



# Michigan Environmental Law Journal

## ENVIRONMENTAL LAW SECTION State Bar of Michigan

<i>Vol. 23, No. 2, 2005</i>	<i>Summer 2005</i>	<i>Issue 71</i>
Grant R. Trigger, Chairperson Honigman, Miller, LLC 6600 Woodward Avenue, Ste.2290 Detroit, Michigan 48226 (616) 575-5655	Robert L. Schroder, Editor Robert L. Schroder, PLLC 8921 Margo Drive Brighton, Michigan 48114 (810) 229-0326	Peter D. Holmes, Assistant Editor BorgWarner Inc. 3850 Hamlin Road Auburn Hills, Michigan 48326 (248) 754-0889

Table of Contents

Articles: **Supreme Court Sharply Limits Contribution Claims** ..... 3  
**Dams, the Public Trust, and MDNR Regulatory Authority**..... 8  
 Committee Reports:  
     Nominating Committee ..... 16  
     Program Committee ..... 17  
 Michigan Environmental Casenotes ..... 20  
 Environmental Law Section Council Meeting Minutes, June 18, 2005 ..... 24

Cite this publication as 23 Mich Env L J No 2, p (2005)

The text of the journal is also at the Environmental Law Section's page at [www.michbar.org](http://www.michbar.org). The views expressed in the *Michigan Environmental Law Journal* are those of the authors and do not necessarily reflect the position of the State Bar of Michigan, the Environmental Law Section, or any governmental body. The publication in the Journal of articles, committee reports and letters do not constitute an endorsement of opinions or legal conclusions which may be expressed. The Journal is published with the understanding that the Environmental Law Section is not engaged in rendering legal or professional services. Readers are invited to submit articles, comments or opinions to the editors. Publication and editing are at the discretion of the editors. Because of time constraints, galley or proofs are not forwarded to the authors.

The Journal is published three times per year, to inform members of Section activities and other matters of interest to environmental lawyers. Subscription is without charge to members and law student members of the Environmental Law Section. Subscription price is \$40.00 (U.S.) per year for non-members. Single issues, as available, may be purchased for \$14.00 per issue. To subscribe or purchase single issues please remit funds directly to: State Bar of Michigan, Michigan Environmental Law Journal, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083. Copyright 2005 by the Environmental Law Section of the State Bar of Michigan. All rights reserved.

---

<sup>21</sup> *Cooper Industries*, 125 S.Ct. at 581 (citing *United States v. New Castle County*, 642 F. Supp. 1258, 1263-69 (Del. 1986); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486-93 (Colo. 1985); *Wehner v. Syntex Agri Business, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985).

<sup>22</sup> *Id.* (citing *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-47 (1981) (refusing to recognize implied or common law right to contribution under the Sherman Act or the Clayton Act); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 90-99 (1981) (refusing to recognize implied or common law right to contribution under the Equal Pay Act or Title VII of the Civil Rights Act of 1964).

<sup>23</sup> MCL 324.20129(3).

<sup>24</sup> See, e.g., *Kelly ex rel. Michigan Natural Resources Comm'n v. Tiscornia*, 877 F. Supp. 1315, 1318 (W.D. Mich. 1993).

<sup>25</sup> *Kokx v. Bylenga*, 241 Mich. App. 655 (2000).

<sup>26</sup> Justices Ginsburg, joined by Justice Stevens in her dissent in *Cooper Industries*, would have authorized Aviall to proceed under § 107. *Cooper Industries*, 125 S.Ct. at 586-87.

## SUPREME COURT SHARPLY LIMITS CONTRIBUTION CLAIMS

### Many Pending Claims Will Likely Be Affected by the Court's *Cooper Industries* Opinion

By Dean F. Pacific\*

On December 13, 2004, the United States Supreme Court issued its opinion in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004). In *Cooper Industries*, the Supreme Court held that a plaintiff that is not party to a prior or pending civil action under § 106 or § 107(a) of CERCLA may not bring a contribution action under CERCLA § 113(f)(1). The Supreme Court's decision is contrary to most prior decisions from the lower courts, and significantly alters the landscape for parties seeking to bring contribution claims under CERCLA.

The *Cooper Industries* case involved cleanup costs associated with four contaminated aircraft engine maintenance facilities located in Texas. The defendant, Cooper Industries, Inc., owned and operated the facilities until 1981, at which time it sold them to the plaintiff, Aviall Services, Inc. Aviall then operated the facilities for a number of years. Aviall ultimately discovered that both it and Cooper Industries had contaminated the facilities with hazardous substances that had spilled onto the ground or leaked from underground storage tanks, contaminating the soil and groundwater at the sites.

Aviall notified the Texas Natural Resource Conservation Commission of these facts. The Commission instructed Aviall to clean up the sites and threatened to pursue enforcement action if Aviall did not do so. No judicial or administrative actions of any kind were taken, however, to compel the cleanup. Aviall proceeded to clean up the properties under the state's supervision, incurring approximately \$5 million in cleanup costs (and with future costs still on the horizon).

Aviall filed a contribution claim under CERCLA § 113(f)(1)<sup>1</sup> against Cooper Industries in the United States District Court for the Northern District of Texas, seeking to recover cleanup costs. The District Court granted Cooper Industries' motion for summary judgment, holding that Aviall did not meet the statutory precondition of a prior or pending § 106 or 107(a) civil action. A panel of the Fifth Circuit affirmed,<sup>2</sup> but the en banc Fifth Circuit reversed.<sup>3</sup>

The Supreme Court granted certiorari and reversed, holding that § 113(f)(1) did not authorize Aviall's suit. The Supreme Court noted that the first sentence of § 113(f)(1) – “the enabling clause that establishes the right of contribution” – provides: “Any person may seek contribution . . . during or following any civil action under § 9606 of this title or under § 9607(a) of this title.”<sup>4</sup> The Court concluded that “[t]he natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, ‘during or following’ a specified civil action.”<sup>5</sup>

The Supreme Court rejected Aviall's argument that the word “may” in the statute should be read permissively, such that “during or following” a civil action is one, but not the only, circumstance under which a party can bring a contribution action. The Court rejected this argument for several reasons. First, the Court reiterated, it read “may” in the context of the

enabling clause to plainly mean that the statute authorized certain contribution actions, i.e., those that satisfied the conditions specified in the statute, and no others.<sup>6</sup> Second, the Court noted the canon of statutory construction that a court will not read a provision of a statute in a manner that renders another part of the statute superfluous.<sup>7</sup> And if § 113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a prior or pending § 106 or § 107(a) civil action, then the explicit “during or following” condition included in the statute by Congress would have no meaning.<sup>8</sup> Likewise, the Court stated that if § 113(f)(1) authorized contribution actions at any time, then the provisions of § 113(f)(3)(B) permitting contribution actions after an administrative or judicially approved settlement would be rendered superfluous. “There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions,” the Court reasoned.<sup>9</sup>

Aviall also invoked the final sentence of § 113(f)(1), the “savings clause,” to support its right to bring a contribution claim. That sentence provides that “nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under Section 9606 of this title or Section 9607 of this title.” But the Court held that the “sole function” of the savings clause is to clarify that § 113(f)(1) does not diminish any cause of action for contribution that may exist “independently of § 113(f)(1).”<sup>10</sup> The sentence thus “rebut[s] any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP.” It does not, however, “itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought ‘during or following’ a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1).”<sup>11</sup>

Finally, the Court concluded that its holding was supported not just by the plain meaning of the terms of § 113(f)(1) itself, but also by reading § 113 as a whole. The Court noted that the statute provides two express claims for contribution: a 113(f)(1) claim during or following the specified civil actions, and a 113(f)(3)(B) claim that may be brought after an administrative or judicially approved settlement that resolves liability to the United States or a State. The Court went on to note that § 113(g)(3) provides two corresponding three-year limitations periods for contribution actions: one beginning at the date of judgment, 113(g)(3)(A), and one beginning at the date of settlement, 113(g)(3)(B). “Notably absent,” the Court said, is any provision governing the limitations period for a purely voluntary cleanup in which no judgment or settlement ever occurs. “The lack of such a provision supports the conclusion that, to assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B).”<sup>12</sup>

The immediate impact of the *Cooper Industries* decision is that plaintiffs like Aviall, who have engaged in purely voluntary cleanups, cannot pursue a contribution claim under § 113(f)(1). One federal district court applying *Cooper Industries* has already granted summary judgment in favor of the defendant and dismissed a § 113(f)(1) claim because of the lack of a prior or pending civil action under § 106 or 107(a).<sup>13</sup>

The *Cooper Industries* decision also raises serious doubt regarding the viability of § 113(f)(1) contribution claims brought by parties who have incurred cleanup costs in connection with a unilateral administrative order issued by the Environmental Protection Agency under CERCLA § 106. Because Aviall had not been subject to such an administrative order, the *Cooper Industries* Court expressly declined to decide whether a § 106 order could qualify as a “civil action” to support a § 113(f)(1) claim. But CERCLA § 113 expressly provides that claims thereunder are governed by the Federal Rules of Civil Procedure, which provide that “a civil action is commenced by filing a complaint with the court.”<sup>14</sup> Moreover, the Sixth Circuit has

recently noted that the plain meaning of the term “action” is a judicial proceeding. Interpreting the Prison Litigation Reform Act, the Sixth Circuit stated: “Black’s Law Dictionary defines [the term ‘action’] as ‘any *judicial* proceeding, which, if conducted to a determination, will result in a judgment or decree.’”<sup>15</sup> In contrast, an “administrative order” is “issued by a *government agency*” and is not the result of a judicial proceeding.<sup>16</sup> Other courts have likewise held that the term “civil action,” when used in other statutes, requires the filing of a complaint in court.<sup>17</sup>

After *Cooper Industries*, it appears that the options for a would-be contribution plaintiff who has not been subject to a prior or pending civil action under § 106 or § 107(a) of CERCLA are rather limited. They can, of course, proceed with a contribution action under § 113(f)(3)(B) if they have obtained an administratively or judicially approved settlement. Under controlling Sixth Circuit law, however, a private party that is itself a PRP may not pursue a § 107(a) action against another PRP.<sup>18</sup> The *Cooper Industries* Court declined to address the validity of this rule, since it had not been addressed below or briefed by the parties, but noted the great weight of lower court authority supporting it.<sup>19</sup>

The Court also declined to decide whether a party like Aviall has an implied right to contribution under § 107, though the Court appeared skeptical of any such claim.<sup>20</sup> While noting that, prior to the enactment of § 113, some courts held that a contribution right arose either impliedly from the provisions of § 107 or as a matter of federal common law,<sup>21</sup> the Court called that conclusion “debatable” in light of Supreme Court precedent refusing to recognize implied or common law rights to contribution in other federal statutes.<sup>22</sup>

State law claims, of course, are also potentially available. Michigan’s Natural Resources and Environmental Protection Act (NREPA) has a statutory contribution provision of its own.<sup>23</sup> Like much of NREPA, however, the provision is modeled after § 113 and, in particular, includes a “during or following a civil action” requirement like that contained in CERCLA § 113(f)(1). Because courts construing NREPA frequently look to CERCLA for guidance where the statutes are similar,<sup>24</sup> state or federal courts interpreting NREPA’s contribution provision may well decide that no contribution action lies in the absence of a prior or pending civil action. Moreover, the Michigan Court of Appeals has held that our 1995 tort reform legislation effectively abolished statutory contribution among joint tortfeasors under state law.<sup>25</sup>

A party that has not been subject to a prior or pending civil action as described in the statute and does not have a judicially or administratively approved settlement to base a contribution claim on will have great difficulty in maintaining a claim after *Cooper Industries*. Such a party plainly cannot maintain a § 113 claim now, and current law precludes a § 107 claim as well – though that rule is certain to be challenged.<sup>26</sup> The notion of an implied or common law right of contribution finds little support in the post-SARA case law, and the Supreme Court expressed skepticism regarding the viability of such claims in any event. State law claims face similar obstacles. While *Cooper Industries* clearly answers the question of statutory construction presented in that case, the environmental practitioner can be certain that it will spawn considerable litigation over the viability of other routes to recovery of cleanup costs.

\*Dean F. Pacific is a partner specializing in litigation, including environmental litigation, with Warner Norcross & Judd LLP in the Grand.

---

<sup>1</sup> CERCLA § 113(f)(1) provides: “Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.” 42 U.S.C. § 9613(f)(1).

<sup>2</sup> *Aviall Services, Inc. v. Cooper Industries, Inc.*, 263 F.3d 134 (5th Cir. 2001).

<sup>3</sup> *Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc).

<sup>4</sup> *Cooper Industries*, 125 S.Ct. at 583 (quoting 42 U.S.C. § 9613(f)(1)).

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (citing *Hibbs v. Winn*, 124 S.Ct. 2276, 2286 (2004)).

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.* at 583-84.

<sup>11</sup> *Id.* at 584.

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

<sup>13</sup> *AMW Materials Testing, Inc. v. Town of Babylon*, 2004 U.S. Dist. LEXIS 25511, at \*13-\*14 (E.D.N.Y. 2004).

<sup>14</sup> Fed. R. Civ. P. 3.

<sup>15</sup> *Riley v. Kurtz*, 361 F.3d 906, 914 (6th Cir. 2004) (quoting Black’s Law Dictionary, 29 (7th ed. 1999)) (emphasis added).

<sup>16</sup> Black’s Law Dictionary 1123 (7th ed. 1999) (emphasis added).

<sup>17</sup> See, e.g., *Oppenheim v. Campbell*, 571 F.2d 660, 663 (D.C. Cir. 1978) (holding that the term “civil action” as used in 28 U.S.C. § 2401(a) “is a term of art judicially and statutorily defined as one commenced by filing a complaint with [a] court, not an executive board.”); *Trapp v. Goetz*, 373 F.2d 380, 383 (10th Cir. 1966) (holding that an appeal from a state administrative board is not a “civil action” within the meaning of 28 U.S.C. § 1331 or 1332); *Barrows v. American Airlines, Inc.*, 164 F. Supp. 2d 179, 182 (D. Mass. 2001) (holding that removal under 28 U.S.C. § 1441 applies only to a “civil action” and accordingly requires the filing of a complaint in court); *In re Hinote*, 179 F.R.D. 335, 336 (S.D. Ala. 1998) (same).

<sup>18</sup> *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-56 (6th Cir. 1998).

<sup>19</sup> *Cooper Industries*, 125 S.Ct. at 584-85 (citing *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349-56 (6th Cir. 1998); *Pneumo Abex Corp. v. High Point, T. & D. R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-06 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120-24 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496, & n. 7 (11th Cir. 1996); *United States v. Colorado & E. R. Co.*, 50 F.3d 1530, 1534-36 (10th Cir. 1995); *United Technologies Corp. v. Browning-Ferris Industries*, 33 F.3d 96, 98-103 (1st Cir. 1994)).

<sup>20</sup> *Id.* at 586.

---

<sup>21</sup> *Cooper Industries*, 125 S.Ct. at 581 (citing *United States v. New Castle County*, 642 F. Supp. 1258, 1263-69 (Del. 1986); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486-93 (Colo. 1985); *Wehner v. Syntex Agri Business, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985).

<sup>22</sup> *Id.* (citing *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-47 (1981) (refusing to recognize implied or common law right to contribution under the Sherman Act or the Clayton Act); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 90-99 (1981) (refusing to recognize implied or common law right to contribution under the Equal Pay Act or Title VII of the Civil Rights Act of 1964).

<sup>23</sup> MCL 324.20129(3).

<sup>24</sup> See, e.g., *Kelly ex rel. Michigan Natural Resources Comm'n v. Tiscornia*, 877 F. Supp. 1315, 1318 (W.D. Mich. 1993).

<sup>25</sup> *Kokx v. Bylenga*, 241 Mich. App. 655 (2000).

<sup>26</sup> Justices Ginsburg, joined by Justice Stevens in her dissent in *Cooper Industries*, would have authorized Aviall to proceed under § 107. *Cooper Industries*, 125 S.Ct. at 586-87.

# DAMS, THE PUBLIC TRUST, AND MDNR REGULATORY AUTHORITY

By David A. Pizzuti\*

## I. INTRODUCTION AND ISSUE SUMMARY

The Michigan Department of Natural Resources (MDNR) has the responsibility to maintain and protect Michigan's aquatic resources. In particular, Michigan's fishery resources are "held in trust by the State for the benefit of both its present and future citizens."<sup>1</sup> The MDNR public trust obligation includes proper management of Michigan's bountiful water resources and the regulation of its dams.<sup>2</sup> Dams on Michigan waterways have adversely impacted important riverine ecosystems, as well as the natural health and productivity of fishery resources. Thus, the MDNR Fisheries Division has envisioned dam modification and removal as possible aquatic management tools for the fulfillment of its public trust responsibility.<sup>3</sup> While regulating dams for the purpose of environmental health is best accomplished in the permitting process, Michigan statutory provisions also authorize such regulation once a permit has been issued.<sup>4</sup>

## II. MDNR BACKGROUND AND FOUNDATIONAL ISSUES

"The overall mission of MDNR Fisheries Division is to protect and enhance fish environments, habitat, populations and other forms of aquatic life, and promote optimum use of the resources for the benefit of the people of Michigan."<sup>5</sup>

### A. Statutory Context and Perspective:

The Michigan Legislature acknowledged the state's public trust obligation when it delegated to the MDNR the responsibility to:

"... protect and conserve the natural resources of the State of Michigan; provide and develop facilities for outdoor recreation; ...prevent and guard against the pollution of lakes and streams within the state, and *enforce all laws provided for that purpose with all the authority granted by law*; and foster and encourage the protection and propagation of game and fish."<sup>6</sup>

However, environmental protection predicated upon "laws provided for that purpose with all the authority granted by law"<sup>7</sup> is vague and lacks significant precedent. Thus, the central issue affecting regulation of Michigan dams for environmental purposes becomes one of statutory interpretation.

Regrettably, the authority to regulate dams for environmental health and the public trust are expressed primarily with respect to the permitting stage,<sup>8</sup> with provisions for subsequent regulation found under Dam Safety, in Part 315 of the Natural Resources and Environmental Protection Act (NREPA).<sup>9</sup> While NREPA authorizes subsequent limitations on permitted dams for natural resources concerns,<sup>10</sup> that authority is complicated by the imposition of a balancing requirement prior to any regulatory action.<sup>11</sup> Yet, limitations under Part 315 may be sufficient for effective protection against the adverse impacts of dams on Michigan waterways.

Comprised of 29 sections, Part 315 concerns the physical safety of dams.<sup>12</sup> Created primarily to protect lives and property from dam failures, it requires a strict permit process for

construction, alteration, repair and removal of dams.<sup>13</sup> Its mandates require a high level of responsibility on the part of dam owners, who must periodically conduct engineering and operational inspections, maintain the physical integrity of the dam, and develop an Emergency Action Plan following Federal Emergency Management Agency guidelines.<sup>14</sup> Once permits are issued however, there is a regrettable scarcity of enumerated provisions for environmental protection. Still, Part 315 may provide all the protection needed.

## **B. Recognized Impacts of Dams on Michigan Waterways**

“The adverse impacts of dams on river and stream ecosystems have been well documented.”<sup>15</sup> Besides the obvious alteration to the natural free-flowing condition of a watercourse, there are numerous, less obvious, impacts that can be devastating to healthy aquatic ecosystems. The following are but a few of the potential impacts identified by MDNR:

Restrict[ed] access (fish and people); Loss of biological diversity and productivity; Alters natural flow; Loss of high gradient reach; Impoundments create poor water quality; Sediment accumulation; Elevated nutrients; Nuisance vegetation; Bank erosion; Restrict the flow of organic material.<sup>16</sup>

The Michigan Relative Risk Task Force identified these areas of concern:

Disruptive changes [occur] in fish behavior which waste energy, alter migratory patterns and curtail reproductive activities... Benthic organism community composition changes... Loss of key high gradient habitat areas; and Decreased overall productivity of the system.

Dams disrupt fish movement. Isolated fish stocks can decrease genetic diversity.

Dams also impact aquatic resources by changing the water quality characteristics of the river system. The major problems are: Temperature changes from the ponds acting as heat sinks; Changes in ground water inputs to the river system... and... Changes in nutrients...<sup>17</sup>

Many other issues have also been identified that “greatly impact and constrain the management of river systems.”<sup>18</sup>

## **C. Dams and Michigan’s Waterways**

For regulation and enforcement purposes the Michigan Department of Environmental Quality created an inventory of 2,503 dams “rang[ing] in size and function from large, actively generating hydropower dams to small earthen dams. The majority of these dams are small, privately owned, non-power generating dams...”<sup>19</sup> The Michigan Relative Risk Task Force Report on Hydrology likewise identified more than twenty-four hundred dams on Michigan waterways.<sup>20</sup> However, they found that only the hundred or so hydroelectric dams regulated by the Federal Energy Regulatory Commission have had the consequences to the physical environment adequately studied.<sup>21</sup> They were critical of the fact that “the impacts of the remaining twenty-three hundred dams have not been quantified.”<sup>22</sup> The Task Force did find that “many of the state and federally owned dams provide water level control for waterfowl and fisheries management purposes.”<sup>23</sup>

## **D. Public Trust Responsibility with Respect to Dams**

The fundamental goal is to “[p]rotect and maintain healthy aquatic environments and fish communities and rehabilitate those that are degraded.”<sup>24</sup> To fulfill its public trust responsibility, the State has a difficult task in mitigating adverse impacts of dams and, where possible, restoring damaged aquatic ecosystems.<sup>25</sup> MDNR articulated its view of its public trust responsibility in a statement regarding the Kalamazoo River:

Remediation objectives:

Restore, protect and if possible enhance populations of species adversely affected; Relax (remove) fish consumption restrictions; Allow for public trust resource management of the river environment, fisheries and wildlife; Allow for safe, high quality recreational use and access...

Fisheries Management Objectives:

Have naturally reproducing populations of [fish]; Provide excellent fisher[ies] outside the highly impacted [areas]; Fisheries productivity and angler use will likely increase substantially if river corridor management plans were permitted to move forward, such as selective dam removal...<sup>26</sup>

In that same document, the MDNR identified several areas where dams have potentially impacted that public trust responsibility:

Implications of retaining dams:

... Fish ladder [and] recreational use passage required; Public trust value in the river segments lost to waste storage must be compensated; State [and] Federal land purchase reimburse[ment]; Impoundment wastes not removed [are] vulnerable to flood and other disturbance; Bank treatment may induce other long-term hydrologic and river channel changes (groundwater discharge, bank erosion); ...significant loss of riparian habitat and habitat potential...<sup>27</sup>

## **E. Making the Case for Biodiversity and Ecosystem Management**

Protection of biodiversity, whether labeled ecosystem management, landscape planning, or watershed analysis,<sup>28</sup> contemplates comprehensive management of natural resources for the overall health of a geographic region. While desired management effects may be approached from a variety of different angles, each with a slightly different but overlapping scope, the fundamental principle remains the same. Management of ecosystems, regardless of the label used, “acknowledges the interconnectedness of seemingly isolated actions and attempts to coordinate those actions in a way that will minimize their impacts on ecosystem function.”<sup>29</sup> However, this acknowledgement alone will not “assure healthy ecosystems or wildlife populations.”<sup>30</sup>

Protection and restoration of river environments is essential for sustainable, diverse, and productive stream fisheries... Aquatic community health is closely linked to water temperature tolerances and impounded waters may discharge at significantly higher or lower temperatures than normally encountered in the stream. Water quality may decline in impounded streams if excessive nutrients, sediments, and aquatic plants accumulate in the impoundment. Flow patterns

reflecting normal high and low water conditions may also be fundamentally altered, affecting stream channel configuration, fisheries habitat, and many other physical and biological processes. Stream changes induced by dams and other watershed conditions are often reflected in the fish community. Native and desirable fish species are almost always displaced in river segments affected by dams.<sup>31</sup>

Biodiversity as a principle may find strengthened statutory protections in the future, but currently MDNR interpretation of its public trust obligation provides the only significant protection at the state level.<sup>32</sup>

### III. ANALYSIS OF REGULATING DAMS FOR ENVIRONMENTAL HEALTH

Dams not properly maintained can fail during flood events, resulting in fish kills, habitat destruction, and release of large amounts of sediment that may contain toxic contaminants. Many of these effects are long-term... and represent a tremendous loss of investment in the dam and in natural resources management (e.g. fish stocking and habitat improvements). Dams that no longer serve any useful purpose should be removed to avoid catastrophic failure, eliminate dam maintenance and liability costs, and to restore natural river functions. Adverse effects of dams on the health and viability of our rivers and streams can be reversed with dam removal.<sup>33</sup>

However, it seems that litigation under state law regarding dam modification or removal actions for healthy ecosystem purposes may be rare. While there are many cases that have litigated various elements of dam impacts under federal law (discharge, fishery resources including fish passage, habitat, instream flow, water quality, etc.), there appears to be little on point under state law.

Each of the above cases involved distinct legal issues outside the scope of this analysis. Those cases dealt predominantly with federal preemption in hydropower licensing under FERC, the Endangered Species Act and other state laws regarding tort damages, property law of riparian water rights and public trust rights to fish upon public waters. Even the cases that litigated a state's police power of health, safety and welfare (versus constitutional takings) were delineated by the state's statutory law for dam licensing and safety. While it is evident that the State possesses some authority to regulate dams for the welfare of the environment, it has yet to be expanded in the courts.

Nevertheless, section 31519 of Part 315 may provide the necessary statutory authority:

(1) Where significant damage to the public health, safety, welfare, property, *and natural resources or the public trust in those natural resources* or damage to persons or property occurs or is anticipated to occur... the department may order the owner to limit dam operations... In issuing these orders, the department shall take into account social, economic, and public trust values.

(2) Where significant damage to persons, property, *or natural resources or the public trust in those natural resources* occurs... the department may order the removal of the dam following a determination by the department that, due to the continued condition or existence of the dam, the dam is likely to continue to cause significant damage... the department shall take into account social and

economic values, the natural resources, and the public trust in those natural resources and shall not issue a removal order when those factors exceed adverse impacts on natural resources...<sup>34</sup>

The legislature, thus, expressed its intent to regulate dams, in a manner consistent with the MDNR public trust obligation.

This assertion is strengthened considerably when rules of statutory construction are considered. Courts are obliged to give effect to the intent of the Legislature.<sup>35</sup> The court looks to the specific language of the statute and where that statutory language is clear, judicial construction is neither necessary nor permitted.<sup>36</sup> Construction should be reasonable and comport with the overall purpose of the act.<sup>37</sup> Legislative provisions must be "construed as a whole to harmonize its provisions and carry out the purpose of the Legislature."<sup>38</sup>

"Statutes in *pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other."<sup>39</sup>

Therefore, though the section 31519, reference to regulating for environmental concerns,<sup>40</sup> the Natural Resources and Environmental Protection Act, gives MDNR a broad authority to manage Michigan's public trust resources.<sup>41</sup>

#### IV. CONCLUSION

There is a growing belief that a significant portion of our nation's dams have reached obsolescence and dam removal to restore environmental health is on the rise.<sup>42</sup> Since 1912, more than 465 dams in the United States have been removed with most occurring in the '80's and '90's.<sup>43</sup> "Dam removal has become an increasingly popular proposal to restore watersheds, facilitate fish passage and permanently eliminate risks to public safety. These environmental benefits notwithstanding, stakeholders must balance legal liability issues, cost restraints, and environmental restoration goals."<sup>44</sup>

As the regulatory agency endowed with the public trust responsibility for Michigan's natural resources, MDNR has authority to regulate dams for broad purposes including environmental health. One obstacle to such regulation however, is the balancing requirement contained in section 31519. The courts frequently balance environmental impacts against the economic value provided. Thus, state agency action will likely fall short of environmental protection objectives unless the circumstances and impacts are well researched and well documented. Michigan law however, may affirmatively provide some statutory authority to regulate dams to address the environmental problems they have created.

*\* David A. Pizzuti is a student at the Michigan State University College of Law. The article above was submitted as an entry in the 2004 Environmental Law Essay contest. In accordance with ELS bylaws and policies, the Michigan Environmental Law Journal periodically publishes student articles which may be of interest to its readers.*

- 
- <sup>1</sup> *Fisheries Division Values, Vision, and Mission*, MDNR Fisheries Division draft statement, 8/26/2003 [hereinafter Draft Statement]. (On file with the author.) Since statehood, the Public Trust Doctrine has provided the underpinning of Michigan's natural resource laws and is incorporated into Michigan's current constitution (Art. 4 § 52). "The [doctrine] in practice means that the waters, fish, wildlife and air are owned by the citizens of the state and the state is the trustee who must protect and manage those resources."
- <sup>2</sup> *Id.* "Fisheries Division is responsible for management of **11,000 lakes, 36,000 miles of rivers and streams, and 43% of the Great Lakes... [which] contain more than 20% of the earth's fresh water and significant habitat diversity that supports a rich fauna of over 153 species of fish.**" (Emphasis added)
- <sup>3</sup> MDNR Fisheries Division Position Statement on Dam Modification [hereinafter Position Statement]. (On file with the author.)
- <sup>4</sup> This does not pertain to federally licensed hydropower projects, dams that provide legally established lake levels or fish passage requirements that are otherwise regulated and are thus specifically excluded.
- <sup>5</sup> Draft Statement, *supra* FN1.
- <sup>6</sup> MDNR enabling statute, MCL § 324.503. (Emphasis added.)
- <sup>7</sup> *Id.*
- <sup>8</sup> MCL § 323.30106 (Part 301, Inland Lakes and Streams). "In passing upon an application the department shall consider the possible effects of the proposed action... including uses for recreation, fish and wildlife, aesthetics ..." and permits shall not be issued "if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state." Furthermore, agency regulations require that "...all existing and potential adverse environmental effects shall be determined..." (1985 AACS, R 281.814 (Rule 4)); MCL § 324.3108(1) (Part 31 Water Resources Protection). Agency rules include "Pollution, impairment, or destruction of water or other natural resources" as a harmful interference under part 31 (1984 AACS, R323.1311(g)(iv)); *see also* 1998 Mich. ENV LEXIS 37 (1998).
- <sup>9</sup> MCL §§ 324.31501-529 (Natural Resources and Environmental Protection Act, 1994 PA 451, as amended; Part 315, Dam Safety.) [hereinafter Part 315]. Now enforced by the Department of Environmental Quality.
- <sup>10</sup> *Id.* § 324.31519 (Order to Limit Dam Operations).
- <sup>11</sup> *Id.* Natural resource concerns are balanced against "economic values" and the agency "...shall not issue a removal order when those factors exceed adverse impacts on natural resources..."
- <sup>12</sup> Part 315, *supra* FN9, §§ 324.31501-529.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> DNR Position Statement, *supra* FN3. (Citing 9 books and journals: Bain et al., *Streamflow Regulation and Fish Community Structure*, *ECOLOGY* 69(2), 382-92 (1988); A.C. Benke, *Perspective on America's Vanishing Streams*, *J. N. AM. BENTHOLOGICAL SOC'Y* 9(1), 77-88 (1990); R.M. Cushman, *Review of Ecological Effects of Rapidly Varying Flows Downstream from Hydroelectric Facilities*, *N. AM. J.*

---

FISHERIES MGMT. 5, 330-39 (1985); B. DOPPELT, ENTERING THE WATERSHED: A NEW APPROACH TO SAVE AMERICA'S RIVER SYSTEMS (1993); H.Y. Hammad, *River Bed Degredation After Closure of Dams*, J. HYDRAULICS DIV., AM. SOC'Y CIV. ENGINEERS 98, 591-607 (1972); Ligon et al., *Downstream Ecological Effects of Dams*, BIOSCIENCE 45(3), 183-92 (1995); G.E. Petts, *Long-term Consequences of Upstream Impoundment*, ENVTL. CONSERVATION 7(4), 325-32 (1980); J.R. Schuman, *Environmental Considerations for Assessing Dam Removal Alternatives for River Restoration*, REGULATED RIVERS: RESEARCH & MANAGEMENT 11, 249-61 (1995); J.V. Ward & J.A. Stanford, *Riverine Ecosystems: The Influence of Man on Catchment Dynamics and Fish Ecology*, CAN. SPECIAL PUBLICATION FISHERIES & AQUATIC SCI. 106, 56-64 (1989.)

<sup>16</sup> Hanshue et al., Michigan Department of Natural Resources Comments to the Contaminated Sediment Technical Advisory Group (CSTAG) [hereinafter Comments to CSTAG]. (On file with author.)

<sup>17</sup> Michigan Relative Risk Task Force Report on Hydrology [hereinafter Task Force Report]. (On file with author.)

<sup>18</sup> *Id.*

<sup>19</sup> Position Statement, *supra* FN3.

<sup>20</sup> Task Force Report, *supra* FN17.

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

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Draft Statement, *supra* FN1.

<sup>25</sup> Position Statement, *supra* FN3.

<sup>26</sup> Comments to CSTAG, *supra* FN16.

<sup>27</sup> *Id.*

<sup>28</sup> See MICHAEL BEAN & MELANIE ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW, 3d ed., 277-81 (1997).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Position Statement, *supra* FN3.

<sup>32</sup> See MCL §§ 324.35501-506.

<sup>33</sup> Position Statement, *supra* FN3.

<sup>34</sup> Part 315, *supra* FN9 § 31519 (emphasis added).

<sup>35</sup> Tawas Lake Improvement Ass. v. Iosco County Bd. Comm'rs, 2003 Mich. LEXIS 1598 (2003) [hereinafter Tawas Lake], *citing* Omelenchuk v City of Warren, 466 Mich. 524, 528 (2002).

---

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

<sup>37</sup> *Macomb County Prosecuting Attorney v Murphy*, 464 Mich. 149, 158 (2001).

<sup>38</sup> *Id.* at 159.

<sup>39</sup> *State Treasurer v. Schuster*, 456 Mich. 408, 417 (1998), *quoting* *Detroit v Michigan Bell*, 374 Mich. 543, 558 (1965) (citation omitted).

<sup>40</sup> Part 315, *supra* FN9 § 31519.

<sup>41</sup> See *Tawas Lake* *supra* FN38; Natural Resources and Environmental Protection Act, 1994 PA 451, (as amended).

<sup>42</sup> See generally Catherine C. Engberg, *The Dam Owner's Guide to retirement Planning: Assessing Owner Liability for Downstream Sediment Flow from Obsolete Dams*, 21 STAN. ENVTL. L.J. 177 (2002) [hereinafter Engberg]; Michael C. Blumm & Viki A. Nadol, *The Decline of the Hydropower Czar and the Rise of Agency Pluralism in Hydroelectric Licensing*, 26 COLUM. J. ENVTL. L. 81 (2001); Michael T. Pyle, *Beyond Fish Ladders: Dam Removal as a Strategy for restoring America's Rivers*, 14 STAN. ENVTL. L.J. 97 (1995).

<sup>43</sup> American Rivers et al., *Dam Removal Success Stories*, vii, xvi (1999) (citing statistics from the U.S. Army Corps of Engineers and National Research Council).

<sup>44</sup> Engberg *supra* FN42 at 218-19.

## **COMMITTEE REPORTS**

### **NOMINATING COMMITTEE**

At the June 18, 2005 Environmental Law Section Council meeting, Chairperson, Grant Trigger appointed a Nominating Committee consisting of Grant Trigger, Chair, Peter D. Holmes, Member, and John L. Tatum, Member. Their task was to recommend a slate of candidates for the offices of Chairperson-Elect, Secretary-Treasurer and members of the Council of the Section, to succeed those whose terms will expire at the close of the next annual meeting, in accordance with Article IV, Section 1 of the Section Bylaws. The Environmental Law Section Council, at its meeting on June 18, 2005, approved the slate of nominees recommended by the Nominating Committee. Susan L Hlywa Topp has been nominated for the office of Secretary/Treasurer. Ken C. Gold, Dennis J. Donohue, and Kurt M. Brauer were nominated for membership on the Council.

To be considered by the Nominating Committee, a prospective nominee must meet the eligibility criteria set forth in Article IV, Section 2, of the Section Bylaws. In order to be eligible for election to the Council, a person "shall have served for no less than two years as "an active member of a Section committee." Eligibility for election as an officer of the Section requires that a person "shall have served not less than four full years as a voting member of the Section Council." In addition to imposing these mandatory qualifications, Article IV, Section 2, directs the Nominating Committee to weigh other factors in nominating candidates, including the need for representation on the Council of women, racial/ethnic minorities, and diverse legal viewpoints and geographic locations, as well as past contributions to the Section in the nature of "sweat equity."

In accordance with the Section Bylaws, an opportunity will be afforded for other nominations for these positions to be made from the floor at the annual meeting, and thereafter the Chairperson-Elect, Secretary-Treasurer and members of the Council of the Section for the following year will be elected by the Section members.

### **REPORT OF THE NOMINATING COMMITTEE**

The Nominating Committee consisting of Grant R. Trigger, Chair, Peter D. Holmes, Member, John L. Tatum, Member, met at the request of the Chair, Grant R. Trigger, to review the available candidates and the requirements for nominating candidates for service on the Environmental Law Section Council. Based on an evaluation and considering years of service to the Section and participation in committee activities the committee makes the following recommendations (Peter D. Holmes will automatically become Chair by operation of the by-laws):

- John V. Byl nominated to serve as Chairperson-Elect.
- Susan L Hlywa Topp nominated to serve as Secretary/Treasurer.
- For new three year terms on the council Ken C. Gold, Dennis J. Donohue, Kurt M. Brauer.
- To fulfill the remaining term of Ken Burgess, who has resigned from Council to take a job in Colorado, Mike L. Caldwell.

Additional nominations are invited from any member of the Section and subject to By-Law requirements for electing officers and other members of the Council the elections will take place at the Section annual meeting in Lansing on September 22, 2005.

We want to encourage any and all Section members who are involved in committee activities to continue their efforts in support of the Council and note that there will be several openings on Council next year for which we will be seeking additional nominations at that time.

## **PROGRAM COMMITTEE**

### **MEETING MINUTES – APRIL 20, 2005**

Attendees included Susan Topp, Matt Eugster, Anna Maiuri, Bob , Kurt Kissling, and John Tatum.

**A. Higgins Lake Program.** Topics for the program on June 17<sup>th</sup> were discussed. The following topics were suggested:

1. **New Boat Ballast Ruling** – Anna Maiuri to follow up.
2. **Alternative Energy**
  - a. Wind Turbines – Susan Topp to follow up.
  - b. Automotive – Robert Schroder to follow up.
  - c. Power Plant Emissions – S. Lee Johnson to follow up.
  - d. Waste Importation Regulations – Kurt Kissling to follow up.
  - e. Bioreactor Landfills – Matt Eugster to follow up.

3. **MDEQ Op Memo's** – Grant Trigger to follow up.
4. **Anti-degradation Policy** – (Whoever volunteered for that one, please call Susan Topp.)

Finalization of the topics will take place no later than May 11<sup>th</sup>. We are hopeful that we can have a few MDEQ staff present to add to the discussions. Planning will be an afternoon session to allow time for travel in the morning. Input from other program committee members is desired.

- B. **Annual Meeting.** No discussion.
- C. **Fall Program.** Environmental Law Boot Camp.
- D. **Next Meeting.** The next meeting will be held on Wednesday, May 11, 2005 at 5:30 pm.

Susan Topp

### **MEETING MINUTES – MAY 13, 2005**

The meeting had been adjourned from May 11<sup>th</sup> to today due to scheduling conflicts by the majority of committee members. Despite the adjournment, the Attendees today were Susan Topp and Matt Eugster.

#### **A. Planning Programs for 2005.**

1. **Higgins Lake Program.** Finalize topics for the program on June 17<sup>th</sup>. The following topics were suggested:
  - a. **New Boat Ballast Ruling** - Anna Maiuri was unable to attend the meeting but sent information in via email beforehand that she has collected information on this topic. AG has recently become involved and filed amicus brief in the Ocean Conservancy case. Anna suggested that someone from the AG's office should speak on this topic instead of the MDEQ. Alternatively, if we can't get a speaker, Anna can do a quick presentation of the issue and the recent court cases/AG involvement.
  - b. **Alternative Energy**
    - i. **Wind Turbines** – Susan Topp can do a short power point presentation of wind maps and case law and ordinance issues.
    - ii. **Automotive** – Robert Schroder to investigate (no report)

- iii. Power Plant Emissions – S. Lee Johnson to investigate (no report).
  - iv. Waste Importation Regulations – Kurt Kissling was unable to attend the meeting but sent information in beforehand. Kurt has raised the following questions:
 

Are we trying to put an "alternative energy" spin on this topic, or are we content to address it as a free-standing issue of proper regulation vs. unconstitutional commercial discrimination?

Given the polarity on this issue, should we be looking for two speakers on the subject, or are we content to present from one site? Since the State and MDEQ are defendants in the current federal litigation, who should we get as a "neutral" speaker.
  - v. Bioreactor Landfills – Matt Eugster reported. Republic Services has in-house counsel that could come. He feels only real legal issue is nuisance.
  - c. MDEQ Op Memo's – Grant Trigger to investigate (no report). Grant is getting Andy Hogarth and other "key people".
  - d. Anti-degradation Policy - Beth/Anna working on getting Rich Powers/McGarry to attend. (no report)
2. **Fall Program.** Environmental Boot Camp. No Report.

**B. Next Meeting.** The next meeting will be held on Wednesday, May 18, 2005 at 5:30 p.m.

### **MEETING MINUTES – MAY 18, 2005**

The meeting was called to order at 5:30 pm. The Attendees were Susan Topp, Matt Eugster, John Byl, Kurt Brauer, Jim O'Brian, and Grant Trigger.

#### **A. Planning Programs for 2005.**

- 1. **Higgins Lake Program.** The program will be from 1:00 pm to 3:30/4:00 pm. The topics for the program on June 17<sup>th</sup> are as follows:

- a. New boat ballast ruling - Anna Maiuri and/or Tim McGarry. Fifteen minute overview of the issue and the recent court cases/AG involvement. If well received, we will include a segment on this topic at the next program.
- b. Wind Turbines – Susan Topp. Fifteen minute update on wind maps, case law and ordinance issues. If well received, we may include a segment on alternative energy at the next program.
- c. Anti-degradation Policy/Multimedia enforcement. - Tim McGarry. Fifteen minute presentation with fifteen minutes for Q & A. Beth Gotthelf to follow up with Tim to confirm his attendance.
- d. MDEQ Op Memo's – Andy Hogarth and other “key people” (possibly Lynelle, Phil, and Pat). Two hours. Grant Trigger to follow up with Andy to confirm who the key people are.

Mike Leffler has been invited but has not confirmed whether or not he can come.

We need to confirm room reservations (have 8 so far), lunch and dinner reservations for Friday noon, Friday evening, and Saturday lunch.

Grant Trigger to follow up with young lawyers to see if interested in attending and going on canoe trip. Section will pay for their dinner.

**2. Fall Program.** Environmental Boot Camp. No Report.

**B. Next Meeting.** The next meeting will be held on Thursday, June 9, 2005 at 5:30 p.m.

## **MICHIGAN ENVIRONMENTAL CASENOTES**

### **Citizens Coal Council v EPA.** 385 F3d 969 (CA6 2004)

Petitioners Citizens Coal Council filed suit against the U.S. Environmental Protection Agency (EPA) to invalidate rules pertaining to coal remining under the Clean Water Act (CWA). EPA's regulations established effluent limitations for mining operations for both remining and western alkaline coal mining operations. Petitioners challenged the authority of the EPA to issue regulations as well as the validity of the regulations for each of these types of operation.

On the first point, the Court found that EPA did have the authority to issue these regulations because Congress did not explicitly assign the authority to issue regulations under the CWA to any particular entity. In addition, the Rahall Amendment, which addresses remining, establishes only “opt-out” provisions, not regulations generally applicable to all operators. Because courts allow broad deference to administrative agencies when Congress does not address an issue unambiguously, the Court held that the EPA had authority to create rules binding on all remining operators.

Next, the court evaluated the EPA’s regulations to determine whether they complied with the language and intent of the CWA. Part of the CWA’s five-step process for establishing and implementing effluent limitations requires that EPA first develop technology-based limits followed by supplementary water-quality limits. The EPA established the desired levels of pollution before defining which technological tools were to be used in attaining those levels. As a result, the Court invalidated EPA’s actions as “without observance of procedure required by law.”

Moreover, the CWA charged EPA with determining how much reduction in effluent was attainable, in measurable terms. As a consequence of working backwards, the EPA used background, i.e. preexisting, conditions to set the attainable standard, i.e. a standard of no increase in pollution. The Court found this approach “arbitrary and capricious” because it made no attempt to reduce pollution and thus contradicted the CWA’s goal of eliminating pollution. Furthermore, EPA’s Final Rule established non-numerical effluent limitations, which the Court deemed to be in violation of the express provision of requiring amount-based measurements. EPA’s regulations also required site-specific plans, which the Court struck down as contrary to its policy against site-specific regulations in the interest of uniformity.

Additionally, the Court found insufficient evidence that EPA considered all of the factors the CWA requires it to take into account in establishing pollution controls, thereby concluding that EPA “abused its discretion” by not following Congress’s statutory directives.

Finally, regarding coal remining regulations, Petitioners challenged EPA’s use of different standards for pre-existing discharges commingled with wastes from active mining regulations, but the Court held EPA’s action valid, giving deference to EPA as Congress did not address this issue. Thus, on the issues of authority, the Court held that EPA was entitled to create regulations. However, Petitioners succeeded in their action, as the Court held EPA’s regulations to be invalid for violating the CWA.

Author: Abby Rubinson, University of Michigan Law School

### **National Wildlife Federation v Cleveland Cliffs Iron Company**

471 Mich 608; 684 NW2d 800 (2004)

Defendant Cleveland Cliffs Iron Company (Cleveland Cliffs) obtained a permit from the Michigan Department of Environmental Quality (MDEQ) to expand its mining operations in Michigan’s Upper Peninsula. Plaintiffs, environmental organizations with members in the affected areas, petitioned MDEQ for a contested case hearing, and the hearing referee dismissed the action for lack of standing, a ruling subsequently affirmed by the Marquette Circuit Court on appeal. The Court of Appeals then denied Plaintiffs’

application for leave to appeal. Plaintiffs concurrently filed suit in Ingham Circuit Court, asserting, *inter alia*, a Michigan Environmental Protection Act (MEPA) claim and seeking an injunction to bar the proposed expansion of Defendant's mining operations. The trial court refused to grant the injunction, finding that Plaintiffs lacked standing. The Court of Appeals reversed, finding that MCL 324.1701(1) provided for such MEPA claims to be brought by "any person." The Supreme Court of Michigan agreed to hear the case, but limited itself to deciding whether, through MEPA, the Michigan Legislature could confer standing on a party who would otherwise lack it for constitutional reasons, given the implicated separation of powers concerns.

Purporting to follow *Lee v. Macomb County Board of Commissioners* (2001) and its holding that decisions on questions of standing may have repercussions endangering the balance between the three branches of government, the Court held that the Legislature had exceeded its constitutional boundaries in conferring standing by statute on "any person." The Court noted that separation of powers concerns here were of particular import for preserving the power of the State's executive branch, whether or not such standing was conferred with its consent, and that the federal judicial power is with a few minor exceptions the same as the Michigan judicial power.

Applying standing doctrine to the case, the Court said the Plaintiff organizations had standing based on affidavits of three individuals, members of the organizations bringing suit who lived near, and engaged in recreational and wildlife-related activities, around the mine and its proposed expansion area. However, the Court went on to say that subject matter jurisdiction requirements include showing injury in fact, causation, and redressability, and that the degree to which such allegations of injury must be supported increases as litigation progresses. The Court concluded its analysis by noting that the Plaintiffs' expert's affidavit, attesting to the harm that the expansion of operations would cause, provided sufficient support for Plaintiffs' suit to survive a motion for summary disposition, but that more proof of these effects would be required at trial. The Court did not rule on the constitutionality of MCL 324.1701(1).

Justices Weaver and Kelly concurred in the result, but argued that conferral of standing on "any person" through MCL 324.1701(1) was within the Legislature's power. Justice Weaver said such conferral was pursuant to the will of Michigan's citizens as expressed in relevant provisions of the Michigan Constitution. Justice Weaver, joined by the other concurring justices, also questioned the correctness of *Lee* and what she believed was the *Lee* majority's improper importation, into Michigan law, of the United States Supreme Court's Article III standing test as articulated in *Lujan v. Defenders of Wildlife* (1992).

Author: Adam Gitlin, University of Michigan Law School

**Forsberg Family, LLC v Charter Meridian**  
2004 WL 345417; 2004 Mich App LEXIS 565 (Feb 24, 2004)

Plaintiff planned to develop 9 acres of undeveloped land in Meridian Township, which included part of a state-regulated wetland. These plans required Plaintiff to develop a small portion of the wetlands for a road and parking lot. The Township Zoning Act, *MCL 125.271 et seq.*, requires that structures and graded surfaces next to wetlands be set back at least twenty feet from the edge of the wetland, and that a protective vegetative buffer be maintained on this twenty-foot strip. Plaintiff applied for a variance

(exception) to this zoning ordinance, claiming that it would be unable to comply with the ordinance and its Michigan Department of Environmental Quality (MDEQ) permit, but the Township denied the application, claiming that any special circumstances were self-imposed.

Plaintiff claimed that two relevant sections of the zoning ordinance, 84.1.11.a.2 and b.1, were preempted by the state wetlands statutory scheme, the Wetland Protection Act, *MCL 324.30301 et seq.*, and thus moved for summary disposition. Defendant also moved for summary disposition, claiming that the ordinance was a proper exercise of the township's zoning power and the wetlands setback requirement was not preempted by the state statutory scheme.

The trial court granted summary disposition to Defendant and the Court of Appeals affirmed. In its decision, the Court of Appeals stated that under the Michigan Constitution, grants of authority to townships must be liberally construed in their favor. The Wetland Protection Act expressly grants local governments the power to regulate wetlands within their boundaries, provided the regulations comply with the Act. Nothing in the Act prohibited the imposition of a 20 foot setback, nor did the zoning ordinance contradict the purpose of the Act.

Author: Josh Kweller, University of Michigan Law School

**Village of Milford v K-H Holding Corp**  
390 F3d 926 (CA6 2004)

In 1989, Plaintiff, the Village of Milford, learned that its municipal water supply contained two hazardous chlorinated compounds. Defendant, K-H Holding Corporation, owned and operated a factory 1,400 feet uphill from Plaintiff's wells. In 1993, Defendant discovered that groundwater on its property containing the compounds in question was migrating toward Plaintiff's wells. In 1994, Plaintiff retained an environmental attorney and consultants to determine the source of contamination. Plaintiff also asked the Michigan Department of Natural Resources (MDNR) to determine that Defendant was a "potentially responsible party" (PRP). MDNR declined and instructed Plaintiff to conduct further studies. Plaintiff complied, and in 1996, asked the Michigan Department of Environmental Quality (MDEQ) to identify defendant as a PRP. MDEQ did so in February 1997. Plaintiff filed suit against Defendant on March 1, 1999, seeking damages for trespass under Michigan law, and recovery of costs under the Comprehensive Environmental Response and Liability Act (CERCLA), and Michigan's Natural Resources and Environmental Protection Act (NREPA).

The district court granted judgment as a matter of law in favor of Defendant on Plaintiff's trespass claim, and found Defendant not liable for costs incurred by Plaintiff in response to the release of hazardous chemicals. The appeals court upheld the district court's determination of the trespass claim, but vacated the district court's determination that Plaintiff could not recover its costs under CERCLA or NREPA.

Applying Michigan's "discovery rule" to determine when Plaintiff should have known of its cause of action against Defendant, the court held that Plaintiff's trespass claim was barred by the statute of limitations. The court further held that the discovery rule does not permit a party to await certainty and ruled that Plaintiff was aware of a

potential claim prior to 1996. Thus, the three-year statute of limitations prevented Plaintiff from bringing its claim in 1999.

Also at issue was whether Plaintiff could recover monitoring and investigation costs under CERCLA. The court held that these costs could be recovered as "removal" costs under CERCLA if they were reasonable, and the activities were not scientifically deficient or unduly costly. The court vacated the lower court's ruling, holding that the close involvement of MDNR and MDEQ suggested that at least some of the costs could be considered reasonable and not environmentally unsound or scientifically deficient. The court also held that Plaintiff was not required to wait until its water was unsafe to take action, and that the fact that some actions were duplicative of Defendant's did not in itself equate with unreasonableness. On the matter of attorney's fees, the court held that a CERCLA plaintiff may recover attorney's fees for work done on projects that could have been performed by a non-attorney if such work is tied to an actual cleanup, is not related to litigation, and is otherwise necessary. These matters were remanded for further determination.

On Plaintiff's NREPA claim, the court's ruling was two-fold. First, the court ruled that because Defendant clearly caused a release or threat of release of a hazardous substance, leading to the incurrence of response costs, Defendant could be liable under NREPA. Second, the court ruled that Plaintiff could recover some response costs under NREPA, as at least some of these costs were required to protect public health and the environment. These matters were also remanded to the district court to determine which costs were required.

Author: David Hostetter, University of Michigan Law School

## **ENVIRONMENTAL LAW SECTION COUNCIL MEETINGS**

### **MEETING MINUTES – JUNE 18, 2005**

**Present:**

In Person: Kurt Brauer, John Byl, Peter Holmes, Scott Hubbard, Lee Johnson, Anna Maiuri, Bob , Susan Topp and Grant Trigger.

By Phone: Chuck Barbieri and Charlie Denton.

Absent: Ken Burgess, Chris Bzdok, Todd Dickinson, Chris Dunsky, Beth Goffhelt, Steve Huff, Craig Hupp, Susan Johnson, Mike Leffler, Tim Lozen, Sharon Newlon, Dustin Ordway, Pat Paruch, Tom Phillips, Joe Quandt, Mike Robinson, John Tatum, Charles Toy and Tom Wilczak.

1. **Minutes:** The minutes of the February 26 meeting were approved.
2. **Secretary-Treasurer's Report:** John Byl presented the Secretary/Treasurer's report. He reported that there is a balance in the Section's account of \$38,406.90 as of May 31, 2005.

There was also a discussion concerning the budget. It was noted that various initiatives will affect the budget for the next year. We decided it is important to encourage active participation by young lawyers, and that on occasion the Section will pay for certain expenses of young members to encourage such participation (such as accommodations and/or meals at Higgins). We also talked about encouraging participation by students and law professors. Finally, we discussed possible teleconferences at law schools.

3. **Standing Committee Reports:**

- A. **Membership.** No report.
- B. **Program Committee.** Susan Topp reported that there were 27 who attended the Program at Higgins on Friday, June 17. The annual meeting will be held from approximately 1:30 to 4:00 on September 22, 2005. Topics at the annual program will include a presentation by Senator Patricia Birkholz concerning water and other environmental legislation; waste implementation issues; and other topics. There also were discussions concerning a possible environmental boot camp in February.
- C. **Michigan Environmental Law Journal.** Bob Schroder reported that he has articles for the next Journal. Bob noted that there have been requests for a total of only nine printed copies of the Journal. The rest of the members are satisfied with the electronic version of the Journal. We discussed sending copies to the law schools, and Bob has agreed to forward a copy of the Journal to each of the law schools in the State. Bob will also check to see if any back issues are available for distribution to law schools and perhaps others.

Three essays have already been submitted for the essay contest. A motion was passed to approve \$2,000 for the essay contest winner again for next year.

- D. **Nominating Committee.** Grant Trigger reported that the Nominating Committee will meet and give a report/recommendations by e-mail before the annual meeting. There was some discussion about encouraging participation by the Attorney General's office in the Section, including committees in the Section. Grant Trigger will follow up with Mark Matus of the Attorney General's office regarding participation by the Attorney General's office.

4. **Subject Matter Committee Reports.**

- A. **Air.** Lee Johnson reported on a couple of new developments. First, he noted that the federal regulations for major sources have been

substantially revised. He noted that there is a new rules package to amend the Michigan Air Rules for major sources and major modifications covering both attainment and non-attainment areas. The draft Michigan Rules track the federal regulations closely. The new rules also address PM 2.5 in non-attainment areas. Lee noted that there will be a need for offsets.

Second, Lee noted that there is a new permit appeal procedure. He commented that the EAB appeal process has delayed several projects in Michigan that would be replaced with a contested case process.

Third, Lee noted that there is some discussion regarding the regulation of odor emissions through permit provisions. Limits would be based on air dispersion modeling. The maximum would be three or five (five for "nice" odors) times the odor detection levels.

- B. **Environmental Litigation.** Grant Trigger noted that the Poletown case was effectively reversed recently. There are questions regarding the ability to use eminent domain to acquire property for public purpose.

There was also a discussion regarding the status of the *Cuno v. Daimler Chrysler* case. The matter is presently pending in the U.S. Supreme Court. Many parties have filed amicus briefs.

- C. **Hazardous Substances and Brownfields.** Grant Trigger reported that legislation is pending (it has since been enacted into law) that allows the use of brownfield tax increment financing to reimburse interest to private parties. The DEQ has reported that there are significant budget concerns for the remediation and redevelopment division. Apparently, there is likely to be a significant loss of funding by the end of September, 2007 unless there are new sources of funding in place by then. It has been noted that there may be a fee for brownfield projects and/or other fee-based programs in the context of RRD matters.

## 5. **Liaison Reports.**

- A. Charles Toy is continuing to do a very good job on behalf of the Environmental Law Section on the Michigan Board of Commissioners.
- B. Pat Paruch reported that the real estate section would like environmental articles for its publication.
- C. There was no administrative law section report.

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

- A. Grant Trigger reported that he needed drafts of the five articles for the Michigan Bar Journal no later than July 28.
- B. Grant will be evaluating the chair and vice-chair positions for the various committees. A decision was made to have detailed committee

discussions/meetings the same day as the next Council meeting. The committee discussions will take place from 10:00 to 12:00 and the Council meeting will be from 12:00 to 2:00 on either November 5 or November 12.

7. **Vice-Chairperson's Report.** See item 9.A. below.
  
8. **New Business.** The Section received a letter from John Berry (Executive Director of the Bar) requesting support for Access to Justice. Grant will ask John Berry to have someone from the Bar make a presentation that is no more than ten minutes at the business portion of the Annual Meeting in September regarding this request. The Council will then take action in November.
  
9. **Annual Meeting.**
  - A. Peter Holmes reported on the Ad Hoc Committee on Young Lawyers. He said the Committee has discussed doing more with area law schools. We will consider holding meetings and teleconferences at law schools in Lansing or Ann Arbor. We may also discuss with the Hearings Office the possibility of conducting contested case hearings at law schools. We also discussed whether the Committee should have a budget to use for various activities to promote participation by Young Lawyers. The decision was made to have the Committee give a report with recommendations at the November Council meeting for such a budget item.
  
  - B. We discussed whether we should submit any proposal to the Court of Appeals in response to the request made by Court of Appeals Chief Judge William Whitbeck at our February meeting. We decided that it would be useful to have a public docket for the Court of Appeals that would list the status of all the pending cases. Grant will follow up on this item.