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DIRECTIONAL DRILLING IN MICHIGAN: A STUDY IN CONTRAST

By John E. Walus*

INTRODUCTION

The United States' dependence on petroleum imports has a significant impact on the formulation and execution of its foreign policy. To mitigate this impact, the current Bush administration is developing a national strategy to reduce our dependency on the imports. A major component of that emerging policy is the expansion of exploration efforts and the increase of our domestic production of petroleum. Michigan, as an oil producing state, can play a key role in that effort. The Engler administration's attempts to increase production through directional drilling under the Great Lakes, however, met significant opposition from not only state and national environmental groups, it also faced opposition from local, state, and federal politicians. This article surveys the history of oil production in Michigan, reviews the petroleum industry's and environmentalists' positions on oil production, analyzes the current situation and concludes that the state should authorize limited exploratory directional drilling under the Great Lakes.

National Energy Strategy

The United States must have a reliable, adequate, accessible, and affordable energy supply. It can no longer tolerate its existing dependency on foreign oil. This dependency now amounts to about 60% of U.S. oil demand; a number expected to rise to 64% by 2020.¹ The current, and seemingly never-ending, turmoil in the Middle East causes fluctuations in the economy that are hard to forecast and expensive to deal with. When necessary, the United States deploys its military to ensure adequate fuel supplies are available.

A sound strategy will ensure that we are able to keep our businesses operating, our homes heated and cooled, maintain our freedom of movement with our automobiles and aircraft, and ensure an adequate fuel supply is available to maintain our armed forces. One of the main components of this strategy is to increase domestic production. The strategy must dictate to the energy producers that exploration and production would be accomplished with environmentally safe and proven

technologies and infrastructure for exploration, production, and distribution.

Oil & Gas Production in Michigan

Michigan is a major oil producing state. It generates \$2 billion a year making it the 17th largest of the 33 petroleum producing states.² The first commercial oil field was discovered in Saginaw in 1925. Since then, crude oil and natural gas has been found in 63 counties in the Lower Peninsula. More than 47,300 wells have been drilled since 1925. Approximately 14,000 wells are currently active and 4,000 of these are directionally drilled.³ The first directionally drilled well under the Great Lakes was drilled in 1979.⁴ There have been a total of 13 directionally drilled wells put into production under the Great Lakes since 1979.⁵ Of the 13, seven are currently active; six natural gas wells (five in Manistee County, one in Bay County) and one crude oil well in Manistee County.⁶ Well depths range from a few hundred feet to approximately 12,000 feet. Currently 10 million barrels of oil are produced annually, 1 billion since 1925. Natural gas is currently being produced at a rate of 300 billion Cubic Feet, more than 4 trillion since 1925. It produces about 25% of the natural gas the state uses. Total dollar value for oil and gas production since 1925 is \$17.6 billion.⁷

According to the oil and gas industry, it contributes to Michigan's economy in several other ways. For example, some of the more significant contributions are: provides for more than 10,000 industry related jobs; 14,000 private mineral rights owners are paid more than \$80 million a year; contributed nearly \$1 billion in oil and gas income (royalties, rentals, lease bonuses) to the State of Michigan since 1927; and, the industry has provided more than \$550 million in revenues to the Michigan Natural Resources Trust Fund since 1976. The Fund, supported by oil and gas revenues from State-owned lands and mineral rights, has helped buy and improve more than 135,000 acres of public park and recreation lands, and provided funds more than 1,000 recreation and tourism projects for Michigan's citizens and visitors. Michigan was the

first state in the nation to establish a fund specifically financed by revenues generated from the oil and gas industry.

Petroleum Industry Position on Directional Drilling

The petroleum industry maintains that directional drilling is the safest, most technologically advanced and environmentally friendly method for extracting underground/underwater resources.

Offshore drilling for petroleum located under the Great Lakes is not allowed in Michigan.⁸ The only viable technique available is directional drilling. Directional drilling is a method of drilling at an angle so that the bottom of the hole is several hundred feet offset from the drilling rig's surface location.

Both the state and federal government heavily regulate the industry. For example, Michigan's Department Of Environmental Quality, Supervisor of Wells Instruction 2-97⁹ establishes the criteria for the siting of oil and gas wells directionally drilled to targets beneath the waters of the Great Lakes. Some of its provisions are:

The proposed surface location of the oil or gas well newly constructed surface facilities associated with the well shall not be less than 1,500 feet from the ordinary high water mark of the Great Lakes and connecting waters.

No portion of the proposed new access roads associated with the well shall be less than 1,500 feet from the ordinary high water mark of the Great Lakes and connecting waters, unless there are existing roads within 1,500 feet of the ordinary high water mark from which an access road may be extended.

The purpose of these provisions is to ensure that the wells are positioned so that any oil or gas spill would not reach the Great Lakes or their tributaries.

Hydrocarbon reserves are typically 4,000 to 10,000 feet below the surface. They are trapped by non-permeable rock formations. Directional drilling is the only method available to access the reserves under the Great Lakes. The industry uses advanced technologies that enhance its ability to locate the reserves. This reduces the number of exploratory wells drilled. It also has developed highly sophisticated directional systems that can travel deeper,

and horizontally, to reach potential oil and gas resources more accurately. These techniques reputedly can find a target the size of a walk-in closet located more than 5 miles from the well drill site and a mile or more below the surface. A cement casing is installed in the well once it is complete to further safeguard against the possibility of seepage.

The oil and gas industry contends that the relatively insignificant risks associated with oil or gas spills with directional drilling pales in comparison to the risks currently accepted with the daily transport of petroleum products. There are miles of pipeline on Great Lakes bottomlands that transport oil and natural gas. For example, two 20-inch diameter pipelines carry Canadian crude oil under the Straits of Mackinac. They transport 22,000 barrels of crude oil per hour. Michigan oil wells produce approximately 20,000 barrels of crude oil per day. Another two 24-inch diameter pipes carry between 1 and 2 billion cubic feet of Canadian natural gas per day. Michigan natural gas wells produce approximately 792 million cubic feet per day. In 1999 barges transported nearly 5 million tons of petroleum and petroleum products across the Great Lakes. This includes boat-fueling activities such as offshore refueling and marina-based fill-ups. Tanker trucks carry gasoline and distillates (fuel oil and diesel) across Michigan highways. In a typical year, nearly 5 billion gallons of gasoline and 1.3 billion gallons of distillate are transported. The average tanker holds 12,000 gallons.

The petroleum industry also cites the experience Canada has had with drilling for natural gas in the Great Lakes. Canada has had a thriving and environmentally safe industry since it first drilled offshore wells in Lake Erie in 1913. More than 2,200 wells have been drilled, of which over 550 wells are still in production today. Ontario has abided by Recommendation 13 of the International Joint Commission's 1970 report entitled "Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River."¹⁰ This report recommends, among other things, that drilling for oil and "wet gas" be prohibited in those bodies of water. Canada has since accessed those waters by directional drilling. An average of 20 new wells are drilled in Lake Erie each year. Canada has safely drilled hundreds of land-based wells along the waterways and shorelines of the Great Lakes.¹¹ Additionally, Congressman Bart Stupak solicited Canada's support to ban directional drilling in the Great Lakes.

The Honorable John C. Snobelan, speaking for the Province of Ontario, did not support the ban due to the outstanding record Canada has had using directional drilling.¹²

Environmentalist Position

Environmentalists contend the risks associated with potential contamination from new directionally drilled wells outweigh the benefits of what may be a small amount of petroleum available. They declare the State of Michigan has a poor record of regulating current wells and the companies that own and operate them.

The Lake Michigan Federation did a study¹³ of the status of existing oil and gas wells. The study was not limited to directionally drilled wells. It was determined that it was legitimate to review statewide oil and gas drilling because the impacts of directional drilling would be virtually the same. The report discusses how current mismanagement continues to place the health of Michigan's population at risk.

Oil and Gas Pollution Sites Threaten Public Health. While information is sparse, it is suspected that 8 sites have contaminated water supplies. Contaminants include hydrochlorides and petroleum hydrocarbons, such as benzene, that can make water undrinkable. Exposure to benzene is possible through breathing vapors while showering or cooking with contaminated water. Symptoms of low-level exposure include drowsiness, increased heart rate, headaches, tremors, confusion, and unconsciousness. Breathing in high levels of benzene-laced air can cause death. Another byproduct of the drilling operation is hydrogen sulfide. It is a highly toxic and colorless gas that is known to be in the oil and gas reserves under Lake Michigan. It is lethal at 50 ppm and it may cause other symptoms such as memory loss, fatigue, and insomnia. There are two major concerns about hydrogen sulfide: potential for leaks from improperly maintained abandoned well sites; and, the release of hydrogen sulfide from sites located near residential and agricultural areas.

Oil and Gas Leaks Threaten Fish and Wildlife Habitat. Oil and gas production potentially threatens both coastline and inland wetlands. Wetlands are important because they provide

shelter and food for a variety of aquatic and terrestrial wildlife, purify water, control erosion, and protect against flooding. Pollution from petroleum products affects larvae and small fish. It can lead to reproductive and growth problems in a variety of species. Lake bottom sediments can hold the pollution for a number of years.

Stopping Leaks Takes Too Long. The state takes too long to react to contaminated sites and initiate cleanup. Two locations that have had lingering pollution problems are the Green Ridge Subdivision in Muskegon County and the Crystal Oil Field in Montcalm County. The pollution has been coming from leaking wells for 35 years. The DEQ has allowed drilling to continue, even though none of the operators have performed cleanup activities.

Cleanups Fall Short. The primary concern here is the lack of comprehensive testing to determine the extent of the pollution. Most site surveys are done visually with little sampling of soil and groundwater. Consequently, when cleanup does occur, it is inadequate.

Taxpayers Pay for Enforcement Shortcomings. Michigan currently has 2,842 contaminated sites. Of these, 187 of them are caused by oil and gas extraction and drilling. Sites on the list can be recommended for public funding. The DEQ plans to obtain funds for 36 sites. Additionally, the DEQ has not aggressively pursued liable parties and held them responsible for the cleanup.

Another environmentalist group, the National Wildlife Federation, opposed oil drilling in the Great Lakes. It stated in a September 13, 2001 hearing of the Michigan Natural Resources Commission, that the Great Lakes are too precious to risk with hasty decisions and inadequate protections. It recommended several threshold requirements before any directional drilling under the Great Lakes be allowed.¹⁴

No directional drilling without sound science in place. Science, not politics, should be the determining factor on reducing the negative impacts of directional drilling. Governor Engler had not implemented all the recommendations of the Michigan Environmental Science Board he

directed to study the problem. Until the panel's findings are fully considered, it would be reckless to go ahead with the drilling.

No directional drilling without proof. The reserves under the Great Lakes are undetermined. It must be proven that the quantity of oil and gas must be of sufficient quantity to warrant the risk of additional drilling. "Risking a treasure such as the Great Lakes in pursuit of uncertain quantities of oil and gas is shortsighted."

No directional drilling until we have a national energy plan that reduces pollution. A national energy plan based on conservation, energy efficiency, and renewable resources that reduce global warming and pollution, including mercury contamination of our lakes, streams, and fish, must be approved. "Continuing to increase our production and use of polluting fossil fuels without such a plan is irresponsible."

The positions taken by the Lake Michigan Federation, based in Michigan, and the National Wildlife Federation, a national environmental group, appear representative of the views of environmental groups and individuals, in general.

Administrative/Legislative History – State and Federal

Following is a timeline¹⁵ of significant activities from the onset of directional drilling to the present.

May 1979. Aztec Producing Company gains state permission to drill the first of 13 oil and natural gas wells beneath the Great Lakes. The well is directionally drilled beneath Lake Michigan from an onshore site just north of Manistee.

August 12, 1997. In the face of mounting concern, Governor John Engler halts new energy development beneath the Great Lakes and directs the Michigan Environmental Science Board (MESB) to study the risks of directional drilling.

October 1997. The MESB issues its findings and recommendations.

October 29, 1997. The state Department of Natural Resources (DNR) and the Department of Environmental Quality (DEQ) issue separate statements that promise to "move swiftly to implement the science panel's key recommendations."

April 1998. The DNR confirms that a formal moratorium on new Great Lakes drilling is in effect until the state has completed a modernization of state oil and gas leasing procedures.

February 8, 2001. A committee of the Natural Resources Commission, the citizen oversight panel that guides policy for the Michigan DNR, announces that the agency's staff is considering lifting the moratorium on Great Lakes drilling.

March 13, 2001. U.S. Representative Bart Stupak (D-Menominee) introduces Congressional legislation (HR 1032) to ban directional drilling beneath the Great Lakes. Representative David Bonior, the Democratic House Minority Whip from Mt. Clemens and a candidate for governor, signs on as a co-sponsor along with members of both parties from other Great Lakes states.

March 14, 2001. State Representative Julie Dennis (D-Muskegon) and State Senator Gary Peters (D-Bloomfield Township) introduce legislation (HB 4467) to permanently ban directional drilling for oil and gas beneath the Great Lakes.

May 31, 2001. The Michigan Senate, defying growing public opposition, approves a budget bill that authorizes drilling beneath the Great Lakes.¹⁶

June 13, 2001. U.S. Senator Debbie Stabenow, (D-Ann Arbor), introduces legislation to ban directional drilling in the Great Lakes until the National Academy of Sciences and federal Environmental Protection Agency have completed studies of the risks.¹⁷

June 28, 2001. The U.S. House of Representatives, on a 265-157 vote, approves legislation to prohibit the U.S. Army Corps of Engineers from reviewing and permitting new drilling beneath the Great Lakes.

July 17, 2001. The U.S. Senate unanimously approves legislation to ban Great Lakes drilling for two years.¹⁸

July 23, 2001. Dick Posthumus, the Michigan Lieutenant Governor and leading Republican gubernatorial candidate, breaks with Gov. Engler and announces he opposes directional drilling beneath the Great Lakes.

August 5, 2001. In an interview with the Detroit News, President Bush stated he did not propose nor does he support drilling beneath the Great Lakes.

August 20, 2001. The staff of the Michigan DNR formally recommends new procedures for opening the Great Lakes shoreline to oil and gas drilling that ignores most of the important safeguards recommended in 1997 by the MESB.

September 12, 2001. Attorney General Jennifer Granholm voices her displeasure with the DNR's proposed procedures, calling drilling "an unwarranted risk to the lakes themselves." Ms. Granholm is a Democratic candidate for Governor.

September 14, 2001. Following the recommendations of the Natural Resources Commission, K.L. Cool, Director of the DNR, approves new leasing procedures to reopen the Great Lakes coast to directional drilling for oil and natural gas.

November 1, 2001. The U.S. Congress approves legislation to ban directional drilling beneath the Great Lakes for two years while the Army Corps of Engineers studies safety concerns.

January 24, 2001. The Michigan House votes, by a 98-7 margin, to permanently ban Great Lakes drilling unless the Legislature declares an "energy emergency."

February 13, 2002. The Michigan Senate, on a 28-5 vote, approves a permanent ban on Great Lakes drilling and drops the House provision to reopen development in the event of an emergency.¹⁹

Two key issues arose during this period. The first was the completion of the study by the MESB²⁰ that was directed by Gov. Engler; the second was the controversy whether the federal government or the state government had jurisdiction over the regulation of drilling under the Great Lakes.

On August 12, 1997, Governor Engler requested that the MESB conduct an evaluation of the state's regulatory procedures pertaining to directional drilling under the Great Lakes. Following are the MESB findings in response to Governor Engler's directives:

Directive 1. Evaluate the risk of directional drilling causing contamination of the waters (through releases of hydrocarbons through the subsurface directly to the lake bottom) and shorelines of the Great Lakes. The Panel concluded that there was little to no risk of contamination to the Great Lakes bottom or waters through releases directly above the bottom hole portion of directionally drilled wells into the Niagaran Reef and deeper reservoirs. There is a small risk of contamination at the wellhead.

Directive 2. Evaluate the potential impacts of directionally drilled wells on competing uses of the Great Lakes water and shoreline areas.

The Panel concluded that the ecological impacts could be minimized by identifying and prohibiting oil and gas development in areas where the ecological resources are either highly sensitive to perturbation or unique, use the most advanced but proven technology and the employment of rigorous permit requirements to help ensure the reasonable protection of all resources in developable areas.

The Panel viewed the social/aesthetic issue to be one primarily of coastal development and zoning irrespective of vertical or horizontal drilling. While technology and science can certainly help to lessen the impacts and even resolve several of the conflicts that may appear, most of these types of issues will require environmental planning and communication between all stakeholders and compromise in order to be resolved.

Directive 3. Review existing and potential permit conditions for adequacy in protecting the shoreline environment from adverse impacts.

The Panel found existing regulations provided considerable protection to the Great Lakes' aquatic and shoreline environments, but they could be better protected if the lease agreements required an aggressive environmental assessment and stakeholder participation prior to the lease sale. Additional recommendations included:

A. Streamline Process. The process could be better streamlined between the DEQ, DNR, and NRC to make it clearer and remove duplicative steps. The leasing process should place a heavier emphasis on land use impacts and conflict analysis. Applicants that cannot obtain a lease due to an inadequate or unacceptable environment analysis should not proceed to the oil and gas permit process.

B. Sealability. The Panel recommended that such discussions on the ability of the geologic units to act as a seal be required by the DEQ in permits for directional drilling. Sources of information for demonstrating the sealability of the geological units might include knowledge of rock units on shore and of subsurface geology from off shore seismic data.

C. Coastal Zone Development Inventories. The Panel recommended a comprehensive coastal zone environmental inventory be compiled for both Lake Michigan and Lake Huron. Its purpose is to clearly identify and evaluate areas that are already impacted with oil and gas development and areas where directional drilling development leases could be allowed, provided that such development could be documented as to cause only minimal and mitigable environmental impacts and conflicts to the shoreline.

D. Use of Existing Infrastructure. In order to afford the greatest environmental protection, the Panel recommended that lease sales should prohibit the construction of any new infrastructures and limit oil and gas development to areas where existing infrastructures are already available to minimize intrusions into virgin or undisturbed areas and to prevent further intrusions into minimally disturbed areas.

E. Residuals. The Panel concluded that the need to store any residue in the ground is nonexistent given current technology.

Title to bottom lands goes back to the birth of our nation. The new federal government held title to those lands in trust until the respective states were admitted into the Union.²¹ The assumption of state ownership is called the "The Equal Footing Doctrine."²² Michigan's position is that the Great Lakes Bottomlands "were submerged lands in 1837 when Michigan was admitted to the Union, and thereupon became the property of the state."²³

Michigan has established and exercised its authority over the submerged lands through the Great Lakes Submerged Lands Act (GLSA).²⁴ The act authorizes the state to use, sell, or lease the submerged lands once the proper departments have determined that public use will not be impaired.²⁵ State law makes drilling for oil or natural gas from within the waters of the Great Lakes illegal.²⁶ With this prohibition and the advances in drilling technology, directional drilling is the only feasible option available to exploit the oil and natural gas reserves under the Great Lakes.

Michigan's position concerning the ownership and control of submerged lands is supported by federal legislation and case law. In the 1947 case of *United States v California*,²⁷ the United States sued California for the rights to petroleum resources discovered within a three-mile area off the coast of California. The U.S. Supreme Court held that although the federal government did not own the submerged land, federal rights superseded the state's regarding the three-mile area and the oil located beneath it.

Congress passed the Submerged Lands Act relying on the holding in *California*.²⁸ The Act stated that the federal government has relinquished "all right, title, and interest" to such submerged land or Bottomland, and authority to lease, sell, or dispose of the land is vested in the respective states. Subsequent state and federal statutes have acknowledged state authority over submerged lands with the exceptions of commerce, navigation, national defense, and international affairs.

The Great Lakes waterways are navigable for all to use and, thus, are the responsibility of the federal government. The federal government maintains that it has the authority for the control of directional drilling and the U.S. Army Corps of Engineers is the federal agency tasked with this responsibility. The Corps of Engineers has attempted to exert control over existing and future wells under the Activities Requiring Permits federal regulation.²⁹ And,

for work under or over a navigable water of the U.S., it is citing the Rivers and Harbors Act.³⁰

Analysis

Directional drilling beneath the Great Lakes is an extremely emotional issue. There are the competing interests of the petroleum industry, supported by the State of Michigan and the Michigan Chamber of Commerce, versus the environmental groups, supported by the tourism industry, waterfront property owners, and concerned citizens. Each group is convinced it is right and is acting in the best interests of the United States, the State of Michigan, and its citizens. The gubernatorial election in Michigan in 2002 has thrown a political spotlight on the issue, raising anxieties, with charges and countercharges hurled between State and Federal Republican and Democratic Party lawmakers, to a level bordering on the unprofessional. Let's review the facts.

The United States has an ever-increasing dependency on foreign petroleum imports. The Bush Administration is formulating a National Energy Policy to meet the demands of a growing national economy and decrease our dependence on oil imports. Increasing domestic production is a key component of the strategy. Michigan has been, and may continue to be, a major producer of oil and natural gas. With off-shore drilling prohibited and technological advances in the accuracy and safety of directional drilling, directional drilling is the only feasible option available to exploit the petroleum reserves underneath the Great Lakes.

There are approximately 14,000 active wells in Michigan. Of the 14,000, 4,000 are directionally drilled. Of the 4,000, 13 wells were directionally drilled under the Great Lakes. Of the 13, 7 are currently in production. Industry executives projected that approximately 30 additional wells would be put into production beneath the Great Lakes.³¹ An additional 30 wells is a relatively insignificant number.

The safety record is a good one. There have been reported hydrogen sulfide leaks, but fortunately causing only minor illnesses³². The deposits underneath the Great Lakes are encased beneath thousands of feet of impermeable rock. Directional drilling will not disturb the bedrock causing leakage through the lake bottoms. The addition of cement casings in the well protects against leakage. The state faces a greater risk of an oil spill from the current

systems in place that transport oil by land and under water. With advances in technology, adherence to the siting recommendations of the MESB, an aggressive oversight program by the State, and an environmentally sensitive petroleum industry, safety can and should improve. Additionally, Canada's experience shows that directional drilling can be done in a safe and environmentally responsible manner.

Several politicians and environmentalists have repeatedly stated that it is not worth the risk to drill for petroleum beneath the Great Lakes because the reserves are insignificant and the potential threats to the environment outweigh the possible gains by tapping the reserves. However, it is not known how much petroleum there is beneath the Great Lakes. The reserves need to be determined before we can conclude whether the risk is warranted.

The strongest argument against directional drilling is the seemingly lax oversight exercised by the state over current drilling operations. Two examples best illustrate this. Northern Michigan became the most active natural gas producing region in the nation in the 1990's. There were 6,500 new wells drilled between Alpena and Manistee to take advantage of a federal tax program that encouraged domestic production. This resulted in the state being crisscrossed with new roads and pipelines, dissecting forests and causing runoff into streams and rivers.³³ And the second example, the excessive time it has taken the state to respond to, and enforce, existing cleanup efforts. For an expansion of directional drilling to have any credibility and support, the state must do a better job fulfilling its oversight role of the petroleum industry by strictly enforcing its laws.

Both the state and federal government have strong cases regarding jurisdiction over the development of resources beneath the Great Lakes. However, their positions do not take into consideration the environmental impact that directional drilling may have on the environment. Until an impartial federal court rules from an environmental perspective on who has jurisdiction, the status quo will be maintained.

Conclusion

The Michigan Legislature was premature in permanently banning directional drilling. The current upward spiral in gasoline prices reinforces the need to

address the nation's fuel supplies. The reserves beneath the Great Lakes should be tapped. The technology exists to do it safely. The state must have the will to strictly enforce existing laws and not pay "lip service" to the excellent recommendations rendered by the MESB in their study. Environmentalists agreed the recommendations were reasonable and should be implemented. The state should authorize limited exploratory directional drilling to determine the extent of the reserves, and then determine whether the risk is warranted. If the state and the petroleum industry do not perform in a safe, environmentally secure manner, then the operations should be shut down. Michigan must continue to do its part in support of the nation's petroleum program.

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Progress Report On EPA's Implementation of The Small Business Liability Relief And Brownfields Revitalization Act

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The Small Business Liability Relief and Brownfields Revitalization Act, Pub. Law 107-118 ("SBLRBRA"), effective January 11, 2002, amended the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")² to reform CERCLA liability and encourage brownfield redevelopment. This article reports on the steps that the United States Environmental Protection Agency ("EPA") has taken and is expected to take in the near future to implement SBLRBRA.

I. LIABILITY REFORMS

A. Regulations, Guidance, Or Both?

SBLRBRA provides that EPA either shall adopt, or may adopt, regulations on several specific subjects discussed below. On other subjects, EPA will probably issue non-binding guidance documents rather than regulations because EPA has no rulemaking authority to define the scope of CERCLA liability.³

B. Regulation To Define "All Appropriate Inquiries"

SBLRBRA requires EPA to promulgate regulations by January 11, 2004 defining what a party must do to make "all appropriate inquiries" into the previous ownership and uses of a property in accordance with generally accepted good commercial and customary standards and practices.⁴ The regulation will determine in part whether a property owner qualifies for the innocent landowner defense to liability, or for the prospective purchaser and the contiguous landowner exemptions discussed below.

The requirement to make "all appropriate inquiries" also applies to environmental assessments performed by recipients of EPA brownfield grants.⁵ Some state officials believe that "all appropriate inquiries" should be defined for this purpose to include laboratory analysis of at least some soil or water samples in addition to a Phase 1 site assessment.

To date, EPA has not proposed any such regulation. Therefore, ASTM Standard E-1527-97 (Phase 1 site assessments) applies as an interim standard for property

purchased on or after May 31, 1997.⁶ EPA is expected to issue an interim final rule in the near future under which compliance with either ASTM Standard E-1527-97 or the more recent ASTM Standard E-1527-00 will satisfy the requirement to carry out "all appropriate inquiries." Sources also indicate that EPA may use a regulatory negotiation procedure, rather than the usual notice-and-comment procedure, for this rule.

C. Liability Exemption For "Bona Fide Prospective Purchasers"

Before January 11, 2002, anyone who purchased contaminated property became liable under CERCLA to remediate all contamination regardless of when the contamination occurred. This strict liability made many developers unwilling to acquire contaminated property. To address this problem, EPA developed a Prospective Purchaser Agreement ("PPA") program under which it negotiates agreements that protect prospective purchasers from CERCLA liability in exchange for agreements to perform specific remediation work or to reimburse EPA for a portion of an EPA cleanup.⁷

Those who purchase property after January 11, 2002 and after "all disposal of hazardous substances" has ceased now have qualified protection from CERCLA liability.⁸ A buyer that qualifies as a "bona fide prospective purchaser" ("BFPP") may consider it unnecessary to obtain a PPA. To qualify as a BFPP, the purchaser must: (1) before the purchase, investigate the property to determine whether it is contaminated by making "all appropriate inquiries" into the previous ownership and uses of the property; (2) take "reasonable steps" to stop ongoing releases of hazardous substances, prevent future releases, and limit human and environmental exposures to hazardous substances; (3) not be affiliated in any way with a liable party; (4) not be the successor by reorganization of a liable party; (5) fully cooperate with efforts to investigate or remediate the site; (6) provide assistance and access for any cleanup or natural resource restoration performed by authorities; (7) comply with any land use restrictions and institutional controls required as part of a remediation plan; (8) comply with EPA information requests; and (9)

provide any legally required notices concerning hazardous substances on the property.⁹ A BFPP may not be affiliated with any party that is liable for response costs at the facility by any family, contract, corporate or financial connection.¹⁰

In many cases, it will not be clear whether a prospective purchaser meets all conditions for this exemption. If ongoing passive migration of contaminated groundwater on or from the property, or continued leaking of hazardous substances from containers abandoned on the property by previous owners or operators, constitutes “disposal” of hazardous substances, then the purchaser might not satisfy the requirement that “all disposal of hazardous substances at the facility occurred before the person acquired the facility.”¹¹ If there are abandoned containers or significant contamination on the property, a prospective purchaser may want to know just what “reasonable steps” he must take to stop or prevent hazardous substance releases. Because the term “release” is broader than the term “disposal,” it is conceivable that the BFPP may have a duty to take reasonable steps to stop or prevent passive migration of hazardous substances, even though such passive migration may not constitute “disposal.” Many parties have expressed concern that the statutory requirement to take “reasonable steps” to stop ongoing releases is vague and fails to inform developers and investors about what they must do to avoid becoming liable to perform complete remediation. Some parties have urged EPA to issue regulations or guidance to “clarify” this issue and others.¹²

If EPA incurs response costs at a facility acquired by a BFPP, EPA has a “windfall lien” on the “facility” equal to the amount by which EPA’s cleanup increased the fair market value of the “property”¹³ above the value that existed before the cleanup.¹⁴ EPA’s lien is subject to the interests of purchasers or creditors who perfect their interests before EPA records notice of its lien with the local land records.¹⁵ There are many unanswered questions about the “windfall lien” provision. Until these questions are resolved, the prospect of a federal lien in an unquantified amount may discourage investors, developers, and their lenders from relying on the statutory BFPP exemption for properties at which EPA either has incurred or is expected to incur response costs. One way to resolve such concerns would be to negotiate a PPA in which EPA waives or otherwise resolves its lien.

EPA has established a workgroup of EPA and Department of Justice (“DOJ”) employees to consider legal and policy issues relating to the liability exemptions for BFPPs and owners of “contiguous” property. (See discussion below of liability exemption for owners of contiguous property.) EPA has also held two “listening sessions” at which it has invited interested parties to express their opinions on what EPA should do to implement SBLRBRA and clarify what certain sections mean. The workgroup has prepared a draft administrative settlement document to be used to resolve potential “windfall liens” under 42 USC 9607(r). Sources indicate that EPA is currently working on two potential settlements that would resolve the liability of BFPPs for “windfall liens.” At least some members of the workgroup would like to issue guidance documents by January 11, 2003, the first anniversary of SBLRBRA.

D. Slowdown In EPA Use Of Prospective Purchaser Agreements?

Many prospective purchasers will decide that it is not prudent to rely on the statutory BFPP exemption, and will ask EPA to negotiate a PPA to clarify that the presence of residual contamination on the property does not constitute ongoing “disposal,” to specify what “reasonable steps” the new owner must take regarding contamination on the property, and perhaps to specify what assistance it may have to provide to any government cleanup or natural resource restoration. Some government attorneys have argued that EPA should no longer devote its resources to negotiating PPAs because Congress has now provided an express statutory exemption for BFPPs.

On May 31, 2002, EPA issued a guidance memorandum stating that “in most cases” the BFPP exemption makes it “unnecessary” for a prospective purchaser to obtain a PPA.¹⁶ The guidance says that it supplements, but does not replace, EPA’s previous PPA guidance documents. It states that EPA will consider entering into PPAs in three “limited circumstances:”

- When the PPA will result in significant environmental benefits (cleanup, reimbursement of EPA costs, or new property use) and “there is a significant need for a PPA” to complete the project;
- When the property is currently involved in CERCLA litigation and there is “a very real possibility” that anyone who buys the property would be sued by someone other than EPA;

- When a “significant public interest would be served by the transaction and it would not otherwise occur without issuance of a PPA” because of “unique site-specific circumstances.”

Although the overall tone of the guidance discourages EPA regions from devoting their resources to PPAs, it clearly allows an EPA region to enter into a PPA if it is inclined to do so.

It is too early to tell whether the availability of the BFPP exemption and the issuance of the guidance will reduce the number of PPAs below previous levels. Between January 1, 2002 and December 3, 2002, EPA announced 20 proposed PPAs in the *Federal Register*, including three that EPA had sent to the Federal Register Office before the President signed SBLRBRA on January 11, 2002. Between May 31, 2002 and December 3, 2002, EPA announced ten proposed PPAs, including four that EPA submitted to the Federal Register Office before its May 31, 2002 guidance. This pace is close to EPA’s 1998-2000 pace of 20 to 24 PPAs per year.

Some EPA regions are exploring ways to encourage prospective purchasers and lenders to redevelop formerly contaminated properties without PPAs. EPA Region 6 has issued two “ready for reuse” certificates that are intended to encourage redevelopment.¹⁷ However, these documents provide no covenant not to sue, and expressly reserve EPA’s right to take enforcement action “if new or additional information . . . impacts this ready for reuse determination.”¹⁸ They are not an acceptable substitute for a PPA.

E. Liability Exemption For Owners Of “Contiguous” Property

SBLRBRA created a qualified liability exemption for those who own property onto which hazardous substances have migrated from property owned by another. An owner who did not “cause, contribute, or consent to” a release of hazardous substances from a neighbor is now exempt from liability, provided that it: (1) investigated the environmental condition of the property before acquiring it, and had no reason to know that it was contaminated; (2) takes “reasonable steps” to stop ongoing releases, prevent future releases, and limit human and environmental exposures to hazardous substances; (3) is not affiliated with any liable party; (4) fully cooperates with authorized environmental cleanups and natural resource restoration; and (5) complies with land use restrictions and

institutional controls.¹⁹ Part 201 of the Michigan Natural Resources and Environmental Protection Act contains a similar but much simpler exemption.²⁰

As noted above, EPA’s workgroup is working on a guidance to express EPA’s interpretation of this exemption.

F. Liability Defense For “Innocent Landowners”

SBLRBRA made it more difficult to qualify for the “innocent landowner defense” that was added to CERCLA in 1986. In the past, an innocent landowner was required to exercise “due care” regarding hazardous substances on the property, and to take precautions against the foreseeable acts of third parties.²¹ These requirements remain. However, like BFPPs and owners of contiguous property, innocent landowners must now also take “reasonable steps” to stop or prevent ongoing and future releases, must cooperate fully in the performance of cleanups and natural resource restoration, and must comply with land use restrictions that are part of a cleanup.²² It is unclear why Congress decided to narrow the innocent landowner defense in this fashion. EPA’s workgroup is considering guidance on these issues.

G. Liability Exemptions For *De Micromis* Wastes And Municipal Solid Waste

CERCLA now exempts from liability parties that disposed of or transported very small (“*de micromis*”) quantities of hazardous substances, and certain parties that disposed of municipal solid waste (“MSW”).²³ In some ways these exemptions are roughly similar to enforcement discretion policies that EPA and DOJ issued in 1996 and 1998.²⁴

A party that proves it disposed of or transported less than 110 gallons or 200 pounds of hazardous substances at a site on the National Priorities List (“NPL”), and that all or part of the disposal occurred before April 1, 2001, is now exempt from CERCLA liability.²⁵ EPA may increase or decrease the thresholds for the *de micromis* exemption by regulation.²⁶ EPA is not expected to propose any such regulation in the foreseeable future.

The exemption does not apply if the President determines that: (1) the materials disposed of by the defendant “could contribute significantly, either individually or in the aggregate,” to cleanup costs; (2) the defendant failed to comply with an EPA information request or impeded a response action; or (3) the defendant was convicted of a criminal violation for the conduct to

which the exemption would apply.²⁷ Because the President's determination is exempt from judicial review, he can unilaterally prevent a person from qualifying for the *de micromis* exemption.²⁸ The President has not yet issued an executive order delegating this authority, although one is said to be "in the works." Unless and until the President delegates this authority, only he may exercise it.

In a cost recovery action by a state or federal government, the defendant must "demonstrate" that it qualifies for the *de micromis* exemption.²⁹ The burden of proof is on the plaintiff in certain contribution actions.³⁰

EPA reportedly has prepared a guidance on the *de micromis* exemption but has not released it at the time this article goes to press.

CERCLA now contains a complex exemption for certain generators of MSW.³¹ Owners and lessees of residential property, small businesses, and certain tax-exempt nonprofit organizations are exempt from liability based on disposal of MSW at NPL sites. As with the *de micromis* exemption, the MSW exemption does not apply if the President determines that: (1) the MSW could "contribute significantly, either individually or in the aggregate," to cleanup costs; (2) the person failed to comply with an EPA information request; or (3) the person has impeded a cleanup.³² The President's determination is not subject to judicial review, again giving the President unfettered authority to deny the benefit of the MSW exemption.³³ The President has not yet issued an executive order delegating this authority, although one is said to be "in the works." Unless and until the President delegates this authority, only he may exercise it.

II. BROWNFIELD REVITALIZATION

The brownfield sections of SBLRBRA: (1) define "brownfield site;" (2) provide federal grants and loans to state and local governments to inventory, investigate, and remediate brownfield sites; (3) encourage state brownfield programs, also called "state response programs," and (4) limit federal enforcement under CERCLA at sites cleaned up under a state response program.

A. Definition Of Brownfield Site

CERCLA now defines "brownfield site" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence

of a hazardous substance, pollutant, or contaminant."³⁴ This very broad definition includes properties contaminated by petroleum, salt, or other materials that are not CERCLA hazardous substances. It also includes properties that suffer from the mere "potential presence" of contamination. The definition expressly includes mine-scarred land, and low-risk sites contaminated by petroleum that are not subject to federal corrective action orders under the Resource Conservation and Recovery Act.³⁵ This huge universe of properties is dramatically reduced by numerous exclusions.³⁶

B. Brownfield Grants

CERCLA now directs EPA to establish three grant programs that build upon several "pilot programs" that EPA established in the late 1990s without express Congressional authorization.

The first program provides grants ("Assessment Grants") to state and local governments to compile inventories of brownfield sites, to determine how contaminated they are, and to plan for their reuse.³⁷ EPA may grant up to \$200,000 per site for these purposes.

The second program provides grants ("RLF Grants") of up to \$1 million each to states and local governments, with a 20% grantee match, to capitalize revolving loan funds ("RLF").³⁸ Each RLF may: (1) make low interest loans to site owners, redevelopers, or other persons for site development, and (2) make subgrants to local governments or nonprofit organizations to remediate contaminated sites owned by the subgrantee.

The third program provides grants ("Cleanup Grants") of up to \$200,000 per site to remediate brownfield sites, subject to a 20% grantee match.³⁹ EPA may make Cleanup Grants directly to local or state governments or nonprofit organizations. Cleanup Grants are to favor development of parks and recreation, facilitate reuse of existing infrastructure, and to provide assistance where other sources are not available.⁴⁰

CERCLA authorizes \$200 million per year for fiscal years 2002 through 2006 for these purposes, approximately double the \$90 million EPA spent in 2001 under its pilot brownfield programs.⁴¹ President Bush has asked Congress to appropriate the full \$200 million for fiscal year 2003. A November 13, 2002 EPA press release states that EPA hopes to provide \$850 million over the next five years in

grants for brownfield assessment, cleanup, job training and grants to states and tribes.⁴²

Although EPA was not able to implement any of the new statutory grant programs during fiscal year 2002, it continued making grants pursuant to its previously established “pilot programs.” On May 3, 2002, EPA announced \$21.5 million of RLF Grants under its previously existing Brownfields Cleanup RLF program.⁴³ On May 20, 2002, EPA announced \$14.6 million of Assessment Grants to 80 communities under its previously existing program.⁴⁴

EPA has taken steps to transform its extra-legal pilot programs into the programs now authorized by the statute. On September 12, 2002, EPA issued for public comment draft guidelines for implementing the statutory grant programs during fiscal year 2003.⁴⁵ On October 24, 2002, EPA announced the availability of its final guidelines for the three statutory grant programs.⁴⁶ The guidelines allow those who received grants under EPA’s pilot programs to “transition” their grants to the statutory grant programs. Those who elect to be governed by the new programs must comply with all statutory requirements, while those who elect not to do so will continue to be governed by their existing cooperative agreements with EPA. Initial proposals for grants under the new programs are due by December 16, 2002. Final proposals will be due by March 5, 2003. EPA expects to award grants in April or May, 2003.

C. Limits On EPA Enforcement Under CERCLA

CERCLA seeks to encourage brownfield redevelopment by limiting EPA’s authority to enforce under CERCLA for properties that have been remediated under a “state response program.” Among other things, a state response program must: (1) inventory brownfield sites within the state; (2) have sufficient oversight and enforcement authority to ensure that cleanup actions performed under the program are effective and will be completed if the property owner fails to complete them; (3) provide for public participation in the selection of cleanup plans; (4) have appropriate mechanisms for the review and approval of cleanup plans; and (5) require that either state officials or a “licensed site professional” verify that cleanup has been properly completed.⁴⁷ Because CERCLA does not provide for EPA to review and approve state response programs, it may be difficult to determine whether a given state has a state response program. EPA has posted on its website a list of 47 states that have

“voluntary cleanup programs” and a list of 19 states that have entered into memoranda of agreement with EPA for voluntary cleanup programs as of March 2002. However, there is no indication which states EPA recognizes as having “state response programs,” and there is no indication that EPA plans to issue such a list.

CERCLA authorizes EPA to give grants to states and Indian tribes that are either developing state response programs, have full state response programs, or simply have a “memorandum of agreement” with EPA regarding that state’s voluntary cleanup program.⁴⁸ Just because EPA has given a grant to a state does not necessarily mean that the state has a “state response program.”

Michigan has a memorandum of agreement with EPA, but it is unclear whether Michigan has a “state response program.” Michigan’s list of Part 201 sites may qualify as an inventory of brownfield sites required under CERCLA as a component of a “state response program.” Although the Michigan Department of Environmental Quality (“MDEQ”) has not taken a formal position on the issue, one MDEQ official has said that MDEQ would take the position that MDEQ’s Part 201 list and other databases maintained by MDEQ constitute an inventory of brownfield sites.

Whether a state has a state response program is important because CERCLA now prohibits federal enforcement under CERCLA against a person who is conducting or has completed a cleanup at an “eligible response site” in compliance with a state response program.⁴⁹ The purpose is to assure a developer that if it remediates a brownfield property to the satisfaction of a state with a state response program, then the federal government is highly unlikely to use its CERCLA authority to demand more extensive cleanup.

This prohibition applies only at “eligible response sites,” which are defined to include all “brownfield sites,” plus certain other sites, minus other categories of sites.⁵⁰ This definition makes it difficult to determine whether a particular property qualifies as an “eligible response site.”

EPA retains CERCLA enforcement authority: (1) against hazardous substance releases that were not addressed by the cleanup if the state requests federal assistance; (2) if hazardous substances migrate across a state line or onto federally owned property; (3) if there is an “imminent and substantial endangerment;” or (4) if

information that the state was not aware of shows that additional cleanup is required to protect public health or the environment.⁵¹ EPA may commence an enforcement action under statutes other than CERCLA against the owner, developer, or other parties.⁵² Thus, the new “enforcement bar” in CERCLA stops far short of providing blanket immunity from federal enforcement.

CONCLUSION

EPA has moved reasonably quickly to transform its pilot grant programs into the statutory grant programs, although the release of its final grant application guidelines on October 24, 2002, left only seven weeks for applicants to prepare and submit their initial proposals. Whether the programs succeed will depend mainly on whether Congress appropriates the full \$200 million per year, and whether EPA selects deserving projects.

On liability issues, EPA has taken no visible action yet to implement the one rule that Congress required: a definition of “all appropriate inquiries.” However, that delay may not be harmful because ASTM Standard E-1527-97 applies during the interim.

The only action EPA has taken to date regarding the new liability exemptions is to issue a guidance intended to discourage EPA regions from issuing PPAs; fortunately, it does not appear to be reducing the actual numbers of PPAs. It may be unfair to criticize EPA for not acting yet to “clarify” the new exemptions, because EPA has no rulemaking authority on liability issues. The liability exemptions for landowners are ambiguous and poorly drafted, and are unlikely to encourage private parties to redevelop brownfields unless and until the meaning of those exemptions, or at least the government’s enforcement policies, are made clear. EPA is likely to issue guidances “clarifying” the new liability exemptions in early 2003. If these guidances are clear and reasonable, they may provide sufficient comfort to encourage the redevelopment of some brownfields. If they are vague, or demand too much from would-be developers, they will probably discourage redevelopment and prevent SBLRBRA from achieving one of its primary purposes.

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² 42 USC 9601 et seq.

³ EPA’s authority under 42 USC 9615 “to promulgate any regulations necessary to carry out” CERCLA does not include authority to define the scope of CERCLA liability. *Kelley v EPA*, 15 F3d 1100 (CA DC, 1994) reh’g denied, 25 F3d 1088 (CA DC, 1994) cert denied sub nom, *Kelley v American Bankers Ass’n*, 115 S Ct 900 (1995) (vacating EPA’s CERCLA lender liability rule).

⁴ 42 USC 9601(35)(B)(ii)-(iii).

⁵ A government or other eligible entity that uses an EPA brownfield grant for site characterization or assessment must perform it in accordance with 42 USC 9601(35)(B). 42 USC 9604(k)(2)(B)(ii). Although Section 9601(35)(B) discusses “all appropriate inquiries” in the context of the innocent landowner defense, it appears that Congress also intended that entities using brownfield grants to conduct site characterization and assessments comply with the standard for “all appropriate inquiries.”

⁶ 42 USC 9601(35)(B)(iv).

⁷ See, Dunsky, “How to Protect Buyers of Contaminated Property from Environmental Liability with CERCLA Prospective Purchaser Agreements ¾ And the Limitations in Doing So,” 26 Michigan Real Property Review 183 (Winter 1999).

⁸ 42 USC 9601(40), 9607(r).

⁹ 42 USC 9601(40)(A)-(G).

¹⁰ 42 USC 9601(40)(H).

¹¹ 42 USC 9601(40)(A) (emphasis added). Most, but not all, of the courts of appeals that have addressed the subject hold that passive migration of contaminated groundwater does not constitute the “disposal” of hazardous substances for purposes of determining whether a former property owner is liable under 42 USC 9607(a)(2). An excellent summary of those cases is provided in *Carson Harbor Village, Ltd v Unocal Corp*, 270 F3d 863 (CA 9, 2001), cert denied 152 L Ed 2d 381 (2002).

¹² “Industry Presses EPA to Clarify Brownfields Liability Provisions,” *Inside EPA’s Superfund Report* (Nov 25, 2002).

¹³ The “facility” that is contaminated is often larger than the “property” acquired by a BFPP. Because 42 USC 9607(r) does not define these terms, or state when and how the lien may be foreclosed, it is unclear how the mechanics of the lien will work.

¹⁴ 42 USC 9607(r)(2)-(4).

¹⁵ See 42 USC 9607(r)(3)(C), which incorporates 42 USC 9607(l)(3) by reference.

¹⁶ Memorandum from Director, Office of Site Remediation, to EPA Regions, “Bona Fide Prospective Purchasers and the New Amendments to CERCLA” (May 31, 2002).

¹⁷ “First-Ever Certificate Of Reuse Awarded Under RCRA To Oklahoma Steel-Making Plant,” *BNA Environment Reporter* (July 12, 2002). “EPA Seeking Alternatives To Prospective Purchaser Agreements,” *Inside EPA’s Superfund Report* (July 22, 2002). “Ready For Reuse Certificate For Air Base In San Antonio Means Cleanup Successful,” *BNA Environment Reporter* (Nov 8, 2002).

¹⁸ October 25, 2002 letter from EPA Region 6 and Texas Commission On Environmental Quality, To Commander, Brooks Air Force Base, Texas.

¹⁹ 42 USC 9607(q).

²⁰ MCL 324.20126(4)(c).

²¹ 42 USC 9601(35), 9607(b)(3).

²² 42 USC 9601(35)(A).

²³ 42 USC 9607(o) and (p).

²⁴ Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors (June 3, 1996). Policy For Municipality and Municipal Solid Waste CERCLA Settlements, 63 Fed Reg 8197 (Feb 18, 1998).

²⁵ 42 USC 9607(o).

²⁶ 42 USC 9607(o)(1)(A).

²⁷ 42 USC 9607(o)(2)(A).

²⁸ 42 USC 9607(o)(3).

²⁹ 42 USC 9607(o)(1).

³⁰ 42 USC 9607(o)(4).

³¹ 42 USC 9607(p).

³² 42 USC 9607(p)(2).

³³ 42 USC 9607(p)(3).

³⁴ 42 USC 9601(39)(A).

³⁵ 42 USC 9601(39)(D).

³⁶ A property is excluded if it: (1) is on or proposed for the NPL; (2) is the subject of a planned or ongoing CERCLA removal action; (3) is the subject of a CERCLA court order or administrative order; (4) is the subject of an enforcement action under, or the holder of a permit under, the Clean Water Act or other federal environmental statutes; (5) is subject to corrective action under the Solid Waste Disposal Act; (6) is a hazardous waste land disposal unit; (7) is a federal facility; (8) is contaminated by PCBs; or (9) has received money from the Leaking Underground Storage Tank Trust Fund. 42 USC 9601(39)(B). However, the President may provide brownfield grants for individual sites that are excluded from the definition of "brownfield site."

³⁷ 42 USC 9604(k)(2).

³⁸ 42 USC 9604(k)(3).

³⁹ *Id.*

⁴⁰ 42 USC 9604(k)(3)(C).

⁴¹ 42 USC 9604(k)(12).

⁴² November 13, 2002 EPA press release, "EPA Administrator Christie Whitman announces EPA and 21 other federal agencies and departments to partner in effort to revitalize brownfields throughout the country."

⁴³ May 3, 2002 EPA press release, "Whitman announces \$21.5 million dollars to revitalize blighted communities in 17 states."

⁴⁴ May 20, 2002 EPA press release, "EPA Administrator Whitman announces \$14.6 million dollars in grants to help 80 communities revitalize abandoned properties."

⁴⁵ 67 Fed Reg 57,813 (Sept 12, 2002).

⁴⁶ 67 Fed Reg 65,348 (Oct 24, 2002).

⁴⁷ 42 USC 9628(a)(2).

⁴⁸ 42 USC 9628(a)(1). EPA has issued a guidance document describing the procedures it will use to issue such grants. 67 Fed Reg 67,616 (Nov 25, 2002).

⁴⁹ 42 USC 9628(b)(1).

⁵⁰ 42 USC 9601(41).

⁵¹ 42 USC 9628(b)(1)(B).

⁵² 42 USC 9628(c).

Mercury, Regulators Message – “Just Say No”

By: Thomas P. Wilczak, William J. Walsh and Todd C. Fracassi*

For those old enough to remember, there once was a rock band named the Quicksilver Messenger Service. Quicksilver, of course, is the common name for elemental mercury. Today, the United States Environmental Protection Agency (“EPA”), state regulatory agencies, and environmentalists across the world have a new quicksilver message — “just say no to mercury.” This article identifies some of the relatively recent developments conveying this message, and discusses the two primary statutory programs regulators will increasingly use to reduce mercury use and discharges.

I. Introduction

Mercury is a basic element that is naturally occurring in the environment. It also has been used by mankind for centuries in a variety of beneficial uses, such as in thermometers to measure human temperature precisely, in vaccines to prevent spoiling during storage, in gauges, in electronic equipment to reduce energy usage, and as a component of dental filings to enhance dental health. In fact, for decades science-prone children would delight in receiving chemistry sets for the holidays or on a birthday, containing, among other things, the shiny silver liquid mercury. So why the recent concern over mercury?

For at least a century, inhalation of very high concentrations of elemental mercury over a lifetime has been known to cause neurological damage (hence the phrase “mad as a hatter,” which refers to the neurological ailments developed by hat makers who used mercury in their trade). Increasingly, however, the impacts of mercury released into the environment have been studied because the element mercury will persist essentially forever. It should be noted, however, that not only can the chemical and physical form of mercury vary, but so too does the toxicity of the various forms of mercury.

While mercury concentrations in air are usually low and of little direct concern, when mercury enters water it can become highly toxic (i.e., methylmercury, the most toxic form of mercury) and accumulate in fish and wildlife (although the amount of accumulation varies drastically from location to location). Sources contributing to mercury concentrations in water bodies include deposition from atmospheric sources and point and non-point source

discharges. Atmospheric sources include natural background emissions and anthropogenic emissions, such as emissions from iron processing, waste incineration, coal burning, mining, and chloralkali facilities. According to EPA, the vast majority of total mercury measured in surface water nationwide is from atmospheric deposition¹, much of which comes from non-United States sources. The Electric Power Research Institute has estimated that anywhere between 30 to 95 percent of mercury air deposition comes from sources outside the United States, of which the contribution from the utility industry ranges from being less than five percent to a little over 20 percent.² Of course, the contribution of sources will vary based on local conditions.

II. Growing Concern Over Mercury Discharges

For many years, total mercury was not considered a cause for concern because it was not detected in municipal discharges or in most surface waters. There have been a number of recent developments, however, bringing mercury use and discharges to the forefront of regulatory concern. Some of these include:

National Developments:

Commitment to Reduce Mercury Use – In 1997, pursuant to the Great Lakes Water Quality Agreement of 1978³, the United States and Canada set targets for mercury reduction.⁴ The United States committed to reduce mercury discharges by at least 50 percent by 2006.

Lobbying By Environmental Groups – Environmental organizations have lobbied legislators and other policymakers to reduce mercury releases, and some states have adopted “zero mercury” campaigns. For example, the New England Zero Mercury Campaign is a coalition of environmental and public health organizations calling for zero mercury use, release and exposure by 2010.

EPA Mercury Action Plan and Final Great Lakes Strategy – The EPA prepared an internal planning document known as its mercury action plan. The plan encourages not only reduction, but also

substitution, of mercury in industrial processes and consumer products, with a national goal of virtually eliminating mercury in the environment.⁵ This plan is being implemented through several initiatives, like the EPA's Great Lakes Strategy 2002.⁶ Components of the Great Lakes Strategy include:

-ensuring 100 percent of the Clean Water Act permits issued for discharges to the Great Lakes and its tributaries "will have permit limits that reflect the Guidance's water quality standards," (i.e., 1.3 ppt for mercury);⁷

-issuing by 2013 total maximum daily loading (TMDLs) for mercury "for each Great Lake and Great Lake tributary listed on each state's 1998 303(d) [impaired water body] list" and completing within 15 years the TMDL for other impaired water bodies added after 1998;⁸

-continuing to "explore innovative or alternative approaches to developing TMDLs to address impaired waters and for implementing programs to restore these waters." This statement refers, among other things, to restrictions on uses. US EPA takes the position that it may implement the TMDL program through alternative mechanisms that require substitution of mercury and limit the discharge of mercury into sewer systems. This position has yet to be definitively determined in court;⁹ and

-creating by 2006 "ten additional voluntary partnerships with sources that use or release persistent toxic substances."¹⁰ (This would include entering a memorandum of understanding (MOU) with groups like the American Hospital Association (AHA) to reduce mercury use and discharges. The AHA has since withdrawn.)

Michigan Developments:

Michigan Mercury Permitting Strategy - In 2000, the Michigan Department of Environmental Quality (MDEQ) prepared a mercury permitting strategy to implement EPA's new test method as part of the national pollution discharge elimination system (NPDES) permit process.¹¹ Before the new test method, a permit holder was considered to be in compliance with the water quality

based effluent limits (WQBEL) for mercury if its pollution minimization program was being fully performed and its effluent was less than 200 ppt (the quantification level of Method 245.1).¹² Since the quantification level of the new test method is below Michigan's water quality standard of 1.3 ppt, however, widespread noncompliance with the water quality standard could now be detected. Consequently, MDEQ developed this strategy to phase the new test method in over a period of five years to allow the development of laboratory capabilities and avoid widespread noncompliance by NPDES permit holders. To avoid widespread noncompliance, a multiple discharger variance for existing facilities not meeting the 1.3 ppt WQBEL was established and a level currently achievable (LCA) of 30 ppt was set. Based on limited surveys by MDEQ, as of September 2001, none of the NPDES permit holders could meet the WQBEL.¹³ Michigan continues to use multiple discharge variances and the LCA

Lowering of Regulatory Standards:

In the late 1990s and early 2000s, EPA standards and advisories for mercury were lowered. Driving the reduction in regulatory standards was the concern over the impacts of methylmercury and that regulatory agencies, including sewerage agencies, generally take a conservative approach to regulation (known as the precautionary principle). This approach attempts to resolve all scientific uncertainties in favor of protecting human health and the environment. This is true for mercury, where the EPA and state agencies assume all or most mercury, regardless of the type or form when released to the environment, is methylmercury, thus, is bioavailable and bioaccumulative.¹⁴ This assumption is critical because methylmercury is more toxic than the mercury originally released, overestimating the likely environmental impact of mercury.¹⁵ Examples of recent reductions to standards include the adoption of the 1.3 ppt Great Lakes Water Quality Criteria in 1995, and a mercury fish tissue criteria of 0.3 ppm adopted in 2001. Further, some states and municipalities have recently adopted more stringent discharge limits (and in many cases, a zero mercury discharge goal).

III. Regulation of Mercury Discharges

Mercury has become one of the most regulated substances in the United States because of its widespread use, increased scientific knowledge concerning the toxicity of methylmercury, and the scientific interest in the path mercury takes in the environment. As the lower detection limit is more widely implemented and more stringent

standards are developed nationwide, total mercury concentrations in surface waters, sediment, and municipal sludge will increasingly be found to exceed one or more federal or state regulatory limit. With this, the regulatory scrutiny can be expected to continue, and likely become even more intense.

To reduce the amount of mercury released into the environment the federal, state and local regulators have established a complex regulatory framework that includes the imposition of mandatory, legally enforceable requirements, and a number of voluntary programs. The two primary statutory programs regulators use to reduce mercury releases are the federal Clean Water Act¹⁶ and Clean Air Act,¹⁷ and their state equivalents.¹⁸

A. Regulating Mercury Discharges from Point Sources - Clean Water Act

The Clean Water Act, and state equivalents, provide federal, state and local environmental regulators legal authority to protect surface water quality through a variety of programs designed to limit the discharge of pollutants, including total mercury (sum of mercury in all of its forms) to water bodies. The Clean Water Act also limits the loading of pollutants discharged into a water body by establishing total maximum daily loading (TMDLs) of pollutants for each stream, river, lake or other water body that has been designated as "impaired".¹⁹ To be considered impaired, the water body must exceed at least one water quality standard. This process will be ongoing as the Clean Water Act²⁰ and the Water Quality Planning and Management regulations²¹ require states to submit a list of impaired waters and a schedule for completing TMDLs to the EPA for its review and approval.

Nationwide, thousands of water bodies have already been listed as impaired, including many for mercury. In fact, states (with the assistance of the EPA) have already started setting maximum amounts of total mercury that can enter certain impaired water bodies ("mercury TMDL"). In April 2002, MDEQ prepared its list of water quality-limited or threatened water needing pollutant TMDLs and established a TMDL implementation schedule over the next ten years.²² During that time Michigan is expected to develop 410 TMDLs for impaired water bodies, some of which likely will be for mercury.²³ Out of the approximate twenty-one water bodies where TMDLs have already been established in Michigan, one includes a TMDL for mercury (Hammell Creek in Houghton County).²⁴ As sampling is performed

using the new lower detection limit for mercury and water quality standards are lowered, a significantly greater number of water bodies are likely to be listed as impaired for mercury, requiring TMDLs.

To be in compliance with water quality standards and meet TMDLs, the EPA or the states must reduce the amount of mercury that discharges into surface water bodies from all sources (municipal sewerage treatment plants, industrial facilities, urban runoff and airborne deposition). Although the EPA acknowledges that reducing the contribution by direct discharges will not have a significant impact on overall mercury concentrations in surface water bodies, wastewater dischargers will increasingly be asked to reduce their contribution.²⁵

State environmental agencies regulate these discharges through the wastewater discharge permit program.²⁶ The EPA and the states use existing mercury standards and guidelines to place permit limits on the amount of mercury that may be discharged from each permitted industrial or municipal discharger into the local water body, including sewerage treatment plants. As mercury standards are lowered, more strict permit limits are likely to be imposed on sewerage treatment systems, which will result in lower limits being imposed upon users of such systems. Although, as of March 2002, only 6 percent of the major sewerage treatment plant water discharge permits contain limits for total mercury, according to the Association of Metropolitan Sewerage Agencies "[a]s more monitoring for mercury is conducted, the number of [sewerage treatment plants] ... with ...[discharge] limits is likely to significantly increase."²⁷

To meet the permit discharge limits, the municipal sewerage treatment plant may either remove the pollutant prior to its discharge to the surface water body or limit the quantity of a pollutant that it receives from a source. With regard to the later approach, the EPA and state regulators have encouraged sewerage treatment systems to issue guidance to control mercury discharges at the source through pollution prevention and even substitution of non-mercury containing products. For example, some guidance has been directed at dental offices to reduce the use of dental amalgam and to install amalgam collection devices. The regulatory agencies have been vague as to whether they consider the suggested guidance to be based on legally enforceable requirements of the Clean Water Act or equivalent state or local laws, or are voluntary requests based on policy preference.²⁸

This question likely will be answered over time on a case-by-case basis, as disputes arise between regulatory agencies and users of the wastewater system. Despite this question, one can expect increased pressure by regulators to reduce mercury use and discharges at the source, particularly as more stringent pollutant discharge limits are imposed as part of the wastewater discharge permit program. For example, MDEQ “has concluded that, in general, source control rather than end-of-pipe treatment for mercury is the most cost-effective method to reduce mercury loadings to achieve water quality standards.”²⁹

B. Regulating Mercury Air Emissions – Clean Air Act

Since the primary source of mercury in surface water is air deposition from anthropogenic emissions, the Clean Air Act, and state equivalents, have played, and will continue to play, a critical role in limiting the amount of mercury reaching surface water bodies.

Pursuant to the Clean Air Act, the EPA has developed air toxics regulations known as national emission standards for hazardous air pollutants (NESHAP) or maximum achievable control technology (MACT) standards, to limit mercury air emissions from a variety of anthropogenic sources. These sources include: hazardous waste combustors; large/small municipal waste combustors; medical waste incinerators; mercury ore processing facilities; mercury chloralkali cell chlorine gas production facilities; waste water treatment plant sludge incinerators; and commercial and industrial solid waste incineration units. The State of Michigan also regulates mercury air emissions on a case-by-case basis under Part 55 of NREPA.³⁰

Existing Federal CAA Regulations:

Hazardous Waste Combustors - On February 13, 2002, EPA issued its Interim Final emission standards for hazardous air pollutants, including mercury, from incinerators, cement kilns, and lightweight aggregate kilns that burn hazardous wastes (hazardous waste combustors).³¹ These MACT standards replace EPA’s September 30, 1999 standards, which were vacated by the United States Court of Appeals (D.C. Circuit) on July 24, 2001 in *Cement Kiln Recycling Coalition v EPA*, 255 F3d 855 (CA DC, 2001).³² With these standards, EPA predicts approximately a 51 percent reduction in mercury air emissions.³³ For new and existing incinerators, the MACT standard for mercury is 45 ug/dscm³⁴ and 130 ug/dscm respectively.³⁵ For cement kilns and lightweight aggregate kilns, the standard for new and

existing sources is 120 ug/dscm. EPA anticipates that a Final rule will be promulgated by June 2005.

Medical Waste Incinerators - EPA issued Final emission standards and guidelines for hospital/medical/infectious waste incinerators (HMIWI) on September 15, 1997.³⁶ These final standards set emission limits for mercury and other pollutants.³⁷ The MACT standard for mercury for small, medium, and large HMIWI³⁸ sources constructed after June 20, 1996 and the emission limit for existing sources is 0.55 mg/dscm. The emission limit for mercury for small existing HMIWI that meet the rural criteria is 7.5 mg/dscm.

Existing Michigan Regulation:

Any new or modified emission unit or units for which an application for a permit to install is required and that emits a toxic air contaminant, must comply with Michigan’s toxic air contaminants regulations.³⁹ A toxic air contaminant (TAC) generally is any air contaminant for which there is no national ambient air quality standard (NAAQS), which may be harmful to the public health or environment.⁴⁰ Each non-exempt source that emits a TAC must apply the best available control technology (T-BACT) so the emissions of the toxic air contaminant do not result in a maximum ambient concentration that exceeds the applicable health based screening level.⁴¹ Michigan lists mercury as a “High Concern Toxic Air Contaminant.”⁴² Although mercury previously was assigned a health based screening level of 0.3 ug/m³/24hrs, this value is no longer applicable and MDEQ is evaluating mercury air emissions on a case-by-case basis.⁴³

Proposals for Additional Air Emission Controls:

Clear Skies Initiative - On February 14, 2002, President Bush announced a proposal to reduce power plant air emissions of sulfur dioxide, nitrogen oxides, and mercury known as the “Clear Skies Initiative”.⁴⁴ The Clear Skies Act (CSA), was introduced in Congress on July 29, 2002 by Representative Joe Barton of Texas and Senator Bob Smith of New Hampshire to enact this initiative.⁴⁵ EPA estimates that if the proposed legislation is enacted, it would cut mercury air emissions from power plants by 69 percent, from 48 tons to a cap of 26 tons in 2010 and 15 tons by 2018.⁴⁶ EPA also contends that the CSA will result in a 20 ton greater reduction in mercury emissions than what could be achieved under the Clean Air Act over the next six years.⁴⁷ The impact of CSA does not appear to be as significant in Michigan, where although the CSA is predicted to reduce mercury emissions by 39 percent,

EPA expects CSA will result in a 0.2 ton greater reduction in 2010 and a 0.5 ton greater reduction by 2020 than the Clean Air Act.⁴⁸

To achieve its stated goals, section 403(a) and (b) of the CSA authorizes the EPA Administrator to initiate a market-based cap-and-trade system by allocating annual "allowances" that can be held or traded by an affected unit.⁴⁹ The cost to purchase one mercury allowance from the EPA Administrator will be \$2,187.50.⁵⁰ Beginning in 2010 and continuing each year thereafter until 2061, EPA will conduct annual auctions of mercury allowances. The number of mercury allowances to be auctioned in 2010 is 8,320 out of 823,680 allocated mercury allowances.⁵¹

In addition, all plants would be required to conduct continuous emissions monitoring.⁵² The CSA also establishes national emission standards for applicable units (boilers, combustion turbines, and integrated gasification combined cycle plants (IGCCs)) that are constructed or reconstructed after enactment.⁵³ Under the CSA, coal fired boilers, combustion turbines and IGCCs would be subject to a mercury emission limit of 0.015 lb/GWh.⁵⁴ In order to protect utilities from being over-regulated, the CSA would amend section 112 of the Clean Air Act to preclude regulation of hazardous air pollutant emissions from utilities.⁵⁵ Utilities governed by CSA also would be exempt from New Source Review.⁵⁶ EPA estimates that the cost of CSA on the nation would be \$3.69 billion in 2010 and \$6.49 billion in 2020, however, it does not expect it to significantly affect electricity prices, including in Michigan.⁵⁷

IV. Conclusion

Concerns with exposure to mercury, especially methylmercury, and how it travels through the environment, continues to increase. With this concern has come increased regulatory scrutiny in an attempt to limit the amount of mercury introduced into the environment. Federal and state regulators and businesses have taken, and will continue to take, steps to reduce mercury discharges (either through legislation or voluntary programs or initiatives). Recent proposals by EPA, the White House, and states, and environmental groups' interpretation of and reaction to them, will have a considerable impact on the regulated community in the future and should be followed closely. Failure to monitor developments in this area will result in missed

opportunities to ensure sound application of science and economic analysis during the final legislative and rulemaking processes.

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¹According to EPA, the "principal sources of fish contamination" with mercury "are air emissions of mercury from coal burning power plants, municipal waste incinerators and other industrial sources." US EPA, *Star Report*, Vol. 4, Issue 1, *Mercury Transport and Fate in Watersheds* at 2 (October 2000). US EPA estimated that direct discharges to water bodies accounted for 2.5% to 8.7% of the mercury loading to the Great Lakes of the atmospheric and other contributions is 97.5% to 91.3%. EPA *Great Lakes Guidance Impact Analysis, Final Report* at 5-3, EPA#: 820/B-95-011 (1995) <www.epa.gov/waterscience/pc/greatlak.html>.

²Some have estimated that only approximately 40 percent of the mercury deposition in the United States comes from United States sources. For example, Randall Lutter and Elizabeth Mader *Health Risks From Mercury-Contaminated Fish: A Reassessment*, AEI-Brookings Joint Center for Regulatory Studies (March 2001) <<http://aei.brookings.org/admin/pdffiles/mercury.pdf>>.

³*Revised Great Lakes Water Quality Agreement of 1978, as amended by Protocol signed November 18, 1987* (visited Nov 26, 2002) <<http://www.ijc.org/agree/quality.html>>.

⁴*BNS Great Lakes Binational Toxics Strategy: Canada-United States Strategy for the Virtual Elimination of Persistent Toxic Substances in the Great Lakes* (visited Nov 26, 2002) <www.epa.gov/gtrlakes/p2/bns.html>.

⁵The EPA Mercury Action Plan and the Great Lakes Strategy 2002 are components of the agency's broader effort to reduce or eliminate the use of all persistent bioaccumulative toxic ("PBT") chemicals (including mercury). For example, Congress has phased out the use of mercury batteries (visited Nov 26, 2002) <<http://www.epa.gov/compliance/resources/newsletters/civill/enfalert/battery.pdf>>. The United States also has signed the Persistent Organic Pollutant Treaty, which bans the use (except in limited circumstances) of listed persistent organic pollutants (visited Nov 26, 2002). <http://www.epa.gov/oppfead1/cb/csb_page/updates/popsleg.htm>. Although mercury is not listed in the current treaty or the draft implementing legislation, many advocacy groups have suggested adding mercury in the future (visited Nov 26, 2002) <<http://www.epa.gov/nceal/pdfs/popsrep/chapter4.pdf>>.

⁶U.S. Policy Committee for the Great Lakes EPA, *Final Great Lakes Strategy 2002: A Plan for the New Millennium, A Strategic Plan for the Great Lakes Ecosystem*, (April 2002) <www.epa.gov/grtlakes/gls>.

⁷*Id.* at 6.

⁸*Id.* at 6.

⁹*Id.* at 7.

¹⁰*Id.* at 68.

¹¹*Mercury Permitting Strategy Implementation of Method 1631*, (Feb 2000) <www.deq.state.mi.us/documents/deq-swq-gleas-Hgstrategy.pdf>.

¹²Since the quantification level of Method 245.1 (200 ppt) was above Michigan's water quality standard for mercury (1.3 ppt), the NPDES permit program was regulated under R 323.1213.

¹³MDEQ letter to United States Environmental Protection Agency regarding MDEQ Mercury Permit Strategy (Sept 12, 2001) <www.deq.state.mi.us/documents/deq-swq-gleas-Hgstrategy.pdf>.

¹⁴Mercury varies in chemical and physical form, as well as toxicity. Because of its varying forms, it also travels differently when it reached the environment.

¹⁵For example, the regulatory agencies assume that all or most of the mercury from a dental office, despite the fact that most of it is bound in the amalgam, will be converted into methylmercury once released into the environment. In other words, they assume that very small quantities of mercury in water will accumulate more than a million-fold in fish (*i.e.*, 0.001 micrograms of mercury per liter of total mercury in surface water ("parts per trillion" or "ppt") will result in 1 to 10 milligrams of methylmercury in one kilogram of fish tissue (parts per million or "ppm").

¹⁶33 USC 1251 to 1387.

¹⁷42 USC 7401 to 7671.

¹⁸MCL 324.3101, MCL 324.5501.

¹⁹33 USC 1313.

²⁰33 USC 1313.

²¹40 CFR, 130.

²²Pursuant to 33 USC 1313 and the Water Quality Planning and Management regulations at 40 CFR, states are required to submit to the EPA for its review and approval a list of impaired waters and a schedule for completing TMDLs. See Michigan Department of Environmental Quality Surface Water Quality Division. *Clean Water Act Section 303 (d) List, Michigan Submittal for Year 2002* (April 2002) <http://www.deq.state.mi.us/documents/deq-swq-gleas-303_d_Rpt2002b.pdf>.

²³*Id.*

²⁴Pursuant to 33 USC 1313 and the Water Quality Planning and Management regulations at 40 CFR, states are required to submit to the EPA for its review and approval a list of impaired waters and a schedule for completing TMDLs. See Michigan Department of Environmental Quality Surface Water Quality Division. *Clean Water Act Section 303 (d) List, Michigan Submittal for Year 2002* (April 2002) <http://www.deq.state.mi.us/documents/deq-swq-gleas-303_d_Rpt2002b.pdf>.

²⁵EPA acknowledged that a 12.8% reduction in direct discharges of mercury to the Great Lakes would result, at most, in a 0.13% to 1.9% reduction in the mercury concentrations in fish tissue. See EPA, *Regulatory Impact Analysis of the Final Great Lakes Water Quality Guidance* (EPA-820-8-95-011) (March 1995) at 6-15, Table 6-8.

²⁶The national pollutant discharge elimination system (NPDES) permit program was established under the Clean Water Act. See 33 USC 1342.

²⁷Association of Metropolitan Sewerage Agencies, *Evaluation of Effectiveness of Publicly Owned Treatment Works (POTW) Mercury Pollution Prevention/Minimization Programs ES* (March 2002).

²⁸One could argue based on legal precedent that such guidance could not be based on legally enforceable requirements of the Clean Water Act, since the EPA is unlikely to possess the authority to set limits on individuals who are not otherwise required to obtain a NPDES permit (*i.e.*, merely discharge into a sewer system). Courts have stated, however, that the EPA may set a discharge limit at a level whereby "a plant would as a practical matter be forced to change internal equipment and processes in order to comply." *American Iron & Steel Institute v EPA*, 115 F3d 976, 995, 996. Thus, this issue should be addressed on a case-by-case situation.

²⁹MDEQ letter to United States Environmental Protection Agency regarding MDEQ Mercury Permit Strategy (September 12, 2001) <www.deq.state.mi.us/documents/deq-swq-gleas-Hgstrategy.pdf>.

³⁰MCL 324.5501.

³¹Standards were issued pursuant to the Clean Air Act, section 112 (d). See NESHAP, *Interim Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Interim Standards Rule)*, 67 Fed Reg 6792 (Feb 13, 2002). EPA estimates that there are approximately 232 hazardous waste combustion units consisting of 189 incinerators, 33 cement kilns, and 10 aggregate kilns. See *Frequently Asked Questions, Final Rule on Hazardous Waste Combustion Emission Standards* <<http://www.epa.gov/epaoswer/hazwaste/combust/faqs.htm>>.

³²*Id.* at 6793. EPA promulgated the Interim standards to comply with the litigation and to avoid the necessity of conducting a source specific MACT analysis pursuant to the Clean Air Act, section 112(j)(2), the so-called "MACT Hammer."

³³Under the original rule, EPA predicted a 55% reduction in mercury air emissions, however, the new interim standards are less stringent. See *Frequently Asked Questions, Final Rule On Hazardous Waste Combustion Emission Standards* (visited Nov 26, 2002) <<http://222.epa.gov/epaoswer/hazwaste/combust/faqs.htm>> U. S. EPA *Final Combustion Rules, Summary of Interim Standards Rule* <<http://www.epa.gov/epaoswer/hazwaste/combust/comb-02.htm>>. Despite the fact the new rules are less stringent, EPA contends the rules will achieve 93 percent of the original reduction. 67 Fed Reg at 6796.

³⁴dscm = dry standard cubic meter.

³⁵*Id.* See also, *EPA Environmental Fact Sheet, Interim Emission Standards for 1999 Hazardous Waste Combustor Rule*, February 2002.

³⁶The Standards were promulgated pursuant to the Clean Air Act §129. See *Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Hospital/Medical/Infectious Waste Incinerators; Final Rule*, 62 Fed Reg 48348 (Sept 15, 1997). The EPA estimates that there are 2,400 HMIWI in the United States combusting 846,000 tons of medical waste annually. *Id.* at 48350.

³⁷*Id.* at 48351. Solid waste incinerators that are required to have a permit pursuant to section 3005 of the Solid Waste Disposal Act are exempt from the HMIWI standards. CAA §129(g)(1). See also, 62 Fed Reg at 48358.

³⁸Small HMIWI have a capacity to burn less than 200 lbs/hr. Medium HMIWI facilities are those that burn between 200 – 500 lbs/hr. Large HMIWI burn more than 500 lbs/hr. *Id.* at 48362.

³⁹Michigan's air toxic rules are promulgated pursuant to MCL 324.5501 See 1979 AC, R 336.1224 to 1232.

⁴⁰1979 AC, R 336.1120(f).

⁴¹List of TACs and their health based screening levels (visited Nov 26, 2002) <http://www.michigan.gov/deq/0,1607,7-135-3310_4105--,00.html>. See 1979 AC, R 336.1224(1) and 336.1225(1).

⁴²1979 AC, R. 336.1226, Table 20.

⁴³*Id.* at note 7. In addition, the Michigan Air Pollution Control Rules do not apply for emission units that are emitting air contaminants that are regulated under CAA 112. 1979 AC, R. 336.1224(2)(a) and R 336.1226(c).

⁴⁴*President Bush Announces Clear Skies & Global Climate Change Initiatives*, (Feb 14, 2002). <<http://www.epa.gov/clearskies/>>.

⁴⁵See S 2815, 107th Cong (2002) and HR 5277, 107th Cong (2002).

⁴⁶EPA Press Release: *Clear Skies Legislation In Congress Proposal Will Improve Air Quality, Prevent Premature Deaths, Illnesses*, (July 29, 2002.) See also, *EPA White Paper on the Clear Skies Initiative and the Current Clean Air Act*, at 1. <http://www.epa.gov/epahome/headline_072902.htm> and (visited Nov 26, 2002) <<http://www.epa.gov/clearskies/>>.

⁴⁷White Paper at 1

⁴⁸*Clear Skies in Michigan, U.S. EPA, Figure 1c* (visited Nov 26, 2002). <<http://www.epa.gov/clearskies/>>. EPA also expects that the CSA will result in significant health benefits. For example, EPA contends that, nationwide, CSA generally will result in 6,400 fewer premature deaths and \$40 billion in health benefit savings, of which \$19 billion of the health benefits would occur in Region V. See, *Summary: Impacts of the Clear Skies Initiative On EPA Region V, U.S. EPA at 2* (visited Nov 26, 2002). Michigan would receive \$3 billion of these health benefits. See, *Clear Skies in Michigan*, (visited Nov 26, 2002) <www.epa.gov/clearskies/>. U.S. EPA at 2. A greater impact in EPA Region 5 is expected, where the EPA predicts that the CSA will reduce 4 more tons of mercury than under the Clean Air Act by 2010 and 6 more tons of mercury by 2020. See U.S. EPA, *Figure* (visited Nov 26, 2002) <www.epa.gov/clearskies/> *Summary: Impacts of the Clear Skies Initiative On EPA Region V*.

⁴⁹S 2815, 107th Cong. 403(a) and (b) (2002). For mercury, a “affected unit” is one that is subject to the mercury emission reduction requirements contained in Part D of the CSA. *Id.*, 402(3). In the context of mercury, an “allowance” is defined as a limited authorization to emit one ounce of mercury. *Id.* 402(4) and 403(d).

⁵⁰*Id.* 403(e)(3)(B).

⁵¹*Id.* 473, Table A.

⁵²*Id.* 405(a)(1)(A).

⁵³*Id.* 481(a)(5). The national emission standards apply to “new affected units” that are constructed (fabricated, erected, or installed) or reconstructed after the CSA enactment date. Reconstruction is defined as the replacement of components where the fixed capital cost of the new components exceeds 50% of the fixed capital costs required to construct an entirely new unit and is technologically and economically feasible.

⁵⁴*Id.* 481(c)(D).

⁵⁵*Id.* 3(a)(5)

⁵⁶*Id.* 483. EPA recently has proposed regulations that are intended to alleviate the burdensome NSR process and provide incentives to businesses to incorporate cleaner technologies. The Clear Skies Act would exempt utilities from these proposed rules.

⁵⁷The EPA has not provided any cost figures by EPA Region or by State because of the methodology EPA employed in calculating the impact of the legislation on the nation as a whole. See *Clear Skies in Michigan, U.S. EPA* (visited Nov 26, 2002) <www.epa.gov/clear.skies>.

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COMMITTEE REPORTS

PROGRAM COMMITTEE

August 2002 Meeting Minutes

The Program Committee held a meeting on Wednesday, August 21, 2002. Attendees included John Byl, Kurt Brauer, Matt Eugster, James O'Brien, Joseph Quandt, Robert Schroder, John Tatum and Tom Wilczak.

Committee Liaison Reports

a. **Reports Environmental Litigation.** Some ideas for joint programs with other sections include: toxic tort class actions with the litigation section; administrative ALJ hearings/contested cases, with the administrative law section; expert witness/Daubert moot court hearing, with judges and litigation sections; and land use/wetland/zoning, with the public corporations law section.

Planning Programs for Remainder of 2002

a. **Annual Program on September 26.** The program will be held on September 26 at the Amway Grand Plaza Hotel in Grand Rapids. The program is a joint program with the Real Estate Section. The topics are mold issues and the new Part 201 rules.

b. **Fall Program.** We discussed a number of possible topics for a fall program in November. Jim O'Brien and Kurt Brauer agreed to be co-chairs for the program. Bill Burton was contacted regarding the possibility of having presentations by the new division chiefs. Bill reported that the new division chiefs will not be selected until late October or November, and that it would not be feasible to have the new division chiefs speak at a November program. The co-chairs will contact each of the subject matter committees of the environmental section, and ask them to put together presentations in their areas (air, water, waste, etc.). They will likely cover hot topics in their respective areas. John Tatum will check to see if we can have a simulcast for the fall program.

c. **Possible Program in Northern Michigan in Winter.** The group wants to try another seminar in the winter (likely in February). One option is a joint program

with the Corps of Engineers. Tom Wilczak has made some initial contact with the Natural Resources/Wetlands Committee regarding a possible joint program. The topics would likely include wetlands and waterfront permitting issues, and the Corps' role at major Superfund, DOE and Part 201 cleanup sites. We also discussed the possibility of inviting other sections to a primer on environmental law, sort of an environmental boot camp. John Tatum and Bob Schroder indicated that they may have some materials from a similar ABA program that they would have available to discuss at the next Program Committee meeting. One of the purposes of such a program would be to help educate other practitioners on when it is appropriate to utilize the services of an environmental attorney. Another suggestion was made that we review what the Environmental Law Institute has done on general environmental courses (such as introductions to the Clean Air Act, Clean Water Act and CERCLA). A suggestion was made that someone review the ELI website for such information. The sections that might be invited to such a program include the business, real estate, and probate sections.

September 2002 Meeting Minutes

The Program Committee held a meeting on Wednesday, September 25, 2002. Attendees included John Byl, Matt Eugster, Beth Gotthelf, Anna Maiuri, James O'Brien, Joseph Quandt, Robert Schroder, John Tatum, Grant Trigger, Susan Topp and Tom Wilczak.

Committee Liaison Reports

a. **Environmental Litigation.** We discussed various ideas for joint programs with other sections. A decision was made to pursue a possible program on Daubert issues. John Tatum will contact the Chair of the litigation section. Matt Eugster will work with Charlie Denton on developing either a separate program on this topic, or including it in the winter program. The program would likely be done with the litigation and judge's sections.

Planning Programs for 2002-2003

a. Annual Program. The program was held on September 26 at the Amway Grand Plaza Hotel in Grand Rapids. There were approximately 50-60 attendees at the program. The materials will be made available on the Environmental Section website in PDF format.

b. Fall Program. In lieu of a full day fall program, Anna Maiuri will take the lead on planning a lunch program in November. That program will likely include a presentation by Krishna Dighe of the U.S. Attorney's office of the Eastern District of Michigan, on enforcement issues at the federal level. There will also be a presentation on wetlands issues. This will likely be held in downtown Detroit, possibly at the offices of Miller Canfield or some other location. This program will be done jointly with the Corps of Engineers.

c. Winter Program. Ultimately, the group decided on a 1-1/2 day program in northern Michigan, likely in the Gaylord area. Susan Topp will follow up with possible venues, including the Otsego Club and Treetops. The program will likely occur in February, and will run from approximately noon on Thursday through late afternoon on Friday. The group thought it would make sense to invite Mike Leffler and members of the new administration (perhaps the division chiefs) to discuss enforcement issues and what to expect from the new administration. Beth Gotthelf, Jim O'Brien and others agreed to help with this program. The Thursday portion would likely be limited to the environmental section, and Friday would be a joint program with another section, likely the real estate section.

October 2002 Meeting Minutes

The Program Committee held a meeting on Wednesday, October 23, 2002. Attendees included Joe Quandt, Matt Eugster, Robert Schroeder, John Tatum, Susan Topp and Tom Wilczak.

Committee Liaison Reports

a. Environmental Litigation. Matt Eugster and John Tatum discussed the possible program on **Daubert** issues. Matt and Charlie Denton are developing an agenda and looking at speaker prospects. John Tatum will discuss co-sponsoring the program with the Litigation Section and will report back at the next meeting.

Planning Programs for 2002 and 2003

a. Fall Program. The Fall Program will consist of a short program on criminal enforcement issues at the federal level. This program will be held at the Detroit offices of Miller Canfield on November 15, 2002. John Tatum confirmed that the program had been posted to the list serve and John Byl and Anna Maiuri are coordinating with others to expand the program's outreach to other committees.

b. Winter Program. Susan Topp reported that she had contacted Treetops Resort, Crystal Mountain Resort and Otsego Club Resort to evaluate potential venues for the winter meeting. Treetops appeared to have the best overall package with respect to the cost of rooms, food and beverage and facilities. The committee agreed to empower Sue to move forward to commit the committee for the winter program which will take place on February 20 and 21 (1 and ½ day program). Possible topics included - Part 201 rules, possible reports from the new DEQ division chiefs as well as a potential presentation by Mike Leffler on prerogatives of the new administration. Other potential topic issues include an environmental "boot camp" for non-environmental/new environmental practitioners. Other possible topic areas include wetland/shoreland/waterfront permitting and regulatory issues (coordinated with the US Army Corp of Engineers) and also landowner rights issues related to oil and gas development. We expect to have the topic field area completely narrowed and potential speakers identified for the next program committee meeting.

November 2002 Meeting Minutes

The Program Committee held a meeting on Tuesday, November 19, 2002. Attendees included Kurt Brauer, John Byl, Matt Eugster, John Tatum, and Susan Topp.

Committee Liaison Reports

a. Water. Beth Gotthelf has been in contact with Ken Gold regarding a potential half-day program on water issues. Beth will continue to work with Mr. Gold to plan this program.

b. Environmental Litigation. John Tatum spoke with a representative of the litigation section regarding possible joint programs. The litigation section has agreed to cooperate and will advertise any such programs and

promote the programs on its listserve. The litigation section does not want to fund or otherwise work on planning the programs.

Planning Programs for 2002-2003

a. Winter Program. Our winter program will be held on February 20 and 21, 2003 at Treetops in Gaylord. The program will start in the early afternoon on Thursday, February 20 and will continue through late afternoon on Friday, February 21. On Thursday afternoon, the program will consist primarily of environmental issues. We hope to have the DEQ division chiefs for Air, Environmental Sciences and Services, Water, Remediation and Redevelopment, and Waste and Hazardous Materials. John Byl contacted Bill Burton after the November 19 program to see if Bill Burton can make contact with the division chiefs for this program. Byl is also to contact Mike Leffler regarding his availability to speak on Thursday afternoon. The topics on Friday will consist of both litigation oriented topics (probably in the morning) and real estate related topics (in the afternoon). The morning topics may include: **Daubert** issues, the recent MEPA case decided in the Court of Appeals, asbestos, alternative dispute resolution, and

current CERCLA issues. Matt Eugster and Charlie Denton will follow up with potential speakers for these topics. Jeff Haynes and Steve Kohl/Susan Padley are actively involved in the MEPA case. The afternoon topics may include wetlands and other natural resources, brownfield legislation, uniform environmental covenants, oil and gas issues, and brief update on Part 201 rules. Sue Topp will follow up with Christine Bailey of the Corps of Engineers regarding wetlands and other natural resources. Kurt Brauer will give a summary of the anticipated brownfield legislation, and John Byl will provide a brief summary of the final Part 201 rules.

b. Joint Program with ICLE. John Byl received an e-mail from Jeffrey Kirkey of ICLE regarding a possible joint program on March 25 in Troy on mold issues. Byl forwarded an e-mail to Mr. Kirkey saying that the Environmental Section would be willing to be listed as a co-sponsor and would provide notice of the program on the environmental section listserve. Byl also provided Mr. Kirkey with names of possible speakers for the mold program.

MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from June 1, 2002 through October 31, 2002.

Little Traverse Bay Bands of Odawa Indians v Great Spring Waters of America, Inc, 203 F Supp 2d 853 (WD Mich, 2002).

<http://www.michbar.org/opinions/district/2002/052802/15170.html>

The plaintiffs sued Great Spring Waters of America, Inc. (GSWA) and Governor, John Engler, claiming that their property rights to use and fish the waters of Lake Michigan and its tributaries were violated when the Michigan Department of Environmental Quality gave GSWA a license to pump water from Sanctuary Springs. The plaintiffs sued the defendants under the Water Resources Development Act (WRDA), which prohibits export or diversion of water from the Great Lakes without approval

of each of the Great Lakes Governors. The court held that the WRDA did not give the plaintiffs a private and implied cause of action, and it dismissed the case. In reaching its decision, the court applied the four-factor test set forth in **Cort v Ash**, 422 US 66 (1975). In evaluating the first factor, the court found that the statute did not create any special benefit in favor of these plaintiffs because Congress did not draft the WRDA to give tribal members any special protection. In evaluating the second factor, the court found no legislative intent that would create a cause of action for these plaintiffs under the WRDA. Instead, the court found that the WRDA was intended to give the Great Lakes Governors authority to act in the interests of their citizens, and that by creating a private cause of action, that authority may be frustrated. In evaluating the third factor, the court found that, if it was to imply a private cause of action, it would be inconsistent with the statutory scheme of the WRDA. Finally, the court evaluated whether this was primarily a state or federal issue, and the court concluded that because the Great Lakes are a primary source of fresh

water in the United States, this was, primarily, a federal issue. Therefore, the court concluded that the WRDA did not create a private and implied cause of action.

National Wildlife Federation v Cleveland Cliffs Iron Co, unpublished opinion of the Michigan Court of Appeals, decided June 11, 2002 (Docket No. 232706); 2002 WL 1308236.

<http://www.michbar.org/opinions/appeals/2002/061102/15285.pdf>

The Michigan Department of Environmental Quality granted defendants a permit to fill wetlands and streams on their property with mining waste. In response, plaintiffs sued under the Michigan Environmental Protection Act (MEPA). The trial court dismissed the suit for lack of standing. Plaintiffs appealed. On appeal, the court held that plaintiffs had standing under the MEPA. The court looked to the plain language of the MEPA, which states that a cause of action may be brought by any person. The court relied on the Michigan Supreme Court's interpretation of an earlier version of the same statute, where the Court found that the words "any person" included legal entities, such as the plaintiffs in this case. The court reversed the trial court's dismissal of the claim for lack of standing.

Andrews v Holly Twp, 216, F Supp 2d 678 (ED Mich, 2002)

<http://www.michbar.org/opinions/district/2002/082102/16083.pdf>

Federal court is not the appropriate forum to resolve claims brought under the Michigan Natural Resources and Environmental Protection Act (NREPA) and the Michigan Constitution, where resolution of the state claims could resolve the case, even though federal issues also exist. Plaintiffs in this case sued Holly Township under the NREPA, the Michigan Constitution, the United States Constitution, and two federal statutes. The plaintiffs claimed that the township's "No-Wake" ordinance, which was passed pursuant to the NREPA, affected plaintiff's property rights on Marl Lake. The court held, under both the Buford and Pullman abstention doctrines, that these claims should be resolved by the state court. The court reasoned that it must abstain and refer these issues to the state court because the issues involved a state administrative agency, enactment of an ordinance under the NREPA by

a state administrative agency and a local unit of government, and, if the state court found that there was non-compliance by a state actor under the NREPA, the federal claims would likely be moot. The court hinted that it appeared that the ordinance was not passed in accordance with the NREPA. Therefore, the court abstained from hearing the merits of plaintiffs' case.

Dow Chemical Co v Fireman's Fund Ins Co, 217, F Supp 2d 816 (ED Mich, 2002)

<http://www.michbar.org/opinions/district/2002/082802/16161.pdf>

In this case, Dow Chemical Company (Dow) sued the Fireman's Fund Insurance Company (FFIC), Dow's insurer, for costs Dow incurred in settling claims related to pesticides in drinking water. In the 1950's, Dow had produced pesticides, Diobromo-3 chloropropane and ethylene diobromide. In 1979, these pesticides were discovered in the groundwater in California. This groundwater contamination led to lawsuits by California municipalities against Dow. Although FFIC provided Dow's defense in these suits under Dow's comprehensive general liability (CGL) policy, it denied coverage for the damages when the claims settled. This suit followed FFIC's denial of coverage. The court held that FFIC was liable for the damages under the CGL policy. The court stated that the policy was not ambiguous, and the court rejected FFIC's argument that the insurance was not triggered because the actual injury occurred after the policy ended. Rather, the court reasoned that, even if the injury was discovered outside of the policy period, the triggering event, the groundwater contamination, occurred during the policy period. Under the terms of the CGL policy, FFIC was obligated to pay for the property damage caused by the pesticides during the policy period.

Omega Environmental, Inc v Saco & Sons, Inc, unpublished opinion per curium of the Court of Appeals, decided September 20, 2002 (Docket No. 223195); 2002 WL 31105088.

<http://www.michbar.org/opinions/appeals/2002/092002/16378.pdf>

This case required the court to determine if under Part 201 of Michigan Natural Resources and Environmental Protection Act (NREPA), a gasoline dispenser was a facility for purposes of assessing response

and cleanup costs. The lower court submitted the question to the jury which found that a gasoline dispenser was not a facility. Appeal was taken on this and several other issues. The appellate court held that the lower court erred in submitting the question to the jury, but that the error was harmless because the jury reached the correct conclusion: a gasoline dispenser is not a facility under the NREPA. The court reasoned that the under the plain meaning of the statute, a gasoline dispenser was not a facility because it was not an “area, place, or property where a hazardous substance . . . has been released, deposited, disposed of, or otherwise comes to be located.” *Id.* (quoting MCL 324.20101(1)(o)). The court determined that the legislature did not intend items of personal property, such a gasoline dispenser, to be a facility because the legislature used the word “where” instead of “in which.” *Omega*, supra. The court stated that by using the word “where,” the “focus [was] on locations of real property, not instruments.” *Id.* Further, the legislature used the term “comes to be located” instead of “is stored” or “contained,” which tended to show that the term facility was intended to encompass the location where contamination may result, not the instrument that may cause the contamination. *Id.*

Attorney General v Richmond Sanitary Landfill, Inc,
unpublished opinion per curiam of the Court of
Appeals, decided September 13, 2002 (Docket No.
231608); 2002 WL 31058346.

[http://www.michbar.org/opinions/appeals/2002/
091302/16269.pdf](http://www.michbar.org/opinions/appeals/2002/091302/16269.pdf)

In 1991, Richmond Sanitary Landfill, Inc. (Richmond I) entered into a consent order with the Department of Natural Resources (DNR). In 1992, for tax reasons, Richmond I became Richmond Sanitary Landfill, Inc. II (Richmond II). In 1995, Richmond II’s mortgage was foreclosed. The landfill was then purchased by Osceola County Waste Services (OCWS). OCWS had a general partner, Environmental Rehab, Inc. (ERI), and a limited partner, McCarthy. McCarthy was also the sole officer and director of ERI. In 1995, the DNR filed suit against several defendants to enforce the 1991 consent order. The lower court granted plaintiff’s motion for summary disposition imposing liability on defendants OCWS, ERI, and McCarthy. Defendants appeal. The appellate court upheld the lower court’s grant of plaintiff’s motion for summary disposition. The court reasoned that OCWS and ERI were bound by the consent order because of their participation

with Richmond I and Richmond II and because of McCarthy’s knowledge of the consent order, which was imputed to OCWS and ERI. The court also reasoned that McCarthy could be held personally liable because he was the president and sole officer of ERI, he was responsible for hiring the waste management company, he was involved in negotiating compliance issues with the DNR, and he personally invested \$3.8 million in the landfill. The court found this sufficient to show that he was aware of the environmental issues and that he was actively involved in the decision-making process related to those issues. Thus, he was personally liable in this case.

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

Tracey Lackman, Robert Andretz, and Collene Beatty.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, June 22, 2002

Call to Order at 10:00am

Present

Todd Dickinson, Beth Gotthelf, Susan Topp, Ken Burgess, Chris Dunsky, Charlie Denton, Mike Robinson, S. Lee Johnson, Grant Trigger, Robert Schroder, Patricia Paruch, Peter Holmes, Charles Toy, John Tatum, Tom Wilczak, John Byl.

Absent

Sharon Feldman, Susan Johnson, Mike Leffler, Sharon Newlon, Chuck Barbieri, Saulius Mikalonis, Mike Ortega, Tom Phillips, Paul Bohn, Steve Huff, Jeff Magid, Joe Quandt.

Minutes

Secretary/Treasurer's Report

Minutes of the last meeting, April 6, 2002, were approved on the motion of Gotthelf, seconded by Schroder.

Dickinson delivered the Treasurer's report, noting that the Section's monthly financial statements for March, April, and May, as prepared by the State Bar, had been distributed on the Council listserv in advance of the meeting. The most recent statement, for the Year-to-Date period ending May 31, 2002, reflected net income of \$5,345.48 (based on total income of \$23,980.83, and total expenses of \$18,635.35), which added to a \$3,279.48 Fund Balance Forward, to leave a Net Remaining Section Balance of \$8,624.96.

Gotthelf moved to increase the Section dues to \$30, supported by Paruch. Trigger suggested tabling the motion until after consideration of the budget and survey agenda items. Wilczak stated that the State Bar may begin charging the Sections for administrative and support services, and observed that the Section dues are fixed by the Section bylaws, so that an increase would need to be approved in accordance with the procedures prescribed for amending the bylaws. Robinson questioned the timing of the dues increase.

Dunsky moved to amend the motion to propose increasing the dues to \$25, and Robinson seconded. Discussion of applicable bylaw provisions ensued.

Wilczak then presented and distributed copies of the Historical Budget Analysis he had prepared. He observed that the categorization of income and expense items was questionable in some respects. Discussion ensued on how to use this information for future planning. Trigger moved to table Gotthelf's motion, with support from Toy. The motion carried.

Membership Committee Report

Trigger reported on the results of the Section Survey recently completed under his direction, the results of which are summarized in a memorandum dated April 5, 2002, which was distributed to Council members. There were a total of 235 survey responses, and highlights included 102 responses favoring continuation of the WIMS Legislative Update Service, and 117 responses from Section members who had purchased the Deskbook.

Program Committee Report

Byl reported that the joint program with the Real Estate Section, held on February 22, 2002, in Gaylord, had 70 attendees. The annual meeting program will be held on September 26 in Grand Rapids. Fall and Winter programs are under discussion. The next annual meeting will be in mid-June.

The question was raised: when should the Section's Higgins Lake meeting be held next year?

Toy observed that this year's annual State Bar Convention would be the last of its kind, and that next year a State Bar Leadership Meeting, held in mid-June would take its place. Under the new format, all of the State Bar Sections would be free to hold their annual meetings whenever and wherever they chose to do so. Tatum questioned whether the Section's annual meeting

at Higgins Lake should be expanded by inviting all section members to attend. Trigger, Gotthelf, and Byl had suggestions. Wilczak questioned whether the venue of an annual meeting of the membership ought to be varied from year to year.

Journal Report

No report was received. A letter from Brinkmeyer proposes having the State Bar do the printing of the MELJ. Tatum indicated that Linda is evaluating this proposal. Holmes reported that Blais has received 3 submissions for the essay contest, for which the Section will award the winner a \$500 prize, if publishable.

Renewed Motion

Gotthelf renewed her motion to propose at the annual meeting an increase in the Section dues to \$30, supported by Dickinson.

Dunsky renewed his motion to amend Gotthelf's motion to propose increasing the dues to \$25, and, upon a vote being called, the motion to amend failed.

The Chair then called for a vote on Gotthelf's motion, which passed unanimously.

Technology Committee Report

Tatum participated in a meeting with State Bar staff to explore means of updating the listservs automatically. Reports show very few opt-outs. Dickinson will explore with WIMS the renewal of the Legislative Update service.

Publications

Tatum reported that ICLE is still dithering on whether it is willing to undertake publication of a new Environmental Deskbook.

Subject Matter Committee Reports

(a) **Air Committee:** Burgess indicated that the Committee had nothing to report.

(b) **Environmental Ethics:** No report.

(c) **Environmental Litigation:** No report.

(d) **Natural Resources/Wetlands:** Wilczak reported that the committee was planning a meeting. Tatum observed that the Survey results show the number of respondents indicating that wetlands was the predominant area of their environmental practice was the second highest of all of the surveyed areas of substantive environmental practice.

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

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

(g) **Superfund:** No report.

(h) **Surface/Groundwater:** No report.

Liaison Reports

(a) **State Bar Michigan Board of Commissioners:** In addition to the matters reported above, regarding the future of annual meetings, Toy reported that the Board of Commissioners is committed to strengthening its ties with the Sections.

(b) **Real Estate:** The Real Estate Section is sponsoring a program on July 17, 18, and 19 on Mackinac Island. Program sessions will be in the morning only. Trigger doing a presentation on mold and other biohazards

(c) **Administrative Law Section:** [Sharon Feldman was unable to attend the meeting, but provided the following report by advance distribution over the Council listserv.] "Our last council meeting was June 19. The council approved minor changes to our bylaws, which will be presented to the section members at the Annual Meeting. We also reviewed comments on our Spring Program (May 21), which were very favorable. Thanks to all who attended for helping make the program a success. The next issue of the Administrative Law Quarterly is expected in July, with 2 articles: one on primary jurisdiction and one on utility deregulation. Our time slot at the Annual Meeting is now the afternoon of September 26 (Thursday). After a business meeting at 1:30, the section has arranged for a speaker (at 2:00). Jane Perkins of the National Health Law Program in Chapel Hill, NC will speak on the topic: "Enforcement of Federal Rights Against State Agencies - Private Citizens Feel the Pain." All are welcome to attend."

(d) **Oil and Gas Law Committee:** Topp reported that the Oil and Gas Committee had not met or had any activity since her last report.

Chairperson's Report

Tatum reported that he and Wilczak had met with representatives of the State Bar in connection with its Section Summit and Leadership initiative, to discuss the State Bar Strategic Plan for 2004, and that he would have a full report on that effort at the first Council meeting after the annual meeting in September.

Vice Chairperson's Report

Wilczak's report on the Historical Budget Analysis was discussed above.

Old Business

Toy reported that the Section has sold 10 of the standard versions of the 20th Anniversary print for \$100 each. In addition to these sales, deluxe versions of the print are being presented as gifts to the MDNR, the MDEQ, the Supreme Court, and the Attorney General's Office.

New Business

Wilczak reported on the slate of candidates for Section Council and Officer positions recommended by the Nominating Committee. Craig Hupp and Hilda Gurley-Highgate were both approached regarding the possibility of being nominated for Council seats, but both declined, due to heavy time commitments in other areas. All Council members with expiring terms and eligible for reelection had agreed to accept nominations. Dickinson had agreed to accept a nomination for President-Elect, and Trigger had agreed to accept a nomination for Secretary-Treasurer. Trigger's elevation would leave his Council seat vacant with a 2-year term remaining. Bill Burton of MDEQ was proposed to fill that vacancy. Topp moved to accept the slate of candidates as proposed by the Nominating Committee, supported by Byl, and the motion carried.

Tatum reported that the Section's annual dinner will be held on September 25, 2002, at Gibson's Restaurant in Grand Rapids.

Byl moved to adjourn the meeting, at 12:00 noon, supported by Toy, and the motion carried.

Next Meeting

September 26, 2002.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Thursday, September 26, 2002

Call to Order at 9:30am

Present

Todd Dickinson, Mike Ortega, Charles Toy, Sharon Newlon, Linda Blais, John Byl, Scott Hubbard, Mark Cooley, Grant Trigger, Peter Holmes, Pat Paruch, Mark Henne, Tom Wilczak, John Tatum, Lavonda Jackson, Craig Hupp

Absent

Sharon Feldman, Susan Topp, Susan Johnson, Michael Leffler, Robert Schroder, Charles Barbieri, S. Lee Johnson, Saulius Mikalonis, Thomas Phillips, Paul Bohn, Charles Denton, Steven Huff, Jeffrey Magid, Joseph Quandt.

Minutes

Secretary/Treasurer's Report

Dickinson reported that the minutes of the June 22 meeting at Higgins Lake had not yet been completed. Dickinson then recapped the monthly financial statement prepared for the Section by the State Bar, for the period ending August 31, 2002, which, taken together with expenses he had subsequently approved and submitted for payment by the State Bar, indicates that the Section's funds are fully depleted as of the September 30 year-end.

Newlon moved to approve the increase in Section dues to \$30 per year, as proposed by the Council at the June 22 meeting, and Holmes supported the motion. The motion carried unanimously.

Journal Report

Blais reported that there were 4 entries submitted in the MELJ Environmental Law Essay Contest, and that the winner was John Walus, a student at Wayne State University Law School (and a student of Adjunct Professor Peter Holmes), whose essay was on directional drilling under the Great Lakes. Mr. Walus will receive a prize of \$500, awarded by the Section, as approved at the June 22 Council meeting.

Nominating Committee Report

Wilczak reported that the Committee was recommending a slate of candidates for Officer and Council positions as follows: Todd Dickinson for Chairperson-Elect; Grant Trigger for Secretary/Treasurer; William Burton to fill the remaining 2-year term of the seat that would be vacated by Trigger's elevation to Secretary/Treasurer; and John Byl, Susan Johnson, Michael Leffler, Sharon Newlon, Robert Schroeder and Susan Topp to fill the remaining Council seats for 3-year terms.

Mark Henne moved to elect the slate of candidates recommended by the Nominating Committee, and Craig Hupp seconded the motion. The motion carried unanimously.

Wilczak noted that Jeff Magid had resigned from the Council, in connection with his recent move to Alaska, which left another vacancy to be filled, and indicated that would be taken up at the next Council meeting.

Chairperson's Report

John Tatum thanked John Byl for his diligent and capable service to the Section as Chair of the Program Committee. Tatum then made the ceremonial presentation of the Section Chairperson's gavel to his newly elected successor, Tom Wilczak. Wilczak responded by expressing the Section's appreciation for Tatum's outstanding service as Chairperson, and presenting him with a framed print of the 20th Anniversary painting by Russell Cobane.

Program Committee Report

Byl briefly previewed the upcoming Winter program, planned for February in Gaylord, and noted that past Section Chair Gene Smary will be speaking at the ABA Environmental conference in Portland, Oregon, in October.

Adjourned at 10:00am.

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