan's interest computation rule applicable to tort cases, which provides for the computation of interest from the date of filing suit.¹⁴⁷ The purpose of an award of interest is to compensate for the lost use or time value of money.¹⁴⁸ Compounding sums expended or damages incurred in the past up to present value also reflects the lost use or time value of money; hence, by bringing NRD claims up to current dollars, the State effectively demanded interest before interest was allowed to run under the statute. It can be argued that this statutory provision on the computation of interest represented legislative policy to discourage the delayed filing of NRD claims by the State by limiting interest recovery.

CONCLUSION TO PART I

NRD are now part of Michigan's principal environmental statutes. Most NRD claims have been brought under Part 201 and the WRCA and its successor, NREPA Part 31. The statute of limitation under Part 201 probably bars NRD claims under Part 201 at sites identified before 1991. However, CERCLA and the OPA provide the State with essentially identical claims under federal law.

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Charles M. Denton is a partner in the Environmental Law Group of Varnum, Riddering, Schmidt & Howlett LLP in Michigan, where he has been practicing for over 20 years following graduation from the University of Michigan Law School. His environmental law practice includes litigation, administrative enforcement, compliance counseling, and insurance coverage law, and he represents a broad range of industrial, municipal, institutional, and individual clients. He has been legal counsel for clients regarding the Kalamazoo River and Lower Fox River contaminated sediments sites, and the natural resources damages claims relating to the Cadillac Industrial Park and Saginaw River & Bay. He is a member of the State Bars of Indiana, Michigan, and Wisconsin, as well as being admitted to practice before the District of Columbia Circuit Court of Appeals and United States Supreme Court. Mr. Denton can be reached at (616) 336-6538; cmdenton@varnumlaw.com.

R. Craig Hupp is a partner with Bodman, Longley & Dabbling LLP in Detroit, Michigan. He holds engineering, law and dispute resolution degrees. He has many years of experience in environmental law, including substantial experience in Superfund litigation. He recently completed negotiation of an NRD settlement at the Verona Wellfield (Thomas Solvents) Superfund Site. Mr. Hupp can be reached at (313) 393-7599; chupp@bodmanlongley.com.

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DISCLAIMER: The opinions of the authors expressed herein do not necessarily state or reflect those of their law firms or clients, are provided for information only, and shall not be considered legal advice.

ENDNOTES

¹ See generally, U.S. General Accounting Office, **Superfund: Outlook and Experience with Natural Resource Damage Settlements**, GAO/RECD-96-71, April 1996. Our research indicates that no comprehensive report of NRD settlements has been published since this report.

² See Appendices A (“NRD Settlements and Assessments List”) and B (“NRD Settlements Summaries Table”) to Part 201 of this article. To the extent that these settlements are available in textual form, they have been added to the environmental law collection maintained by the State Bar of Michigan’s Environmental Law Section, at Wayne State University <<http://www.lib.wayneedv/lawlibrary/collections/superfund.html>>.

³ Clean Water Act, 33 USC 1321(f)(4), as added by the Clean Water Act amendments of 1977, Pub L 95-217; Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC 9601 et seq.

⁴ 1982 PA 307, MCL 299.601 et seq., as amended by 1990 PA 233, 234 adding, among others, 12(f) to Michigan Environmental Response Act, MCL 299.612(f). For an overview of Michigan NRD law as of the early 1990s, see Hupp, R Craig, and Panourgias, L, **An Overview of Natural Resources Damages Claims Under Federal and State Laws**, 12 Mich Env LJ 4 (1993).

⁵ MCL 324.48740(1)(a) & (1)(d) (before re-codification, MCL 305.13) provide for criminal penalties for individuals convicted of taking fish illegally: \$10 per pound of game fish, and \$5.00 per pound for non-game fish. If proceeds are collected by court action, they go to a game and fish protection fund.

⁶ See also, Draft Great Lakes Strategy of the Great Lakes Water Quality Agreement, 66 Fed Reg 30187 (June 5, 2001).

⁷ 1990 PA 233, 234.

⁸ See Appendix A to Part II for a list of these NRD settlements and assessments.

⁹ MCL 324.48740(1)(a) & (1)(d).

¹⁰ *Id.*

¹¹ 1929 PA 245, MCL 323.1 et. seq., repealed by 1994 PA 451 and recodified at NREPA Part 31, MCL 324.3101 et. seq.

¹² MCL 323.6, recodified as MCL 324.3109.

¹³ *In the Matter of Water Pollution, The Upjohn Company, Final Order No. DFO-SW91-003* (March 13, 1991).

¹⁴ 1990 PA 233 & 234, adding 12(f) to the Michigan Environmental Response Act (“MERA” or “Act 307”), MCL 299.612(f).

¹⁵ 42 USC 9601 et seq.

¹⁶ 1994 PA 451 (effective March 30, 1995), MCL 324.20101 et seq.

¹⁷ MCL 324.20126a(1)(c).

¹⁸ MCL 324.20126a(3).

¹⁹ MCL 324.20126a(4).

²⁰ *Id.*

²¹ MCL 324.20101(ee) & (ff).

²² 1995 PA 71 (effective June 5, 1995).

²³ MCL 324.20104.

²⁴ *Id.*

²⁵ MCL 324.20104.

²⁶ Personal telephone conversation with Lynelle Marolf, MDEQ-ERD (October 1, 2001).

²⁷ 1994 PA 451, MCL 324.5530(3).

²⁸ MCL 324.9121(6), as amended by 2000 PA 504.

²⁹ MCL 324.3115(2) (Attorney General may recover NRD from a person who knowingly discharged a substance in violation of law, permit or rules).

³⁰ MCL 324.11502(9), added by 1996 PA 359; (definition of “corrective action” includes “the taking of other actions related to the release as may be necessary to . . . mitigate injury to the . . . environment, or natural resources”) A solid waste facility owner must maintain funds or financial assurance mechanisms to cover the costs of “corrective action.” MCL 324.11523(1)(b); MCL 324.11546(3) (Attorney General may seek restoration costs for violations of statute or rules).

³¹ MCL 324.21302(d) (“corrective action” includes “the taking of other actions related to the release as may be necessary to prevent, minimize, or mitigate injury to the . . . environment, or natural resources”).

³² MCL 324.11151(9) (Attorney General may recover NRD for any violation of a permit, requirement or rule under Part 111).

³³ MCL 324.31525(5) and (7) provide, respectively, for criminal penalties for willful violations leading to serious damage to natural resources and for a court order compelling a person who violates this part “to restore the site affected by the violation as nearly as practicable to its original condition.”

³⁴ MCL 324.1701 *et seq.*

³⁵ MCL 324.1701.

³⁶ **Nemeth v Abonmarche Development, Inc.**, 457 Mich 16; 576 NW2d 641 (1998).

³⁷ *The Marine Protection, Research, and Sanctuaries Act of 1972, Title III, 16 USC 1431, 1432, and 1443, as amended by the National Marine Sanctuaries Act, and the Anadromous Fish Conservation Act, 16 USC 757, also provides for restoration for certain impacted natural resources in limited circumstances.*

³⁸ 42 USC 9607(a)

³⁹ 42 USC 9651(c)(2).

⁴⁰ 42 USC 9607(f)(2)(C).

⁴¹ 42 USC 9651(c)(2) (1994).

⁴² *See discussion of the scope of a “Type B” NRDA for the Kalamazoo River, Michigan site in Part II of this article.*

⁴³ 33 USC 2701 *et seq.* (1994).

⁴⁴ 33 USC 2702(a) & (b) (1994).

⁴⁵ 33 USC 2701(a) & (b) (1994).

⁴⁶ 33 USC 2706(a) & (b) (1994).

⁴⁷ 33 USC 2702(b)(2) (1994).

⁴⁸ *Id.* at 2701(b)(2)(A) and 33 USC 2706(d)(1) (1994).

⁴⁹ 33 USC 2706(f) (1994).

⁵⁰ 33 USC 1251 *et seq.* (1994).

⁵¹ 33 USC 1321(f) (1994).

⁵² 237 Mich App 682; 604 NW2d 719 (1999), *vac and rem.*, 463 Mich 939; 621 NW2d 215 (2000).

⁵³ MCL 324.20140(2) (prior to June 29, 2000 curative amendment).

⁵⁴ *Id.* at 690; 604 NW2d at 725.

⁵⁵ **Shields v Shell Oil Company**, 463 Mich 939; 621 NW2d 215 (2000).

⁵⁶ Part 201, 140; MCL 324.20140.

⁵⁷ As a result of the Court of Appeals’ **Shields** decision, MCLA 324.20140 was amended by the Michigan Legislature to provide that recovery of response activity costs incurred prior to July 1, 1991, would be allowed only if filed by July 1, 1994. The legislation applied retroactively and provided that the amendment was curative and intended to clarify the original intent of the legislature. The Supreme Court’s decision is consistent with the amendment.

⁵⁸ MCL 344.1701 *et seq.*

⁵⁹ 457 Mich 16; 576 NW2d 641 (1998).

⁶⁰ 209 Mich App 452; 532 NW2d 192 (1995).

⁶¹ 212 Mich App 510; 538 NW2d 65 (1995), *leave to app den.*, ordered not precedential, 451 Mich 909; 550 NW2d 525 (1996).

⁶² **Nemeth**, 457 Mich at 34-35; 576 NW2d at 650.

⁶³ 235 Mich App 596; NW2d 620 (1999).

⁶⁴ 43 CFR 11.10 (2000).

⁶⁵ 43 CFR 11 (1987) (originally promulgated at 51 Fed Reg 7725 (Aug 1, 1986)).

⁶⁶ **Colorado v US Dept of Interior**, 880 F2d 481 (CADC, 1989); **Ohio v US Dept of Interior**, 880 F2d 432 (CADC, 1989).

⁶⁷ 59 Fed Reg 14281 (Mar 25, 1994); 61 Fed Reg 20560 (May 7, 1996).

⁶⁸ 51 Fed Reg 27725 (Aug 1, 1986).

⁶⁹ **Colorado v DOI**, 880 F2d at 491.

⁷⁰ 61 Fed Reg 20609 (May 7, 1996) (codified at 43 CFR Part 11, Subpart C).

⁷¹ 43 CFR 11.10 (2000) (referencing 42 USC 9607(f)(2)(C)).

⁷² 61 Fed Reg 20560 (May 7, 1996).

⁷³ *Id.*

⁷⁴ 43 CFR 11.13(a) (2000).

⁷⁵ 43 CFR 11.13(b) (2000).

⁷⁶ 43 CFR 11.13(c) (2000).

⁷⁷ 43 CFR 11.13(d) (2000) (referencing 43 CFR 11, Subpart D).

⁷⁸ 43 CFR 11.40(a) (2000).

⁷⁹ 43 CFR 11.18(4) & (5) (2000); the technical references are set forth in the Selected Bibliography at the end of Part I of this article.

⁸⁰ 43 CFR 11, subpart E (2000).

⁸¹ 43 CFR 11.15 (2000). This definition is narrower than the scope of damages under OPA. Compare to 15 CFR 990.30 (2000) (referring to 33 USC 2702(b) (1994)).

- ⁸² 43 CFR 11.80 *et. seq.* (2000).
- ⁸³ 43 CFR 11.83 (2000).
- ⁸⁴ 43 CFR 11.32(a)(2) (2000).
- ⁸⁵ 43 CFR 11.81(a) (2000).
- ⁸⁶ 43 CFR 11.81(d) (2000).
- ⁸⁷ 43 CFR 11.91(a) (2000).
- ⁸⁸ 43 CFR 11.43 (2000).
- ⁸⁹ 134 F3d 1095 (CADC, 1998).
- ⁹⁰ 5 USC 551, *et seq.* (1994).
- ⁹¹ *No. CV 96-0122; 1998 US Dist LEXIS 6172 (D Idaho, Mar 31, 1998).*
- ⁹² *Comments in the rulemaking process under the OPA offer support for "record review" in challenges to NRDA under NOAA's regulation. Id. at 10, citing 61 Fed Reg 440, 478-479 (Jan 5, 1996).*
- ⁹³ **United States v ASARCO, Inc**, *No CV-96-0122-N-ELJ; 1998 WL 798897 (D Idaho, Sept 30, 1998).*
- ⁹⁴ 42 USC 9611(g)(1)(A) & (B) (1994).
- ⁹⁵ CERCLA 151(c), 42 USC 9651(c) (1994).
- ⁹⁶ 42 USC 9611(g)(a) (1994).
- ⁹⁷ 214 F3d 1104 (CA 9, 2000).
- ⁹⁸ 88 F3d 1191 (CADC, 1996).
- ⁹⁹ 43 CFR 11.91(e).
- ¹⁰⁰ **Kennecott**, 88 F3d at 1209-13.
- ¹⁰¹ 52 Fed Reg 042 (March 20, 1987).
- ¹⁰² 104 F3d 1507 (CA 9, 1997). *Plaintiffs sought to recover NRD under 42 USC 9607(a)(4)(C) (1994).*
- ¹⁰³ **New Mexico v General Electric Co**, *No. 99-1118 (D NM, April 6, 2000), as reported in 31 Env't Rep. (BNA) 872 (May 5, 2000).*
- ¹⁰⁴ 42 USC 9606(b)(2)(E), 9610(c), & 9659(f), respectively.
- ¹⁰⁵ **New Mexico v General Electric**, *31 Env't Rep Cas (BNA) at 873-74.*
- ¹⁰⁶ 421 US 240; 95 S Ct 1612; 44 L Ed 2d 141 (1975).
- ¹⁰⁷ *Id.*
- ¹⁰⁸ 61 Fed Reg 40 (Jan 5, 1996).
- ¹⁰⁹ *NOAA's Guidance on Scaling Compensatory Restoration Actions (Oil Pollution Act of 1990), NOAA (December 18, 1997), contains further information on the planning and development processes for creating restoration plans for injured resources and calculating interim use losses. It provides in depth discussion, useful examples, and an extensive bibliography with abstracts.*
- ¹¹⁰ 15 CFR 990.13 (2000).
- ¹¹¹ *See also, O'Connor, Craig R, NOAA's Approach to NRDA: What Do Trustees Want?, Paper Presented at the IBC Second Annual Conference on NRDA (October 4-5, 1999).*
- ¹¹² 15 CFR 990.10 (2000).
- ¹¹³ 15 CFR 990.14 (2000).
- ¹¹⁴ *Id.*
- ¹¹⁵ *Id.*
- ¹¹⁶ *Id.*
- ¹¹⁷ 15 CFR 990.20 (2000).
- ¹¹⁸ 15 CFR 990.23 (2000).
- ¹¹⁹ 15 CFR 990.25 (2000).
- ¹²⁰ 15 CFR 990.27 (2000).
- ¹²¹ 15 CFR 990.30 (2000).
- ¹²² *Id.*
- ¹²³ 43 CFR 11.15 (2000).
- ¹²⁴ *Id.*
- ¹²⁵ *Id.*
- ¹²⁶ *Id.*
- ¹²⁷ 15 CFR 990, Subparts D, E, & F (2000).
- ¹²⁸ 15 CFR 990.62 (2000).
- ¹²⁹ 15 CFR 990.63 (2000).
- ¹³⁰ 15 CFR 990.65 (2000).
- ¹³¹ 15 CFR 990.64(b), implementing 33 USC 2717(f)(1)(B) & 2712(h)(2) (1994).
- ¹³² 128 F3d 767 (CADC, 1997).
- ¹³³ *Id.* at 772-73.
- ¹³⁴ *Arrow, K, Solow, R, Portney, P, Leamer, E, Raner, R, and Schuman, H, Report of the NOAA Panel on Contingent Valuation, Appendix I to Advance Notice of Proposed Rulemaking at 58 Fed Reg 4601-14 (January 15, 1993). A subsequent private study, following the NOAA study's recommendations, concluded that the use of contingent valuation pursuant*

to the recommended guidelines did provide reliable results. Carson, R, et al., **Was the NOAA Panel Correct About Contingent Valuation?**, Discussion Paper 96-20, Resources for the Future, (May, 1996).

¹³⁵ *General Electric*, 128 F3d at 774.

¹³⁶ *Pub L 99-499*.

¹³⁷ *With the notable exception of the Financial Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, which added "secured creditor" protections to CERCLA 101(20)(E) through (G). Pub L 104-208, Title II, 2501 et seq., 110 Stat 3009-462 (1996).*

¹³⁸ *Reisch, M, Superfund and Natural Resource Damages, Congressional Research Service Report to Congress (January 8, 2001). For examples of prior NRD legislation reform efforts, see U.S. Senate Subcommittee on Superfund (March 5, 1997) (statement of Terry D. Garcia, Acting Asst. Sec., NOAA) (testimony provides background of some recent restoration initiatives and discusses draft proposal for NRD under CERCLA); U.S. Senate Subcommittee on Superfund (September 4, 1997) (statement of Terry D. Garcia, Acting Asst. Sec. NOAA) (testimony discusses draft proposal for reforming NRD provisions of CERCLA, including cost-effective criterion and restoration-based approach).*

¹³⁹ *Particularly controversial are inclusion of non-use values in calculation of NRD and the use of contingent valuation to estimate values where there is no market-based value available.*

¹⁴⁰ *This is currently the case under 42 USC 9607(f)(2)(C) (1994). Some argue that the burden should shift to the government to prove its assessment correct.*

¹⁴¹ *Reisch, supra.*

¹⁴² *MCL 324.20126a(4), and USC 9607(f)(1) (1994).*

¹⁴³ *See the discussion of the Verona Wellfield NRD Assessment for an example of this situation, infra.*

¹⁴⁴ *43 CFR 11.84 (2000); 15 CFR 990.63(b) (2000).*

¹⁴⁵ *Author, based on review of NRD demand for the site asserted during settlement negotiations.*

¹⁴⁶ *MCL 324.20126a(3).*

¹⁴⁷ *MCL 600.6013 & 600.6455.*

¹⁴⁸ *The People v \$176,598.00 US Currency*, 242 Mich App 342; 618 NW2d 922 (2000).

THE SUPREME COURT REVISITS THE 'TAKINGS' QUESTION

Mark A. Cooley¹
D. Haywood & Associates, P.C.

On June 28, 2001, the U.S. Supreme Court decided *Palazzolo v Rhode Island*, ___ US ___; 121 S Ct 2448 (2001) (Docket No. 99-2047). This inverse condemnation case may have important implications for takings law in Michigan. The majority decision was written by Justice Kennedy. Justices O'Connor and Scalia wrote concurring opinions; Justices Ginsberg, Souter and Breyer dissented and Justice Stevens concurred in part and dissented in part. This article analyzes only the majority opinion.

The Petitioner owned a waterfront parcel, almost all of which was designated as coastal wetlands under Rhode Island law. The property was initially acquired in 1959 by a company of which Petitioner was a shareholder. Shortly after the property was acquired by the company, Petitioner acquired all of the stock in the company and became the sole shareholder. During the 1960's, the company made some initial attempts to develop the parcel which were unsuccessful. In 1971, Rhode Island enacted legislation creating a Council which was charged with the duty of protecting the State's

coastal property. In 1978, the company which owned the property was terminated, and the title to the property passed to the Petitioner as the corporation's sole shareholder. In 1983, the Petitioner renewed efforts to develop the property. Two different proposals were submitted and rejected by the state Council. Petitioner thereafter filed an inverse condemnation action in the Rhode Island Superior Court. After a bench trial, the superior court ruled against Petitioner. The Rhode Island Supreme Court affirmed the trial court, reciting multiple grounds for rejecting Petitioner's suit. The Rhode Island Supreme Court held that the Petitioner's takings claim was not ripe and that Petitioner had no right to challenge regulations predating 1978 when he became the owner of the property. Further, Petitioner had not been deprived of all economically beneficial use, since there was \$200,000 in development value remaining on an upland portion of the property. The state supreme court also held that the Petitioner could not assert a takings claim under the general test enunciated in *Penn Central Transportation v New York City*, 438 US 104; 998 S Ct 2646; 57 L Ed 2d

631 (1978), because he could have had no reasonable investment backed expectations which were affected by the regulation, since it predated his ownership. The U.S. Supreme Court reversed the state supreme court on the first two bases, and held that while the state supreme court was correct to conclude that the owner was not deprived of all economic use of his property, he was not precluded from making a claim under the principles set forth in the **Penn Central** case merely because he had not owned it at the time the regulation was enacted.

After briefly outlining inverse condemnation decisions, the Supreme Court turned to the issue of ripeness when the acquisition of property postdates the regulation in question. The Court once again reiterated its prior holdings that takings claims must be ripe, in that the governmental entity charged with implementing the regulation must have reached a final decision regarding the application of the regulations to the property at issue. It is only through such a final decision that courts are able to determine whether a regulation has deprived a landowner of all economically beneficial use of the property (the **Lucas**² standard) or has defeated the reasonable investment backed expectations of the landowner to the extent that a taking has occurred. (The **Penn Central** standard.) The central question, according to the Supreme Court, is whether the Petitioner obtained a final decision from the Council determining the permitted use of the land.

After noting that the state supreme court reasoned that doubt remained as to the extent of development which might be allowed on Petitioner's parcel, the Supreme Court rejected the state supreme court's reasoning that until virtually every possible development proposal has been turned down, the extent of permitted development on Petitioner's wetlands cannot be known with sufficient certainty. According to the Court, such a response is contradicted by "the unequivocal nature of the wetland regulations at issue and by the council's application of the regulations to the subject property." This was based upon the council's determination that the uses proposed in the applications did not satisfy the compelling public purpose standard of the regulations. The Court went on to say:

[A] landowner may not establish a taking before a land use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of the challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowners first having

followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.

The Court then said "government authorities, of course, may not burden property by imposition of repetitive or unfair land use procedures in order to avoid a final decision." The Court concluded that the council's decisions "make plain that the agency interpreted its regulations to bar Petitioner from engaging in any filling or development activities on the wetlands."

The Court then turned to the state supreme court's finding that the Petitioner's claim was unripe for the reason that he had not sought permission for the upland portion of the parcel. The Court first reiterated that the ripeness doctrine exists to eliminate uncertainty as to the land's permitted uses. Then, the Court noted that there was no ambiguity in the records as to the extent of what could be permitted on Petitioner's property, either on the wetlands or on the uplands. Because of this lack of ambiguity, the claim was ripe.

The final ripeness issue was based upon the state supreme court's emphasis on the Petitioner's failure to apply for permission to develop a 74 lot subdivision. Petitioner had based the value of the inverse condemnation claim upon development of the site as a 74 lot subdivision. The Supreme Court did not find this particularly relevant as the council had clearly determined that the wetlands could not be filled. Since the wetlands could not be filled, the Supreme Court seemed to think it was obvious that 74 single family residences could not be built in the wetlands.

The Court then turned to the question of whether the fact that the property was not owned by Petitioner at the time the council promulgated its wetlands regulation, barred the takings claim. The Court summarized the argument by saying that post-enactment purchasers cannot challenge a regulation of the takings clause "because property rights are created by the State. . . so. . . the State can shape and define property rights and reasonable investment backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation." [citation omitted]. While this was clearly the Court's interpretation of the argument, the Court did not endorse this reasoning. Waxing philosophic, Justice Kennedy said "The State may not put so potent a Hobbesian stick into the Lockean bundle."

Noting that the right to improve property is subject to the reasonable exercise of state authority, Justice Kennedy reiterated that the takings clause of the Constitution allows a landowner to assert that a particular exercise of the state's regulatory power is so unreasonable or erroneous as to compel compensation. Prospective enactments, such as new zoning, can limit the value of land without effecting a taking, because it can be understood by all. Other enactments are unreasonable and "do not become less so through passage of time or title." Justice Kennedy went on to say "were we to accept the State's rule, the post-enactment transfer of title would absolve the state of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A state would be allowed, in effect, to put an expiration date on the takings clause." Finally, Justice Kennedy said "future generations, too, have a right to challenge unreasonable limitations on the use and value of land." The Court concluded that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the state's law by mere virtue of the passage of title."

Turning to the question of whether the state supreme court's ruling on the merits of the takings claim, holding that all economically beneficial use was not deprived because the uplands portion of the property could be improved, the Supreme Court agreed that was the case. The Supreme Court went on to say that the state may not evade the duty to compensate on the premise that the landowner is left with a token interest. Although development of the site as a subdivision would have resulted in a value of over \$3,000,000, and the upland portion of the property had a value of \$200,000, the Supreme Court concluded that this was not a situation where the landowner had only a token interest. The Court stated that a regulation permitting a landowner to build a substantial residence on an 18 acre parcel does not leave the property economically idle. The Court specifically declined to address the question of "what is the proper denominator in the takings fraction." On the other hand, since the claims and the *Penn Central* analysis were not examined by the state supreme court, the United States Supreme Court remanded.

The implications of this decision are two-fold. Perhaps the strongest statement is the clear statement by the Court that mere passage of time or title does not preclude an inverse condemnation claim. The Michigan Supreme Court has recited, and apparently approved the "reasonable investment-backed expectations" standard. See *K&K Construction, Inc v DNR*, 456 Mich 570; 575 NW2d 531 (1998); *Bevan v*

Brandon Twp, 438 Mich 385; 475 NW2d 37 (1991). No longer, however, should a property owner be subject to the argument that they cannot pursue a claim because they purchased or took title with notice of some statutory limitation on the use of the property.

The issue regarding the finality of the regulatory agencies decision is not quite as clear since it could be argued that the Supreme Court in this case was relying on the specific findings of the Rhode Island Coastal Resources Management Council. The doctrine of finality has been recognized by the Michigan courts in *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989) and *Paragon Properties Co v City of Novi*, 452 Mich 568; 550 NW2d 772 (1996). In cases such as *Carabell v DNR*, 191 Mich App 610; 478 NW2d 675 (1991); *Oceco Land Co v DNR*, 216 Mich App 310; 548 NW2d 702 (1996),³ and *Bond v DNR*, 183 Mich App 225; 454 NW2d 395 (1989), the Court of Appeals said that despite denial of a permit application, the property owners were free to submit further applications for development that might be approved. The language of these cases suggest that as long as regulatory bodies do not make the kinds of findings that the Rhode Island council made in *Palazzolo*, takings claims might be avoided. On the other hand, in *Palazzolo*, the Petitioner only made two propositions to the council. The Petitioner proposed first to fill the entire parcel and then to fill 11 of the 18 wetland acres for a beach club. The Court seemed to find great significance that even the second proposal was found to be not a compelling public purpose. This suggests that it may be viable to propose the least extreme use and if that were denied by the regulatory agency, the *Palazzolo* case would allow the argument that the regulatory agency had spoken with finality and that development or use had been precluded.

In conclusion, at least some of the frustration property owners and their counsel, have dealt with in trying to establish inverse condemnation cases against the state in wetlands cases should be reduced. Practitioners should carefully scrutinize the findings of the relevant regulatory agency to determine whether findings which preclude development have been made. At the very least, the mere fact that property was acquired after 1980 no longer precludes the issuance of wetlands permits pursuant to Part 303 of NREPA, MCL 324.30301 et seq.; MSA 13A.30301 et seq.

The United States Supreme Court will next consider whether a temporary moratorium on development constitutes inverse condemnation under the Fifth Amendment. The Court granted certiorari in a Ninth Circuit case from Nevada.

In that case, a state regional agency had implemented an ordinance prohibiting development in environmentally sensitive areas near Lake Tahoe while a regional development plan was written and adopted. The Ninth Circuit held that because of the temporary nature of the prohibition, the plaintiff's property was not rendered worthless. It is expected that the Supreme Court will rule on the case next term. **Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency**, 216 F3d 764 (CA 9, 2000), cert granted June 29, 2001.

Afterword

In the relatively brief time since **Palazzolo** was released, it has already earned a "Yellow Flag" from West Publishing. The Federal Circuit of the Circuit Court of Appeals has cited **Palazzolo** twice this fall. In **Cienega Gardens v United States**, 265 F3d 1237 (CA Fed, 2001), **Palazzolo** was cited for the proposition that "A 'regulatory taking' may occur when government action, although not encroaching upon or occupying private property, still affects and limits its use to such an extent that a taking occurs." *Id.* at 1244. The Federal Circuit Court of Appeals went on to say that **Palazzolo** had reiterated "the 'important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.' **Palazzolo**, 121 S Ct at 2459 (emphasis added)," and noted that **Palazzolo** had also reaffirmed the futility exception to the final decision rule. In **Cienega Gardens**, the Court of Appeals concluded that the claimants had presented an even more compelling case of futility than in **Palazzolo**. Why this should have raised the yellow caution flag to West's editors is not immediately apparent.

In **Rith Energy, Inc v United States**, 270 F3d 1347 (CA Fed, 2001), appellant Rith Energy filed a petition for rehearing based on **Palazzolo**. The Court of Appeals reviewed **Palazzolo** and denied relief stating, "As we read **Palazzolo**, it is not inconsistent with either the judgment or the analysis in our opinion." *Id.* at 1348. The first issue on rehearing was whether Rith had suffered a categorical taking. The Court of Appeals concluded that **Palazzolo** was consistent with other Supreme Court decisions and the earlier decision of the Court of Appeals, in holding that since not all value was lost there was not a total or categorical taking. *Id.* at 1349. The Federal Circuit then turned to the question of whether it was appropriate for the Court to consider the Surface Mining Control and Reclamation Act of 1977. The Circuit Court said, "Neither **Palazzolo** nor **Nollan** holds that investment-backed expectations are irrelevant in analyzing a regulatory

taking." Noting that **Palazzolo** had explicitly rejected a "blanket rule" that purchasers with notice could not seek compensation, the Circuit Court said that the Supreme Court had not held that the reasonable expectations of persons in a highly regulated industry are irrelevant to determining whether particular regulatory action constitutes a taking, quoting Justice O'Connor's concurrence. The Circuit Court reviewed **Nollan v California Coastal Commission**, 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987), and concluded, "In its starkest form, the argument that the Supreme Court rejected in **Nollan** and **Palazzolo** suggests that the government may take any private property without compensation as long as it announces far enough in advance its intention to do so. To reject such a "blanket rule," as the **Palazzolo** Court termed it, falls far short of suggesting that reasonable investment-backed expectations no longer have a role to play in regulatory takings analysis." *Id.* at 1351.

¹Mr. Cooley is an associate with D. Haywood & Associates, P.C., in Lansing, where he specializes in environmental law and policy, and civil litigation.

²**Lucas v South Carolina Coastal Council**, 505 US 1003; 112 S Ct 2886; 120 L Ed 2d 798 (1992).

³The Court of Appeals in **Oceco Land Co**, insisted that the issue was whether the plaintiff had met its burden of proof, not whether the claim was ripe. However, the decision was that the plaintiff had not met its burden of proof because it had failed to show that other potential uses of the property were not feasible. This appears to be a distinction without a difference.

THE PERSISTENCE OF LOCAL WETLAND ORDINANCES IN MICHIGAN

by

Dave Dempsey¹ and Michael D. Kaplowitz²

BACKGROUND

The 1979 enactment of the Goemaere-Anderson Wetland Protection Act (Wetland Protection Act)³ marked a significant turning point in the history of Michigan's wetland resources. Like residents in other Great Lakes states, Michigan's early settlers regarded wetlands as posing significant public health risks. For example, an 1879 health report stated that one-seventh of the state's surface area lay in "wet marsh or boggy saturated land below the 45th parallel, where malarial diseases menaced public health."⁴ By 1956, development activities, drainage laws, and the filling of wetlands resulted in 26,261 miles of legally established drains in Michigan that had siphoned water from more than 17,000,000 acres of land.⁵

Citizen attitudes toward wetlands slowly changed. Alarming declines in waterfowl populations resulted in federal efforts to purchase and protect wetlands as wildlife refuges in the early 1900s. By the 1960s, water quality, flood control, and recreational benefits of wetlands had become more widely recognized.⁶ In Michigan, legislative efforts began in the 1970s to change the more than 140 years of wetland drainage policy. While several wetland protection bills were drafted in the early part of the 1970s, they met with overwhelming opposition from several powerful lobbies, including the Michigan Association of Homebuilders.⁷

The enactment of Michigan's Wetlands Protection Act in 1979 resulted from many compromises designed to soften resistance to the bill from powerful lobbies.⁸ The enacted legislation, however, was sufficiently protective for the U.S. Environmental Protection Agency to authorize Michigan to administer much of the federal wetland protection program.⁹ Today, Michigan and New Jersey are the only two states in the country with such delegated authority.¹⁰

SMALL WETLANDS & THEIR PROTECTION

Michigan's 1979 Wetland Protection Act did not cover all of the state's wetlands.¹¹ The most significant exception to statewide wetland protection is that wetlands less than five acres in size that are not adjacent (or contiguous, in the state's terminology) to a lake or stream are not protected. The 1979 act authorized the Michigan Department of Natural Resources (now, the Department of Environmental

Quality [DEQ]) to protect non-contiguous wetlands less than 5 acres in size when there was an agency determination that protection of the area was essential to the preservation of the state's natural resources from pollution, impairment, or destruction. To date, the DEQ has only designated a handful of non-contiguous wetlands as "essential to the preservation of the natural resources of the state." By one estimate, the 1979 legislation left between 250,000 and 500,000 acres of Michigan wetlands unprotected by statute.¹²

The 1979 Wetland Protection Act, however, did leave open the possibility for local communities to regulate wetlands less than 5 acres in size. The statute specifically authorized the enactment of local ordinances that could govern development in areas with these smaller, non-contiguous wetlands. Supporters of this provision of the legislation hoped that it would enable and encourage townships and cities to protect the state's smaller, non-contiguous wetlands.¹³ In fact, after the 1979 Wetlands Protection Act was passed, communities began to enact wetland ordinances.

In response to the passage and implementation of a number of local wetland ordinances, the Michigan Association of Realtors and the Michigan Association of Homebuilders asked state legislators to pre-empt local wetland protection ordinance authority in 1991.¹⁴ After about one year of debate and negotiation, the Michigan Legislature enacted and Governor John Engler signed legislation narrowing, but not pre-empting, local wetland protection authority.

Among the many changes that resulted from the 1992 legislation was an amendment to the Act's language authorizing local wetland protection ordinances. The new language prohibits local governments from enacting ordinances that are "more restrictive" than state law. For example, local ordinances may no longer regulate activities that are not regulated by the state statute. Such activities include the cutting of vegetation. The new legislation also imposed the requirement that local ordinances regulating development in wetlands less than two acres in size require a determination that the particular wetland is essential to the preservation of natural resources and that such wetland fulfills

at least one of 10 enumerated bio-physical functions. There are other changes and prohibitions in local communities' ability to regulate wetlands. Suffice to say, the 1992 changes in Michigan's Wetland Protection Act inspired dark predictions from environmental organizations and others that the new law would discourage local units of government from protecting wetlands.

Assessing Impact on Local Ordinances

The implementation of local wetland ordinances by some Michigan communities may have caused some interested parties to seek the 1992 amendments to restrict local wetland regulatory authority. There has not been a systematic analysis, however, reported on local wetland protection activity before or after the 1991 amendments. While detailed analysis of all aspects of local wetland protection ordinances in Michigan is beyond its scope, this article does report the results of a first look at the extent of local wetland protection activity in Michigan before and after the 1992 changes. Specifically, this article examines the notion that the 1992 amendments to Michigan's Wetland Protection Act would discourage the passage and implementation of local wetland protection ordinances.

To explore whether the 1992 amendments to Michigan's Wetland Protection Act resulted in a diminution of local wetland protection activity, data on the range, type, and timing of local wetland protection ordinances in Michigan are needed. While there is an effort underway to design and implement a statewide survey to collect primary data on specific local wetland ordinances, there already exists enough data on local wetland protection ordinances in Michigan to address the question at hand.¹⁵ Information on municipalities with local wetland ordinances in place before 1992 is available in several publications and was obtained by way of key personal interviews.¹⁶ Likewise, information on local wetland protection ordinances after the 1992 amendments is available in published data.¹⁷ This data, when coupled with information collected from municipal officials and wetland advocates across the state, allows for some preliminary analysis of the impacts, if any, of the 1992 legislation on local wetland ordinances in Michigan. The results shed light on the changes in local wetland protection in Michigan.

Results

Table 1 illustrates the list of communities that adopted local wetland protection ordinances before 1992 and the list of communities with such ordinances after the 1992 amendments. Between the 1970s, when the East Michigan

Environmental Action Council [EMEAC] and other organizations began to work with local governments on wetlands ordinances, and 1991, forty local units of government adopted some form of wetland ordinance, most of them concentrating on regulation of development in non-contiguous wetlands. It appears that townships in southeast Michigan, particularly in Oakland County, were the most likely to adopt local wetland protection ordinances. See Table 1.

Table 1 also lists the 39 municipalities that have enacted either new or revised wetland protection ordinances as of May 2000.¹⁸ In addition, between five and ten other local governments are considering the adoption of new wetland protection ordinances.¹⁹

As Table 2 highlights, the aggregate change in the number of communities with local wetland ordinances changed from 40 to 39 after the 1992 changes to the state law. These numbers, however, by themselves do not tell the whole story. Eleven of the communities with pre-1992 wetland ordinances did not revise and adopt local wetland protection laws after the passage of Senate Bill 522. Ten communities that did not have local wetland ordinances under the prior state legislative framework did adopt local wetland protection ordinances after the 1992 changes.

Preliminary Analysis

The data do not support the notion that the 1992 changes in the state's wetland protection act would stop or seriously inhibit local wetland protection ordinances. While the nature and extent of local wetland protection ordinances may well have changed, 29 communities with local wetland protection before the 1992 changes and 10 "new" communities went through the necessary steps in order to adopt local wetland protection ordinances after the 1992 changes. Therefore, it cannot be said that the 1992 changes prevented communities from adopting local protection of wetlands. This data, however, when coupled with information from key people across the state sheds light on the nature and extent of today's local wetland protection activity in the state.

Even after the 1992 changes, Oakland County communities continue to be the most active in their local wetland protection activities. Communities in Oakland County represent just under half of the state's local wetland protection ordinances (19 of 40 before 1992; 17 of 39 after 1992). Endowed with hundreds of small lakes and thousands of acres of wetlands, Oakland County continues to be one of the state's fastest growing, its population increasing by 10

percent between 1990 and 2000.²⁰ Concern about the impact of growth on wetlands is the primary impulse behind the great number of ordinances in Oakland County.²¹

Assessments of the overall impact of the 1992 amendments on local wetland initiatives have not been unanimous. Wil Cwikiel, policy specialist at the Tip of the Mitt Watershed Council, has said the 1992 changes have not diminished local wetland initiatives. According to Cwikiel:

The 1992 amendments limiting local ordinances to only those activities regulated by the state have served to limit the activities that locals should be allowed to regulate. However, there are almost as many local ordinances now as there were then, and the number should grow in the next few years...for the most part, the 1992 amendments didn't "scare" local governments from doing wetland regulation.²²

In contrast, Carla Clos, a resident of Ingham County's Meridian Township who was the leading champion of the township's 1991 ordinance, sees:

[T]he amendments to the state act ha[ving] the effect in some places of discouraging local units from regulating these resources. The redrafting of these ordinances alone was a costly endeavor. And while Meridian Township already had a wetland inventory, some local units believed that the cost was too high to provide for a new inventory.²³

Clos also reported that several local units of government revised ordinances after the 1992 amendments to delete references to protection of wetlands less than 2 acres in size because of the "burdensome-appearing procedures" for such areas. She added that because the 1992 legislative changes appeared designed to bring local ordinances more closely in line with state law, some communities lost enthusiasm for enacting the ordinances, because they had earlier hoped to close the loopholes in the state law.

Despite perceptions of prohibitive costs and potential litigation, local governments did work to enact new ordinances in the 1990s. For example, officials of Superior Township in the fast-growing eastern region of Washtenaw County enacted a wetland ordinance in 1996.²⁴ It seems that local sentiment in favor of preserving the area's open space was enough to overcome any concerns about the role and need for local wetland ordinances. Michael Boyce,

supervisor of Convis Township in Calhoun County, proposed a wetland ordinance in his community in 2000. Boyce reported that, As a township official, I'm deeply concerned about two inter-related problems whose combination is devastating to rural communities: sprawl and loss of critical habitat. It's alarming to see how little we as a nation seem to have learned from our environmental oversight, neglect, and mistakes of the past. By working locally to develop strong ordinances to protect critical habitats such as wetlands and grasslands, local leaders can help thwart sprawl and encourage diversity and beauty for the benefit of current and future generations.²⁵

One reason the 1992 amendments may not have inhibited local wetland ordinances as much as predicted is that the legislation enacted was far different from the simple preemption of local authority originally proposed. By setting forth clear guidelines for local regulation of wetlands, the final version of the wetland protection legislation may have clarified the roles and responsibilities associated with local wetland protection thereby increasing the comfort of some local officials to enact such ordinances. The 1992 amendments may have resulted in the perception that local wetland ordinances would be easier to defend. While the 1992 amendments to Michigan's Wetland Protection Act may have placed obstacles in the way of local units of government seeking to protect wetlands, the amendments have not stopped communities from enacting local wetland protection ordinances.

Current State of Affairs

While there seems to be a perception by some that the Department of Environmental Quality [DEQ] is not adequately conserving small wetland resources, some communities report a great deal of help from the DEQ in establishing local wetland ordinances. DEQ staff try to assist local governments that express an interest in wetland ordinances by providing available information on wetland preservation.²⁶ In addition, the DEQ continues to fund and publish guidebooks assisting local units of government in developing wetland protection ordinances.²⁷

In some instances, the decision of state wetland protection authorities not to protect resources perceived as highly valuable by local communities has galvanized local units of government into taking action. For example, when the DEQ issued a permit to build a house on what was claimed to be "an undisputable wetland" in Antrim County, local officials were powerless to intervene.²⁸ In response, Antrim County began work on an ordinance to protect the

estimated 28,000 acres of wetlands within its borders.²⁹ The proposed ordinance was offered for public comment in 2001, attracting both praise and criticism.

There may be many other local initiatives to protect small wetlands. In 1996, the Michigan Natural Features Inventory, then an arm of the Nature Conservancy but housed within the Michigan Department of Natural Resources, conducted a preliminary analysis that identified 353 small wetlands not adjacent to lakes or streams that deserved protection because of their biological significance.³⁰ To date, the DEQ has not declared any of these 353 areas “essential for the preservation of natural resources” under state law, and thus protected by state permit requirements. It is likely that some of the 353 wetlands not designated by the DEQ as critical have already been lost.³¹ Local communities, however, are attempting to close the gap. For example, the wetland protection ordinance enacted by Washtenaw County’s Superior Township states that the township finds its small wetlands to be “indispensable and fragile resources.”³² So it appears that local units of government are gradually stepping in to fill the void created by gaps in federal and state wetlands law.

Conclusion

Changes to state law that aimed to limit local wetland protection authority in 1992 appear to have only mildly and temporarily thwarted local wetland initiatives. Growing public concern over loss of wetlands and other open space in the face of population growth, a public perception of reluctance by the Michigan DEQ to protect wetlands, and increasing familiarity and comfort among local governments with the 1992 amendments themselves seem to have gradually increased interest in local regulation of wetlands.

Although not as expansive as the general grant of authority previously provided by the 1979 Wetland Protection Act, the current statute appears to provide sufficient authority for local units of government to conserve valuable wetland resources. Absent major changes in the law in the future, it is likely that the number of local units of government with wetlands ordinances will continue to increase, soon exceeding the number with such ordinances prior to the 1992 amendments.

Table 1: Municipalities with Local Wetland Ordinances

COUNTY	ORDINANCES BEFORE 1992	ORDINANCES AFTER 1992
Allegan	Clyde Township Saugatuck Township	Clyde Township
Antrim	Forest Home Township	Forest Home Township
Charlevoix	Bay Township Hayes Township	Hayes Township
Cheboygan	Burt Township	
Genesee	Argentine Township City of Fenton Mundy Township	Argentine Township City of Fenton Fenton Township
Grand Traverse	Whitewater Township	Whitewater Township
Ingham	Meridian Township	Meridian Township
Kalamazoo	Charleston Township	
Lapeer		Elba Township
Leelanau		Village of Empire
Livingston	Brighton Township Green Oak Township Hamburg Township Village of Pinckney	Brighton Township Genoa Township Hamburg Township Village of Pinckney
Mackinac		Clark Township
Manistee		Manistee Township
Monroe	LaSalle Township	LaSalle Township

COUNTY	ORDINANCES BEFORE 1992	ORDINANCES AFTER 1992
Oakland	Addison Township	Addison Township
	City of Auburn Hills	City of Auburn Hills
	Bloomfield Township	Bloomfield Township
	Brandon Township	
	Village of Clarkston	
		Village of Franklin
	Independence Township	Independence Township
	City of Lake Angelus	
	Milford Township	Milford Township
	City of Novi	City of Novi
	Oakland Township	Oakland Charter Township
	Village of Orchard Lake	Village of Orchard Lake
	Orion Township	Orion Charter Township
	Village of Oxford	Oxford Charter Township
	City of Rochester Hills	City of Rochester Hills
	City of Southfield	City of Southfield
	Waterford Township	Waterford Township
	West Bloomfield Township	West Bloomfield Township
	White Lake Township	White Lake Township
	Washtenaw	City of Wixom
City of Ann Arbor		City of Ann Arbor
Augusta Township		
		Township of Ann Arbor
		Salem Township
Wayne	Brownstown Township	Superior Township
	Grosse Ile Township	
		Grosse Ile Township

Sources: Cwikel 1992 (as modified by MDEQ 2001); MDEQ 2000

Table 2: Changes in Local Wetland Ordinances in Michigan

Number of local wetland ordinances before 1992	40
Number of local wetland ordinances after 1992	39
Number of local wetland ordinances dropped after 1992	11
Number of local wetland ordinances adopted after 1992	10

ENDNOTES

¹ Policy Advisor, Michigan Environmental Council. M.A., Michigan State University.

² Assistant Professor, Dept. of Resource Development, Michigan State University. Ph.D., Michigan State University; J.D., Duke University; M.A., Johns Hopkins; B.S., Union College (NY). Contact Information: Michael D. Kaplowitz, J.D., Ph.D., 311a Natural Resources Michigan State University, East Lansing, MI 48823, 517-355-0101, e-mail: kaplowit@msu.edu

³ MCL 281.701 et seq., repealed by Pub Acts 1995, No. 59, recodified by Natural Resources and Environmental Protection Act MCL 324.30301 et seq.

⁴ Henry F. Lyster, *The Reclaiming of Drowned Lands*, Seventh Annual Report of the Secretary of the State Board of Health for the Fiscal Year Ending Sept. 30, 1879 (1880).

⁵ Patrick Comer, Michigan Department of Natural Resources, *Michigan Natural Features Inventory, Wetland Trends in Michigan since 1800: A Preliminary Assessment* (1996).

⁶ Ann Vileisis, *Discovering the Unknown Landscape: A History of America's Wetlands* (1997).

⁷ Dave Dempsey, *Ruin & Recovery: Michigan's Rise as a Conservation Leader* (2001).

⁸ Personal communication with Bob Garner, former aide to Representative Thomas Anderson, chair of the House Conservation and Recreation Committee (October 1999).

⁹ Michigan assumed program responsibility as of October 16, 1984. See 49 Fed Reg 38947 (Oct 2, 1984)

¹⁰ New Jersey's program became effective on March 2, 1994. See 59 Fed Reg 9933 (Mar 2, 1994)

¹¹ Michigan's Wetlands Protection Act, 1994 PA 451, MCL 324.30301 et seq., as amended, requires permits for certain activities in regulated wetlands. Specifically, a permit is required from the Michigan Department of Environmental Quality (DEQ) to dredge or remove soil or minerals from a wetland; to deposit or place fill material in a wetland; to construct, operate, or maintain a use or development in a wetland; or to drain surface water from a wetland. MCL 324.30301 defines regulated wetlands as those contiguous to the Great Lakes, Lake St. Clair, or any inland lake, pond, river, or stream; and as those noncontiguous wetlands larger than five acres, in counties with a population of 100,000 or more.

¹² Clean Water Fund, Clean Water Action, *Resource At Risk: Michigan's Wetlands Under Attack* (1992).

¹³ Personal communication with John Sobetzer, former Director of the East Michigan Environmental Action Council (Oct 17, 1999).

¹⁴ Eugene Jaworski, *Local Regulation of Wetlands: Amendments to Michigan's Wetlands Protection Act*, 6 Planning and Zoning News 1993.

¹⁵ The authors are in the early stages of implementing a statewide survey of communities with wetland ordinances.

¹⁶ See for example, Wil Cwikiel, *Michigan Wetlands—Yours to Protect: A Citizens' Guide to Local Involvement in Wetland Protection* (1992). Also personal communication, Amy Lounds, Land and Water Management Division, Michigan Department of Environmental Quality (Oct 1, 2001).

¹⁷ See for example Michigan Department of Environmental Quality, *Communities With Local Wetland Ordinances* (2000) at http://www.deq.state.mi.us/lwm/grt_lakes/wetlands/localgov.htm.

¹⁸ This is the date of the latest Michigan Department of Environmental Quality report on municipalities that have given notice to the state of local wetland protection ordinances. While there may be several more or fewer municipalities with such ordinances at the time of publication, this is the best available data and is sufficient for the purpose at hand.

¹⁹ Personal communication, Amy Lounds, Land and Water Management Division, Michigan Department of Environmental Quality (March 21, 2001). Among those considering enacting ordinances are the City of East Lansing and Antrim County. If the latter takes effect, it will be the first countywide wetland ordinance in the state.

²⁰ *Divvying up Oakland: Political districts targeted for redistricting*, Detroit News, April 15, 2001.

²¹ Personal communication, Mark Wyckoff, President, Planning and Zoning Center, Inc. (Feb 12, 2001); Personal communication, Elizabeth Harris, Executive Director, East Michigan Environmental Action Council (April 2, 2001).

²² Personal communication, Wil Cwikiel, policy specialist, Tip of the Mitt Watershed Council (March 19, 2001).

²³ Personal communication, Carla Clos (March 20, 2001).

²⁴ Personal communication, Elizabeth Harris, Executive Director, East Michigan Environmental Action Council (March 19, 2001).

²⁵ Personal communication, Michael Boyce, Supervisor, Convis Township (March 20, 2001).

²⁶ Personal communication, Amy Lounds, Land and Water Management Division, Michigan Department of Environmental Quality (April 30, 2001).

²⁷ See for example, Tip of the Mitt Watershed Council, *Preserving Michigan's Wetlands: Options for Local Governments* (1997). This publication was funded by the U.S. Environmental Protection Agency and the DEQ. It is available on the DEQ's website at http://www.deq.state.mi.us/lwm/grt_lakes/wetlands/local.htm.

²⁸ See Michigan Environmental Council, *Continuing Dereliction of Duty*, (2001).

²⁹ Michigan Land Use Institute, *Great Lakes Bulletin* (March 2001).

³⁰ William MacKinnon, *The Critical Non-Contiguous Wetlands of Michigan*. Michigan Natural Features Inventory report for Land and Water Management, Michigan Department of Environmental Quality, State Wetland Conservation Plan, Sept 30, 1996.

³¹ Personal communication, Wil Cwikiel, policy specialist, Tip of the Mitt Watershed Council (March 19, 2001).

³² Charter Township of Superior, *Wetlands and Watercourse Protection and Restoration Ordinance* (1996).

COMMITTEE REPORTS

PROGRAM COMMITTEE

The Program Committee held a meeting on Wednesday, October 17, 2001. Attendees included John Byl, Scott Hubbard, James O'Brien, Arthur Siegal, John Tatum and Susan Topp.

1. Committee Liaison Reports.

No reports. John Byl agreed to send a letter to the chairs of the subject matter committees, reminding them of the liaisons from the Program Committee and the ability of the Program Committee to facilitate and help organize programs for the subject matter committees.

2. Planning Programs for 2001 and 2002.

a. **Proposed Joint Program with Real Estate Section.** Please refer to the minutes from the September meeting regarding possible topics. Susan Topp will follow up with Bob Schroder and Pat Paruch regarding the program. Susan has made initial contacts with some ski resorts in northern Michigan regarding cost and availability.

b. Other Possible Programs.

i. We decided it would be a good idea to hold an MDEQ roundtable on the transfer of the Wayne County air program to the AQD of the MDEQ. Arthur Siegal agreed to take the lead on this roundtable. He will contact Bill Burton regarding speakers and he will identify possible locations, such as the Detroit Chamber. We concluded that this would be a good lunch program sometime in December or January at a location in Wayne County.

ii. New developments on air issues. We might consider an air program on the topics identified in the minutes from the September meeting.

iii. We also discussed the possibility of a program on water topics, such as the metal products and machinery (MPM) rules. Scott Hubbard is following up with Ken Gold on possible topics for such a program.

3. Next Meeting.

The next meeting will be held on Wednesday, November 14, 2001 at 5:30 p.m. The call in number is 312-461-9197, code # 298963.

The Program Committee held a meeting on Wednesday, November 14, 2001. Attendees included John Byl, Matt for Charlie Denton, Beth Gotthelf, Joe Quandt, Bob Schroeder, John Tatum and Susan Topp.

1. Committee Liaison Reports.

No reports. A sample was provided of a letter being sent today by John Byl to the chairs of the subject matter committees to remind them of the assistance they can receive from the Program Committee.

2. Planning Programs for 2001 and 2002.

a. **MDEQ Roundtable in Detroit concerning Transfer of Wayne County Air Program to the AQD.** This topic is being covered by two programs in the near future, one sponsored by MMA and the other by the East Michigan Chapter of A&WMA. Kim Burgess, Kyle Jones and Rhonda Ross will be meeting this Friday and discussing whether it makes sense for the Environmental Section to plan a lunch program on this topic in view of the coverage of this topic at other programs.

b. **Proposed Joint Program with the Real Estate Section.** We discussed possible locations based on all the information received from Susan Topp. The list was narrowed down to the following three locations: Boyne Mountain, Otsego Club, and Treetops. Sue will obtain some additional follow up information from those three. We tentatively set a date of Friday, February 15 for this program. In addition to getting additional information from the three resort locations, Sue will follow up with Pat Paruch of the Real Estate Section regarding its cooperation on this joint program.

Possible topics include mold cases (this was discussed at some length during this meeting), the new Part 201 Rules, the BEA and due care process, negotiating a transaction involving a contaminated property, brownfield financial incentives, transfer of RCRA sites (including the recent use of PPAs for such transfers), and other possible topics. This will likely be a full day seminar.

3. Next Meeting.

The next meeting will be held on Wednesday, December 12, 2001 at 5:30 p.m. The call in number is 312-461-9197, code #298963.

MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from June 1, 2001 through August 31, 2001.

United States v Kentucky, 252 F3d 816, (CA 6, 2001)

In 1996, the United States Department of Energy (DOE) applied for a permit to run a landfill containing radioactive materials in Paducah, Kentucky. The Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet), the state regulatory agency for the disposal of solid waste, issued the permit, but included some conditions relating to the disposal of radioactive materials. The DOE appealed these conditions and filed suit in federal district court seeking declaratory and injunctive relief from them. The Cabinet filed a motion to dismiss the DOE's action. In denying the motion, the district court stated it was not required to decline jurisdiction because the DOE had presented a conclusive federal preemption claim. The Cabinet appealed.

The Sixth Circuit affirmed, holding that the permit conditions were preempted by the Atomic Energy Act (AEA), which controls the disposal of radioactive waste. The court stated that the DOE was not required to identify specific conflicts between the conditions on its permit and the AEA to establish its preemption claim. Further, the court stated that the DOE was exempted from these conditions based on federal sovereign immunity. Lastly, the court rejected the Cabinet's abstention argument because the DOE's claim was based on federal, not state, law.

RCO Engineering Inc v ACR Industries Inc, unpublished opinion per curiam of the Court of Appeals decided June 20, 2001, Docket No 201436 (2001 WL 705856)

In 1968, defendant Blanchard purchased vacant property in Roseville, Michigan. Between 1968 and 1988, ACR Industries (ACR) and its predecessor dumped petroleum products into a three-thousand-gallon underground storage tank. A founder of plaintiff corporation purchased the property in 1987 and discovered a release of hazardous substances from the tank in 1991. Plaintiff conducted a Type A cleanup of the site. Plaintiff brought suit against ACR alleging that ACR was liable for \$1.5 million in cleanup costs. A jury found defendant liable, but further found that plaintiff, who had already been reimbursed \$990,000 by the

State of Michigan, had not established that cleanup costs in excess of \$990,000 were necessary. Consequently, plaintiff's claim was denied.

On remand from the Michigan Supreme Court, the Court of Appeals considered whether the trial court erred in denying plaintiff's motion to exclude defendant's evidence regarding the cost-effectiveness of a Type B cleanup. The court held that the trial court did not err in allowing evidence of the cost effectiveness of a Type B cleanup to be introduced. The court reasoned that if either Type A or Type B cleanup provided adequate safety for the public, then the cost effectiveness of each was appropriate to consider in deciding which type to perform. In fact, in dicta, the court stated that even if the DNR had approved a Type A cleanup, it would still be permissible for the court to allow evidence in regarding the cost effectiveness of the choice.

McKusick v Travelers Indemnity, unpublished opinion per curiam of the Court of Appeals decided June 8, 2001, Docket No 221171 (2001 WL 637676)

Plaintiffs McKusick and Tietz appealed from an order granting summary disposition in a garnishment action. Plaintiffs were injured in the course of their employment when a hose delivery system carrying highly toxic material failed. Plaintiffs filed a product liability action against the manufacturer of the hose delivery system (Hi-Tech), whose insurance carrier, Travelers, denied coverage based on a pollution exclusion endorsement in the insurance contract.

Plaintiffs and Hi-Tech entered into a settlement agreement that included an assignment of Hi-Tech's indemnification rights against Travelers in a pending declaratory action to plaintiffs. Plaintiffs then filed a garnishment action against Travelers. The trial court granted Travelers' motion for summary disposition and held that plaintiffs were precluded from coverage because of the pollution exclusion endorsement.

On appeal, plaintiffs claimed that the pollution exclusion endorsement did not apply because the exclusion only applied to claims arising from traditional environmental pollution. The court upheld the trial court's decision and stated that the pollution exclusion applied because the provision was broad and applied when injury from a pollutant arose from the insured's work or products. The court stated that the contract language was unambiguous and did not limit the

exclusion to an environmental term of art related to the discharge, dispersal, release, or escape of pollutants. Further, the court stated that the plaintiffs were not harmed in the ordinary course of their employment, but rather by exposure after Hi-Tech's hose delivery system failed. Thus, plaintiffs' claim was barred because their injuries had more than a remote connection to Hi-Tech's defective product.

Huggett v Dept of Natural Resources, 464 Mich 711; 629 NW2d 915 (2001)

Plaintiff acquired an existing peat moss farm, which was mostly wetlands, and decided to convert the land into a cranberry farm. Plaintiff contacted the Department of Natural Resources (DNR), to see if a wetland permit was required to make the necessary changes. The DNR stated that a permit was required, and plaintiff applied for it. The DNR then denied the plaintiff's application. Plaintiff requested a contested case hearing, which was delayed. Plaintiff then filed suit, claiming that the intended use not subject to the wetland permit requirements because this farming activity was exempt. The trial court found that this farming activity was exempt from the wetland permit requirements. The Court of Appeals reversed. Plaintiff appealed, and the Michigan Supreme Court granted leave, limited to whether the Court of Appeals correctly applied the farming exemption. The Court also requested that the parties address the applicability of the minor drainage and existing farming exemptions to the permit requirements. The Court held that the farming activities exemption was not broad enough to encompass plaintiff's proposed use because the drainage proposed by the plaintiff was more extensive than was allowed for in the that exemption, which only provided for minor drainage of the property. The Court agreed with the appellate court's decision, but not its reasoning. The Court reasoned that the exemption did not just apply to land that was already in agriculture use and found that there was no need to rely on federal law to reach its decision. The Court also decided that the agricultural production and harvesting exemption did not apply because, although some of plaintiff's proposed activities fell within the exemption, others would not. Finally, the Court found that the existing farming exemption did not apply because the proposed cranberry farm was not an ongoing activity before October 1, 1980. Therefore, plaintiff was required to obtain a wetland permit.

Attorney General v Woodland Oil Co, unpublished opinion per curium of the Court of Appeals decided July, 21, 2001, Docket No. 213707

In this case, the Michigan Supreme Court vacated the appellate court's previous decision in light its holding in *Shields v Shell Oil Co*, 463 Mich 939; 621 NW2d 215 (2000). Previously, the appellate court had found that §20140(2) of the Natural Resources and Environmental Protection Act (NREPA) barred plaintiffs' action. The legislature amended this section, effective June 29, 2000, and the amended version was interpreted by the Court in the *Shields* case. On reconsideration, the court reviewed the previous decision and held that plaintiffs' claim was not barred under the current NREPA §20140(2) because plaintiffs only sought to recover response costs they incurred after July 1, 1991. Therefore, that section was inapplicable. But the court held that plaintiffs' claim was barred under the six-year statute of limitations set forth in the NREPA §20126a(1)(a). The court decided that plaintiffs' assertion that defendants' actions were only an interim response activity was not supported by the definitions set forth in subsection 20101 of the Act. In interpreting this subsection, the court stated that an interim response activity was one that was a quick response to a release. Here, defendants had established a three-phase remedial action plan in 1989, which was designed to completely eliminate the hazard. Plaintiffs did not take over the clean-up until 1991. The court reasoned that because plaintiffs had approved the three-phase remedial action plan in 1989, and plaintiffs did not file suit until 1997, eight years later, the six-year statute of limitations ran, barring plaintiffs' claims.

Travis v Preston, _____ Mich App _____; _____ NW2d _____ (2001); 2001 WL 221756 (Aug 21, 2001)

Plaintiffs sued defendant, a hog farming operation, alleging that the farm violated zoning and Michigan law, constituted a nuisance, and violated township ordinances. Initially, plaintiffs asked for injunctive relief. At trial, the parties stipulated that injunctive relief would not be sought if no additional buildings were constructed on the property. The trial court ordered judgment for plaintiffs, finding that there had been a partial taking, awarding them each \$29,000 in damages. On appeal, the court held that the current version of the Michigan Right to Farm Act ("RTFA"), which prohibits nuisance claims against a farm if it complied with

the generally accepted agricultural management policies, did not apply to this case because it went into effect after the suit was filed. It also held that the prior version of the RTFA did not preempt local zoning ordinances. The court also found that the case must be reversed and remanded to another judge because the trial judge had improperly visited the scene of the controversy on several occasions without the parties' knowledge. The court reasoned that, although a trial court may visit the scene of a controversy, it must be done after the parties are notified and only to clarify the court's understanding of undisputed facts. It cannot be done to independently investigate the facts, which was done in this case. Finally, the court also found that under the Township Rural Zoning Act, the only available remedy is abatement, not money damages. Therefore, on remand, no money damages were to be awarded, even if a nuisance was proven.

Village of Nashville v Michigan Twp Participating Plan, unpublished opinion per curiam of the Court of Appeals, decided Aug 3, 2001, Docket No 224598

Plaintiffs operated a waste products transfer facility that transferred waste oil to an oil recycling plant for processing. In 1993, the operator of the recycling plant sued the Village of Nashville seeking damages for PCB contamination in 200,000 gallons of fuel. Defendant insurer refused to defend, stating that all of the allegations raised claims that were barred under the insurance policy's pollution exclusion exception in the general liability or the errors and omissions provisions. Plaintiffs sued, and the trial court granted plaintiffs' motion for summary disposition and awarded damages in excess of \$400,000. Defendant appealed. On appeal, the court found that defendant insurer did not owe a duty to defend because the pollution exclusion in the general liability provision was an absolute pollution exclusion. The court reasoned that the claim was premised on the contamination of recycled fuel products from PCBs in waste oil, which triggered the pollution exclusion as an actual, alleged, or threatened discharge, dispersal, release or escape of pollutants, regardless of the theory of liability raised. Therefore, defendant did not owe a duty to defend against the claims under either policy. The court also found that plaintiffs had no reasonable expectation of coverage because the provision was unambiguous. Therefore, the court reversed the trial court's ruling and granted defendant's motion for summary disposition.

Bob's Beverage Inc v Acme Inc, ___ F3d ___ (CA 6, Sept 4, 2001); 2001 WL 1011894

Between 1974 and 1980, defendant Acme, Inc. (Acme) operated a business rebuilding automobile air conditioner parts. This involved various chemicals, including chlorinated solvents and caustic soda. Acme released these chemicals, first into the septic system and then directly onto the surface of the property. Acme also stored 55-gallon drums of waste oil and other chemicals on the property. The drums released chemicals into the groundwater. In 1981, Benjamin and Henry Merkel (Merkels) bought the property. Approximately two years later, they replaced the septic system and found evidence that chemicals had been dumped into it, and a complete bypass of the dry wells in the system, which caused waste water to run into an adjoining stream. While replacing the septic system, the Merkels also dug up and disposed of large amounts of soil from the area where the leaking drums were being stored. In 1988, plaintiffs bought the property from the Merkels. Contamination of the groundwater was discovered and the EPA required plaintiffs to conduct an investigation into the cleanup of the property.

Plaintiffs filed suit against both Acme and the Merkels under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), for cleanup costs. The district court found Acme liable for \$411,467, but found that the Merkels were not liable. Plaintiffs appealed the court's holding as to the Merkels. The court affirmed the district court's ruling. First, the court found that the Merkels did not cause the release of chemicals that would have added to plaintiffs' clean up costs. Second, it found that even if they did, there was no evidence to show that under CERCLA there was a disposal because the chemicals in the soil were already there when the septic system was replaced. The district court's decision was affirmed.

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

Lina Farris, Rachel Whiting, Dirk LeGate, Judy Singleton, and Patty Wilson

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL ANNUAL MEETING

Wednesday, September 12, 2001

Present

Charlie Toy, John Tatum, Todd Dickinson, Ken Burgess, John Byl, Mike Robinson, Susan Topp, Grant Trigger, Ken Gold, Paul Bohn, Tom Phillips, Sharon Newlon, Peter Holmes, Bob Schroder, Mike Leffler

Absent

Edward Reilly Wilson III, S. Lee Johnson, Jeff Magid, Michael Ortega, Patricia Paruch, Charles Barbieri, Steven Huff.

Minutes

No minutes were approved at this meeting.

Program

Prior to the meeting Charlie Toy, John Tatum and Paul Bohn had quickly scrambled to schedule an outstanding last minute Annual Program following the cancellation of Robert F. Kennedy, Jr. as the speaker due to the tragedy of September 11, 2001. Art Nash, Deputy Director of the Michigan Department of Environmental Quality, spoke on the state of the environment and MDEQ's goals, objectives and achievements over the past year. He focused upon environmental quality issues, the status of environmental enforcement and compliance inspections, and the status of the Part 201 Rules package. He also addressed increased public involvement (including MDEQ's goal to encourage more public outreach and education efforts by the regulated community, especially on complex permits), the State's assumption of Wayne County's Air Permitting Program, MDEQ's move to Constitutional Hall beginning December 1 and concluding in February 2002, and the non-licensed practice of law by non-lawyers at contested case hearings. Doug Martz, President of the Water Quality Board of Macomb County and the local chapter of Channel Keepers, then spoke about his efforts at organizing the local Channel Keepers chapter, and his involvement in the Twelve Towns combined sewer overflow issues in Macomb County.

Secretary/Treasurer's Report

Tom Wilczak reported that as of the end of July 2001, the Section had earned an additional \$632 in income and had incurred \$3,285.84 in additional expenses, for a net balance of \$23,641.42. Wilczak further noted that there were outstanding expenses for the Annual Meeting that had not yet been recorded by the Section.

Nominating Committee Report

The Nominating Committee of the Section proposed the following slate:

A nominating committee of Mike Leffler, John Tatum and Susan Topp was appointed by Charles Toy, Chair of the Section. The Committee presented its report to the Council at the meeting at Higgins Lake on June 9, 2001. The Committee was directed by the Council to consider the feedback and discussion at the meeting and to then present the slate of nominations to the membership at the annual meeting. The following candidates meet the criteria specified in the bylaws of the Section. They have all served on committees and made significant contributions to section activities. They are geographically diverse, and have diverse areas of practice.

Chairperson Elect - Tom Wilczak

Secretary/Treasurer - Todd Dickinson

Council (6 positions)

Second 3 year term: Grant Trigger, Paul Bohn

First 3 year term: Steve Huff, Joe Quandt, Jeff Magid, Charlie Denton

Following discussion, the proposed slate of candidates was unanimously elected by a voice vote.

Chairperson's Report

Charles Toy briefly noted that he had copies of the Annual and Liaison Reports for review and distribution. He then thanked the Council for the opportunity he had to serve as Chairperson for the last year, paying special tribute to Grant Trigger for his work on the Membership Committee and the 20th Anniversary Celebration, Gene Smary and Jeff Haynes for their work on the desk book and the upcoming December edition of the Bar Journal, Todd Dickinson and John Tatum for all their hard work on behalf of the Technical Committee, Linda Blais and Steve Chester for their work on the Environmental Law Journal, Joe Polito for the State of the Law Update, John Tatum and Tom Wilczak for their assistance as Vice-chair and Secretary/Treasurer, among others, and, most of all, his wife and daughter for their support over the past year.

Charlie Toy then presented a award to John Dunn for his service to the Council, having served two consecutive three year terms. Charlie then presented the gavel to John Tatum and formally introduced him as the new Chairperson of the Council.

Chair-Elect Remarks

John Tatum eloquently presented a plaque to Charles Toy for all of his hard work over many years of service to the Section Council.

The meeting was then adjourned and the Council members reconvened at the University Club for the annual dinner and the 20th Anniversary Celebration.

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