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WHEN THE POLLUTER EXITS: ENDOWING THE COMMUNITY'S ENVIRONMENT

by James P. Hill*

Total/UDS refinery closing

In October of 1999 when the Ultramar Diamond Shamrock Corporation (UDS) closed its refinery in Alma, Michigan, the small community was rocked by the economic implications of losing over 200 jobs, not to mention the loss of tax revenues and its impact on an already financially troubled school system. As UDS had made clear that it wanted to exit the Michigan market altogether, the only legal stumbling block to a quick exit was to address the contamination left by UDS and its predecessors after decades of oil refining.

At first blush, a quick resolution of environmental issues made sense for all the interested parties. UDS wanted out of Michigan, the city of Alma wanted to ensure that the refinery was dismantled and the property cleaned-up and redeveloped, while both the United States Environmental Protection Agency (EPA) and Michigan Department of Environmental Quality (MDEQ) wanted to close the books on lingering underground water pollution plumes and groundwater discharge permit and air quality violations. Accordingly, the wheels of environmental remediation were put into motion.

The Department of Justice (DOJ), on behalf of the EPA, promptly began closed-door negotiations with UDS over past federal violations, including RCRA, the Clean Air Act and the Clean Water Act. The MDEQ began preparations to remediate the refinery site after the DOJ – UDS negotiations were concluded, and the City of Alma began exploring the potential of brownfield development funding for the site under Michigan's Brownfield Redevelopment Financing Act, MCL 207.2651 (2000). It appeared that a quick resolution for UDS from its Michigan refinery environmental damage was both realistic and desirable.

Community Impact and involvement in the environmental process

In the rush to closure on environmental issues, however, one glaring oversight emerged: what environmental burdens should Alma be left to shoulder and which of these should UDS be responsible for addressing before its exit? The impact of decades of

refining oil on the health of the community, the loss of community recreational activity caused by petroleum discharges into the water, the impact of refinery petroleum pollution on the Superfund site clean-up activity in St. Louis (only 2 miles downstream from Alma), and UDS's obligations to Alma based upon the major tax concessions that UDS and its successors were granted by the local community – not to mention tax concessions at the state and federal level, were all factors relevant to any settlement with UDS.

Unfortunately, community concerns had little chance of being seriously considered, as the principal negotiators for a consent judgment were limited to UDS and the DOJ/EPA representatives. Negotiations were kept confidential from local and state representatives. When the two parties concluded their negotiations, the state and the local community were handed a proposed consent judgment that gave the community \$900,000 as a Supplemental Environmental Project (SEP)¹ and called upon UDS to pay up to \$9 million dollars to clean up a highly contaminated nearby creek, and to pay the federal government a lump sum \$4 million fine. The MDEQ was then authorized to pursue remediation of the site.²

The City of Alma had requested much more than the \$900,000 SEP, but the closed-door negotiations resulted in this single direct benefit to the community. The \$9 million cap negotiated to clean up Horse Creek was millions of dollars less than both UDS and Alma College scientists previously had estimated would be necessary to clean it up. Nothing was provided for funding research as to the extent of the contamination off-site of the refinery or in the nearby Pine River, the source of much of the city's drinking water. No funding was provided to assess any adverse health effects on citizens living near the refinery and whose drinking water was derived from private wells near the refinery, nor was any investigation of the overall community contamination caused by refinery operations even proposed.

Indeed, as the Michigan United Conservation Clubs (MUCC) concluded in a letter to a federal judge regarding the proposed consent decree, "it makes sense . . . to do as

much study to define the extent and type of contamination prior to entering into negotiation of the SEP." The MUCC further noted that, "The driving goal . . . in the consent decree should not be a monetary goal which could have the effect of seeing money spent without satisfactorily restoring the damaged area to any sort of usefulness."³

On May 10, 2000, however, when the proposed consent decree was presented to the community in an open forum at Alma College for public comment, it was clear from the DOJ presentation that money indeed was the goal. Continually throughout the public hearing and in private meetings with local officials, the DOJ stressed the value of this proposed consent decree in terms of being one of the largest such consent decrees negotiated rather than addressing its environmental remediation adequacy. Upon receiving rather hostile comments from many citizens at the public hearing, the DOJ also stressed the value of the settlement in terms of providing a SEP and Horse Creek clean-up funding, pointing out that the DOJ/UDS negotiations could have resulted in the total \$13 million consent judgment being sent to the federal treasury instead of sharing funds with the community.

An uneven environmental playing field for the community

The DOJ's focus on money in its environmental negotiations with UDS highlights two inadequacies in the current environmental settlement process. First, by the DOJ focusing upon obtaining money up front for past violations and not first seeking to determine the extent of the contamination caused by refinery operations (as the MUCC suggested), the size of the proposed settlement bore no relationship to the extent of the environmental damage imposed upon the community by UDS and its predecessors.

With more in-depth investigation in order to obtain a better handle on the overall extent of environmental damage, the DOJ would have been in a better position to negotiate a settlement that more fully reflected the environmental damages incurred. Indeed, in a factually similar situation involving an Amoco refinery closing in Casper, Wyoming in 1991, an open collaborative process for cleaning up the site was created, with the community being an integral part of the process. The result was an Amoco commitment of approximately \$60 million dollars in direct benefits to Casper even before remediation of the site was undertaken.⁴

Secondly, the closed door negotiations (resulting in a \$900,000 SEP for the City of Alma), put the already financially strapped city in an unenviable take it or leave it position. Under current law if the city were to successfully fight the proposed decree as inadequate, the DOJ could renegotiate the subsequent consent decree and provide that all UDS payments be made directly to the federal treasury, leaving the community with nothing.

Under the Clean Water Act, for example, the courts have held that civil penalties imposed upon polluters must be deposited in the U.S. Treasury and not be used to rectify local environmental interests specifically affected by violations. Thus, as one writer concludes, the full potential of the SEP is untapped if its creation is limited to consent decrees which arise from environmental violations.⁵ Without local input in the government negotiation process, the citizen suit option is the only major recourse to an unacceptable consent judgment, but it too is subject to the same penalty limitations that would prohibit the funding of a SEP. Furthermore, the MDEQ has indicated to local officials that it will not seek penalties in its supervision of the refinery site clean up, such that there will be no basis for a SEP from the subsequent state remediation activity.

Recognizing community environmental rights in polluter exit negotiations

It would appear that the needs of those most impacted environmentally when a polluting company unexpectedly exits are left to the whims of those most distant from the community itself: namely, the DOJ and the MDEQ. While the citizen suit remains an option,⁶ the cost of such litigation is daunting, especially if the MDEQ is inclined to support the position of DOJ, and the City of Alma is forced to risk losing its SEP if it dares challenge the consent agreement. In the words of the MUCC,

The community should at all times be heard on issues that impact them. This includes community input on what areas should be cleaned, what methods will be used to clean them and any real or possible dangers the community may suffer (to the physical environment, to the health of the people and to the economic well-being of the community) from the clean-up process.⁷

To enhance community environmental rights, it would appear that some provision enabling community input and involvement in the formal environmental

remediation process is necessary to provide meaningful community participation.

While brownfield laws and state plant closing laws have been touted as community centered laws to aid when major employers exit, both are inadequate to meet the present and future environmental problems the community is left to face when the polluter exits. Recent changes in Michigan's brownfield laws, in the words of one newspaper editorial, "have resulted in local governments underwriting the efforts (of developers) through tax breaks, and environmental concerns aren't addressed at all."⁸ In fact, even the most stringent state closing laws only provide financial benefits based on wages, not environmental damage.

The plant closing laws and perhaps more appropriately the federal Victims of Crime Act of 1984 (VOCA), however, do reflect an important principle of community impact. They both recognize and compensate for the unique burdens that are placed on the individual and the community by third parties, as opposed to the more national view taken under current environmental policy that prefers deposit of environmental fines in the national treasury rather than in the coffers of the impacted communities.

A common characteristic of state plant closing laws creates mandatory community assistance payments when the company exits.⁹ The VOCA creates a fund for victims of crimes derived from fines and penalties paid by federal criminal offenders. Approximately 90% of these funds are distributed to states to fund victim and compensation programs.¹⁰ Unfortunately, in terms of environmental responsibility, no such fund exists, and the opportunity for any local environmental benefit is at the mercy of negotiators whose ties and interests do not necessarily reflect or recognize local needs.

A community environmental endowment fund

When efforts are made to rectify and compensate environmental harms, it rarely seems to be the case that polluters overestimate the amount of contamination or environmental harm they have inflicted when they wish to exit the community. In a rush to closure of environmental issues, decisions are often based upon less than adequate environmental assessments. Lawyers in turn are asked to iron out negotiation settlements based upon inadequate scientific information. Once the polluter has been relieved of environmental responsibilities through a

consent decree, the remaining environmental bill is passed on to the taxpayer and the community to resolve as best it can with limited resources.

Accordingly, it would seem appropriate from a precautionary standpoint that, when polluters seek to exit the community, a community environmental fund be negotiated as part of any proposed consent decree between the polluter and the federal or state government to address future environmental problems. The environmental endowment fund would be created for the benefit of the community and directed under the joint authority of the state and local authorities. Negotiations over the size of such a fund would be resolved through direct participation by local and state authorities as part of any proposed overall consent decree. The size of the fund should be based both upon known and suspected environmental problems that may arise in the remediation process and should also seek to compensate the community for its lost recreational opportunities and diminished environmental quality. To ensure an adequate fund, provisions in state environmental laws that require the seeking of civil penalties to create such a fund or in federal laws that require the deposit of civil penalties in the federal treasury should be eliminated.

With the creation of such an environmental endowment fund, the rights and needs of the local community most impacted by the polluter can be more effectively addressed, and the role of the local community is enhanced at the negotiation level as well. In addition, the community is provided with the necessary resources to address or offset the environmental issues affecting the present and future needs of the community.

The creation of this fund does not solve all of the community's environmental problems, but, recognizing the legitimate roots of such a proposal in other federal and state laws, it does empower the local community to act in the best interests of its citizens. It also helps communities avoid the Faustian choices that current environmental policies create.

Endnotes

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¹A SEP is an environmentally beneficial project which a defendant or respondent agrees to finance as settlement for an environmental enforcement action. The defendant/respondent is not otherwise legally required to perform this project.

²*United States v TPI Petroleum Inc*, No 00-10151 (BCD Mich, filed April 21, 2000).

³Letter to U.S. Federal District Judge Victoria Roberts from MUCC Corporate Counsel J. Kevin Winters, July 10, 2000.

⁴See generally *Wilson v Amoco Corp*, 989 F Supp 1159 (D Wyo, 1998) and No 96-124B (D Wyo, Aug 17, 1998).

⁵Note, *Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act*, 24 BC Envir Aff L Rev 561 (Spring, 1997). However, under Section 7604 (g) (2) (1994) of the Clean Air Act, courts have been granted authority to impose SEP's to a maximum of \$100,000 as part of their enforcement orders.

⁶Virtually every major environmental law contains a citizen suit provision to supplement government enforcement actions. *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use of Improper Abuse of Citizen Suits under the Clean Water Act*, 21 Env't L 175 (Winter, 1991).

⁷Letter to Judge Roberts, *op.cit.*, at fn 3.

⁸"New law tips the balance on money and environment," *Morning Sun*, Sept 22-23, 2000, p 4. Reprinted from the *Traverse City Record Eagle*.

⁹*State Plant Closing Legislation: A Modern Justification for the Use of the Dormant Commerce Clause*, 75 Va L Rev 845, 854 (May, 1989).

¹⁰See generally <http://www.ojp.usdoj.gov/ovc>.

STANDING IN ENVIRONMENTAL MATTERS: CITIZEN SUITS VS. CONTESTED CASE PROCEEDINGS

By: Steven H. Huff¹

It is clear that Congress views the citizens suit as an important part of the environmental legislative scheme. Every major environmental statute contains a provision for a citizens suit. See, e.g., 42 USC 7604 (CAA), 33 USC 1365 (CWA) and 42 USC 6972 (RCRA).² In fact, language providing for citizen suits under the Clean Air Act (CAA), Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA) has been treated interchangeably by the courts. See, e.g., *Student PIRG v Fritzche, Dodge & Olcott, Inc*, 759 F2d 1131, 1136 n 4 (CA 3, 1985). Congress' consistent provision for citizen suits in environmental legislation "evinces a legislative intent that 'citizen[s] are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests.'" *Proffitt v Commissioners, Township of Bristol*, 754 F2d 504, 506 (CA 3, 1985) (second alteration in original) (quoting *Friends of the Earth v Carey*, 535 F2d 165, 172 (CA 2, 1976) (CAA case)); see also *Coalition for Health Concern v LWD, Inc*, 834 F Supp 953 (WD Ky, 1993) (RCRA case). Commentators have suggested that Congress intended for

citizen-suit plaintiffs [to] augment the [Environmental Protection] Agency's enforcement efforts by . . . pursuing independent enforcement

action; supplementing the Agency's resources when those resources are lacking; and policing the Agency's efforts by acting when, for political reasons, the Agency has failed to do so. Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement of Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW U L Rev 220, 222 (1987).³

In fact, the legislative history of Section 304 of the CAA, the first citizen suit provision, indicates that citizen suits should be encouraged.⁴

Nevertheless, a typical claim made by defendants in many citizen suits and contested case hearings is that a plaintiff or petitioner lacks "standing". The purpose of a standing requirement, of course, is to ensure that only those persons who have a substantial interest in a case or controversy will be allowed to come into court and complain. *House Speaker v State Admin Board*, 441 Mich 547, 554; 495 NW2d 539 (1993); *White Lake Improvement Ass'n v Whitehall*, 22 Mich App 262, 273; 177 NW2d 473 (1970). Generally speaking, a person establishes standing to sue by demonstrating a personal stake in the controversy sufficient to guarantee the "adverseness which sharpens the presentation of issues" *Baker v Carr*, 369 US 186, 204 (1962).

The language of the citizen suit provisions provides some further guidance. The CAA, CWA, et al. confer standing on any individual having an interest that is or may be adversely affected by a defendant's actions. To have standing to file a citizen's suit, one must have standing to sue. **Sierra Club v Morton**, 405 US 727; 92 S Ct 1361; 31 L Ed 2d 636 (1972) (CWA case). To have standing to sue, the plaintiffs must be either (a) living within the vicinity of the natural object they seek to protect; or (b) citizens who use or enjoy the resource. **Michigan v Allen Park**, 501 F Supp 1007, 1013 (ED Mich, 1980), aff'd 667 F2d 1028 (CA 6), cert den 456 US 927 (CWA case). As noted in **Morton**, an alleged injury to aesthetic, conservational or recreational interests is sufficient. **Morton**, 405 US at 735; see also **United States v SCRAP**, 412 US 669, 686 (1973); **Gladstone, Realtors v Bellwood of Bellwood**, 441 US 91; 99 S Ct 1601; 60 L Ed 2d 66 (1979) (RCRA case); **Friends of the Earth v Consolidated Rail Corp**, 768 F2d 57 (CA 2, 1985).

Since 1992, courts in all jurisdictions have, for the most part, been following the standing standard established in **Lujan v Defenders of Wildlife**, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 315 (1992) ("**Lujan II**")⁵ in the context of citizen suits brought under environmental statutes.⁶ In that case, the U.S. Supreme Court set forth the three "elements" of standing necessary to satisfy Article III, §2's standing requirements. A plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. **Lujan II**, at 364. For earlier related discussions of the U.S. Constitution's case-or-controversy limitation on judicial authority, see **Valley Forge Christian College v Americans United for Separation of Church & State**, 454 US 464, 472 (1991); and **Public Interest Research Group of New Jersey v Powell Duffryn Terminal, Inc**, 913 F2d 64, 71 (CA 3, 1990), cert den, 111 S Ct 1018 (1991).

A number of federal circuit courts have applied the **Lujan II** requirements with inconsistent results. On the one hand, there is **Seattle Audubon Soc v ESPY**, 998 F2d 699 (CA 9, 1993) where use of and plans to use land conferred standing, and **Heart of America Northwest v Westinghouse Hanford Co**, 820 F Supp 1265 (ED Wash, 1993) where the routine use of lands was found to confer

standing in a RCRA/CERCLA case. On the other hand, in **Public Interest Research Group of New Jersey v Magnesium Electron, Inc**, 123 F3d 111 (CA 3, 1997), the permitted discharge(s) at issue ultimately flowed into waters used by the plaintiff's members for recreation. Certain of plaintiff's members submitted affidavits stating that their enjoyment of the waters was lessened to the extent they knew the waters contained pollution, and they avoided eating the fish or drinking the water. Nevertheless, the Third Circuit concluded that there was no evidence of direct impact to the members and, for this reason, the plaintiff lacked standing. Thus, at least for that court, more than a recreational interest was needed.

Almost a year ago, on January 12, 2000, the U.S. Supreme Court decided **Friends of the Earth, Inc v Laidlaw Environmental Services (TOC) Inc**, 528 US 167; 120 S Ct 693; 145 L Ed 2d 610 (2000). As noted by Justice Ginsburg, who wrote the majority opinion, "This case present[ed] an important question concerning the operation of the citizen-suit provisions of the Clean Water Act." **Id.** at 700. The issue in the case related to standing to bring a claim under the CWA, which provides in pertinent part, that citizen suits may be brought by "a person or persons having an interest which is or may be adversely affected." 33 USC 1365(a), (g). Because the citizen-suit provisions of most environmental statutes closely parallel the CWA provision, this decision has great significance for all citizen suits brought pursuant to environmental statutes.⁷ The impact on standing requirements in other arenas, such as contested case hearings, is less clear.

In **Laidlaw**, the Supreme Court explained that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits . . ." **Id.** at 704. It held (as had the district court) that injury in fact was adequately documented by the Friends of the Earth members asserting that Laidlaw's pollutant discharges directly affected their recreational, aesthetic and economic interests, and that they had reasonable concerns about the effects of those discharges on those interests. Citizen affidavits and deposition testimony attesting to their reduced use of the waterway at issue for fear of pollution were sufficient to show injury in fact.⁸

Looking to **Lujan II**'s redressability element, defendant Laidlaw next claimed that even if the plaintiff had standing to seek injunctive relief, it lacked standing to seek civil penalties. Defendant's argument was that civil penalties, which are paid to the government, offer no redress to private citizens. Thus, it argued that citizens *never* have standing to seek civil penalties — even where those citizens are facing ongoing pollution violations. Citing **Los Angeles v Lyons**, 461 US 95, 109; 103 S Ct 1660; 75 L Ed 2d 675 (1983), the Court agreed that a plaintiff must demonstrate standing separately for each form of relief sought. **Laidlaw**, at 706. In **Lyons**, the Court had explained that, notwithstanding the fact that a plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief.

In rejecting the defendant's argument, however, the Supreme Court distinguished **Steel Co v Citizens for Better Environment**, 523 US 83; 118 S Ct 1003; 140 L Ed 2d 210 (1998), a case relied upon by the defendant. That case only "established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit. 523 US at 106-107." **Laidlaw**, at 707. The Supreme Court explained that "[s]uch penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation." **Id.** at 700.⁹

It further stated:

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct. **Id.** at 706-707.

Justice Ginsburg goes on to explain that the dissent misses the mark in its argument that it is the availability of the civil penalties rather than their imposition that has a deterrent effect on a polluter. She states: "A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again."

Id. at 707. The Court acknowledges that there could be a point where "the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing." **Id.** It explained, however, that "[t]he fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case." **Id.** As for the case before it, the Court concluded:

In this case we need not explore the outer limits of the principle that civil penalties provide sufficient deterrence to support redressability. Here, the civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries . . . **Id.**

On February 23, 2000, the Fourth Circuit Court of Appeals held that circumstantial evidence was sufficient to show injury in fact and traceability with respect to a citizen suit filed under the CWA. **Friends of the Earth, Inc v Gaston Copper Recycling Corp**, 204 F3d 149 (CA 4, 2000). In that case, two environmental groups filed a citizen suit alleging that a corporation was illegally discharging pollutants into a waterway.¹⁰ The trial court had found that the plaintiffs failed to establish injuries traceable to defendant's facility because of an absence of evidence showing the actual level of pollution in the water and dismissed their case for lack of standing. The appellate court rejected the trial court's requirement that plaintiffs must provide evidence establishing the actual level of pollution in the water in order to show injury in fact and traceability. "The trial court erred therefore in creating evidentiary barriers to standing that the Constitution does not require and Congress has not embraced." **Id.** at 155-156.¹¹ Citing **Laidlaw**, it also stated that "the Supreme Court does not require such proof." **Id.** at 159. It also pointed out that no circuit court has "required additional scientific proof where there [is] a direct nexus between the claimant and the area of environmental impairment." **Id.** "Such a novel demand would eliminate the claims of those who are directly threatened but not yet engulfed by an unlawful discharge." **Id.** at 160.

Instead, it found that plaintiffs had presented circumstantial evidence which was sufficient to show injury in fact and traceability. Citing **United States v Winchester Municipal Utilities**, 944 F2d 301, 304 (CA 6, 1991), it stated: "Whereas the previous scheme required proof of actual injury to a body of water to establish a violation,

Congress now instituted a regime of strict liability for illegal pollution discharges.” *Gaston Copper*, at 151. The Fourth Circuit pointed out that the *Laidlaw* Court “required no evidence of actual harm to the waterway . . .” *Id.* at 156. The issue is whether the person bringing the lawsuit has an “injury in fact”. *Id.* at 160-161.

After explaining that the “injury in fact” prong is necessary to prevent suits by persons “whose allegations of injury are based on mere conjecture rather than an actual or threatened invasion of their legally protected interests”, the Fourth Circuit stated that the “standard is one of kind and not degree.” *Id.* at 156. Citing *Sierra Club v Cedar Point Oil Co*, 73 F3d 546, 557 (CA 5, 1996), it stated that the “claimed injury ‘need not be large, an identifiable trifle will suffice.’” *Id.*¹² Moreover, “[t]he Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements.” *Id.* at 160 (citations omitted). “Threats or increased risk thus constitutes cognizable harm. Threatened environmental injury is by nature probabilistic. And yet other circuits have had no trouble understanding the injurious nature of risk itself.” *Id.* (citing *Cedar Point Oil Co; Village of Elk Grove v Evans*, 997 F2d 328, 329 (CA 7, 1993); and *Mountain States Legal Foundation v Glickman*, 92 F3d 1228, 1234-34 (CA DC, 1996)).

With respect to the second prong, the Fourth Circuit stated:

Traceability ‘does not mean that plaintiffs must show to a scientific certainty that defendant’s effluent . . . caused the precise harm suffered by the plaintiffs. . . . If scientific certainty were the standard, then plaintiffs would be required to supply costly, strict proof of causation to meet a threshold jurisdictional requirement – even where . . . the asserted cause of action does not require such proof. . . . Thus, the ‘fairly traceable’ standard is “not equivalent to a requirement of tort causation.” *Id.* at 161 (citing *Natural Resources Defense Council, Inc v Watkins*, 954 F2d 974, 980 n 7 (CA 4, 1992); *Cedar Point Oil Co*, at 557-58; *Natural Resources Defense Council, Inc v Texaco Ref & Mktg, Inc*, 2 F3d 493, 505 (CA 3, 1993); and *Powell Duffryn Terminals*, at 72-73.)

Instead, a plaintiff must show that a given pollution causes or contributes to the kind of injuries it alleges in the specific geographic area at issue. This shows the pollution “has affected or has the potential to affect [plaintiff’s] interests.” *Id.* at 161 (citation omitted).

In *Gaston Copper*, plaintiffs presented evidence of (1) the past presence of metals in the water of the type discharged by defendant in the geographic area of concern, (2) the effect or potential effect of discharges on the waterway many miles downstream, (3) the harmful environmental and health impacts of the toxic chemicals at issue, (4) toxicity tests showing the defendant was discharging pollutants at environmentally harmful levels and (5) members’ fears of swimming or fishing in the water because of potential contamination. The Fourth Circuit explained that “circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution [are sufficient to meet both the] injury in fact and traceability [prongs from *Lujan II*].” *Id.* at 163. As to “traceability”, the Court stated, “To have standing hinge on anything more in a Clean Water Act case would necessitate the litigation of complicated issues of scientific fact that are entirely collateral to the question Congress wished to resolve – namely, whether a defendant has exceeded its permit limits.” *Id.* at 162.

The issue in *Laidlaw* and *Gaston Copper* was whether plaintiffs had standing to be *in court* under the federal Clean Water Act. Those suits were based on gross violations of NPDES permits. Whether their holdings or any other holdings applying the *Lujan II* standing elements can be extended to contested case proceedings concerning, for example, the issuance of a permit or license, is subject to some debate.

To begin with, it could be argued that the requirements for standing to bring an administrative procedure to challenge a permit should be *less* stringent than that for a federal court proceeding. This is based on the fact that the Michigan statute which specifically provides for a contested case hearing has an extremely liberal “standing” requirement. In pertinent part, the statute says:

If the permit or denial of a new or increased use is **not acceptable** to the permittee, the applicant **or any other person**, the permittee, applicant, **or other person** may file a sworn petition, [etc.] . . . MSA 13A.3113(2); MCL 324.3113(3) (emphasis added).

On its face, this language is broader than that contained within the various citizen-suit provisions. Thus, the test for standing under the Michigan APA is “acceptability”. Arguably, anybody for whom the permitted activity, if implemented as permitted, is not acceptable, has standing to challenge the permit or use. The statute does not limit petitioners who have a private stake in the outcome, but specifically states that ANY other person can file.

In the context of contested case hearings involving environmental matters, however, the Michigan Department of Environmental Quality’s Office of Administrative Hearings has adopted the standard set forth in *Michigan Administrative Law*, § 10:12, at 17 (1993) when standing is an issue. In order to have standing, one must show:

1. That the party asserting standing, or a person whom the party legitimately represents, has personally suffered in fact some actual or threatened injury to an economic or other substantial interest, as a result of the putatively illegal conduct of the defendant;
2. That the interest injured is one which is arguably within the zone of interests to be protected or regulated by a statute or constitutional guarantee which is relevant to the controversy;
3. That the injury asserted fairly can be traced to the challenged action; and
4. That the injury asserted is likely to be redressed by a favorable decision on the merits of the case.

These four factors appear to narrow the group of prospective petitioners from what we would have if only the *Lujan II* factors were used. This is because although the last two factors are virtually identical to *Lujan II* factors (2) and (3), the first two factors, taken together, appear more narrow than *Lujan II*’s “injury in fact” requirement.

In asserting a standing challenge, a permittee will want to argue that those *four* elements need to be thoroughly evaluated by the administrative tribunal, point by point. If a petitioner in a contested case hearing does not have standing, the administrative tribunal does not have jurisdiction, and the matter must be dismissed. See, e.g.,

Michigan Bell Tel Co v Public Serv Comm’n, 214 Mich App 1; 542 NW2d 279 (1995).¹³

As mentioned above, with respect to the third and fourth elements of standing in a contested case hearing, parties can reasonably rely upon cases discussing *Lujan II* factors (2) and (3). For example, in the context of a water permit application, it will always be the theory and claim of a petitioner that the facility, as permitted, pollutes (or will pollute) certain waters. The “challenged action” is the threatened operation of a facility which, if permitted, will pollute those waters. Thus, it would be readily apparent that the injury asserted is “fairly traceable” to the challenged permit. A permittee will want to argue that a petitioner needs to state more than a general link.¹⁴ The reasons for this are essentially that (a) a Tribunal needs to be able to determine how the interest a petitioner is seeking to protect is threatened by the issuance of a permit, and (b) the permittee and the department (e.g., MDEQ) need to have adequate notice of what aspects of the permit are at issue. A defendant may want to cite the Fifth Circuit, which has stated:

In short, [plaintiff] and its members relied solely on the truism that water flows downstream and inferred therefrom that any injury suffered downstream is ‘fairly traceable’ to unlawful discharges upstream. At some point, this common sense observation becomes little more than surmise. *Friends of the Earth, Inc v Crown Cent Petroleum Corp*, 95 F3d 358, 361 (CA 5, 1996).

A petitioner will counter that the “fairly traceable” causal connection requirement is obviously not meant to be as demanding as the proximate causation requirement of tort law. *Powell Duffryn*, 913 F2d at 72, 73 n10 (CWA case); see also *Laidlaw*, at 704. In other words, at the standing stage, a petitioner need not prove that a permittee’s pollution alone causes or will cause certain, precise harm to the petitioner. *Powell Duffryn*, at 72.

With respect to the “redressability” element, a similar approach on both sides may be taken. The redressability element does not require, in the context of determining standing, that a petitioner establish its case by proof leaving no room for dispute. It is only required that the injury asserted is “likely” to be redressed by a favorable decision on the merits. A petitioner who has sufficiently demonstrated the other three elements of standing should not have much difficulty establishing redressability. It

logically follows that if the granting of a permit to pollute at certain levels will injure or threatens to injure a petitioner, then a decision to deny that permit will likely redress the problem.

Things are much less certain and potentially much more complicated with respect to the first and second elements of petitioner standing. In responding to an “injury in fact” challenge, a petitioner will need to provide detailed affidavits describing its injuries. Although *Laidlaw* says that an injury in fact is adequately alleged when the affiants “aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity,” at 705 (citing *Morton*, 405 US at 735),¹⁵ a petitioner should not rely on that analysis with respect to establishing the first element of standing in a contested case proceeding. Instead, a petitioner would be wise to see that its affidavits comply with the more narrow interpretations of *Lujan II*’s “injury in fact” element. It obviously is not sufficient to present “general averments” and “conclusory allegations”, such as those found inadequate in *Lujan v National Wildlife Federation*, 497 US 871; 110 S Ct 3177; 111 L Ed 2d 695 (1990) (“*Lujan I*”). The affidavits and/or any other testimony must be sufficiently specific so that they are not equated to the speculative “some day” intentions to visit various endangered species halfway around the world which the Supreme Court held insufficient to show injury in fact in *Lujan II*, 504 US at 564.¹⁶

To support its alleged injury in fact, a petitioner may want to rely on *White Lake Improvement Ass’n v Whitehall*, 22 Mich App 262, 273; 177 NW2d 473 (1970). The *White Lake* court held that the Association, which was a non-profit membership corporation, had standing to represent the interests of those of its owners who owned land bordering on White Lake. Such persons, having direct contact with the affected waters, experience a different impact from the threatened discharges than does the general public.

As to the “zone of interests” element, *Lujan II* and its progeny provide no guidance because there is no parallel *Lujan II* factor. Under this factor, a challenge to a regulated discharge must allege injury to interests protected under the permitting requirements. For example, in challenging a permitted water discharge, complaints concerning the impact on endangered species and odor from the regulated facility, although perhaps showing an injury in fact, may be found outside the zone of interest.

In conclusion, between *Lujan II*, *Laidlaw* and their progeny, citizen suit standing guidelines under federal environmental law are fairly drawn at this time. In the arena of petitioner standing with respect to contested case proceedings in the State of Michigan, however, although the elements themselves are clear, the content of the evidence necessary to establish those elements at the standing stage remains open to some debate. Because the contested case standing requirements allow standing for actual or *threatened* injury, as opposed to *Lujan II* which requires actual or *imminent* injury, citizens may find a warmer welcome with the administrative law judge. From both an economical and public policy standpoint, it makes more sense to relax standing requirements for citizens during the permitting stage and allow their participation rather than delaying them access until they are injured or injury is imminent.

¹ Steven H. Huff is of counsel to Donnelly W. Hadden, P.C. on environmental matters. He specializes in environmental torts. Mr. Huff extends his thanks to Donnelly W. Hadden and Beth S. Gotthelf for their contributions to this article.

² See David Sive & Frank Friedman, *Citizen Suits in Environmental Litigation* 304-05 (1987) (listing twelve major federal environmental statutes providing for citizen suits, including the CAA, CWA, CERCLA, Safe Drinking Water Act (SDWA)); 3 Susan M. Cooke, *The Law of Hazardous Waste* §16.03 (1992) (“With only one exception, a ‘citizen suit’ provision has been included in every federal environmental statute passed since 1970”).

³ In addition, “citizen involvement provides an important set of checks and balances in the enforcement process. By overseeing the Government’s efforts, citizens can assure themselves and the public at large that all views are represented in the process and that the outcome is based on all available knowledge” 130 Cong Rec 89152 (daily ed. July 25, 1984) (statement of Sen. Mitchell).

⁴ See S Rep No. 91-1196, pp. 36-37 (1970), 1 Senate Committee on Public Works, 93d Cong, 2d Sess, *A Legislative History of the Clean Air Act Amendments of 1970*, pp. 436-437 (Comm Print 1974).

⁵ This case is also often referred to as *Defenders of Wildlife* but the author prefers the more compact “*Lujan II*”.

⁶ There may be situations where *Lujan II* can be distinguished with respect to its laundry list of standing requirements. See, e.g., *Atlantic States Legal Foundation v Karg Bros*, 841 F Supp 51, 55-56 (ND NY, 1993).

⁷ As another example, § 6972(a)(1)(A) of RCRA provides that any person may commence a civil action on his own behalf against any person who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to 42 USCS 6901 *et seq*.

⁸By this decision, the Supreme Court reversed the Fourth Circuit Court of Appeals which had assumed plaintiff's standing but held the case was moot because defendant had fully complied with the terms of its permit. It also held that civil penalties payable to the government did not redress any injury to plaintiffs. See 149 F2d 303 (CA 4, 1998).

⁹ Citing cases from the Seventh, Third and Eleventh Circuits, the *Laidlaw* Court went on to "resolve the inconsistency between the Fourth Circuit's decision in this case and the decisions of several other Courts of Appeals, which have held that a defendant's compliance with its permit after the commencement of litigation does not moot claims for civil penalties under the Act." *Id.* at 703. It explained that a "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Id.* at 700.

¹⁰ An association may have standing to sue in federal court based on either (a) an injury to the organization in its own right or (b) as the representative of its member(s) who have been harmed. *Warth v Seldin*, 422 US 490, 511 (1975). See also *Hunt v Washington State Apple Adver Comm'n*, 432 US 333, 343 (1977).

¹¹ The district court required further evidence concerning (1) "the chemical content of the waterways" at issue, (2) "any increase in salinity of the waterways" and/or (3) "other negative change in the ecosystem of the waterway[s]". See 9 F Supp 2d at 600.

¹² In *Cedar Point Oil Co*, 73 F3d at 556, the Fifth Circuit held that citizens' concerns about water quality sufficed as injury in fact where two of the citizens lived near the body of water at issue and all of them used the water for recreational activities and expressed fear that the discharge would impair their enjoyment of those activities, which were dependent upon good water quality.

¹³ A tribunal's authority, under the Administrative Procedures Act (APA) is to conduct a quasi-judicial de novo review of an application in order to render a final agency decision in a contested case hearing. MCL 24.281. When a permit is issued or denied by the MDEQ, and that action is timely challenged, the initial decision does not constitute the final agency decision until findings of fact and conclusions of law are made after an administrative hearing. MCL 24.285. Evidence introduced at the hearing is part of the record, and the challenged action is not complete until the agency has made its final decision. The agency's final decision after a contested case must be based solely on the hearing record. *Id.*

¹⁴ Based on *Lujan II*, the demonstration of causation may receive higher scrutiny in a situation where the "challenger" is not the permittee (such as a citizen's group petitioner). In *Lujan II*, the Supreme Court stated: When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. *Lujan II*, at 561.

¹⁵ Examples of the kind of statements that should be made in affidavits are presented in the *Laidlaw*, at 704-705.

¹⁶ Note, however, that the Court recognized that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." *Lujan II*, at 562-563.

COMMITTEE REPORTS

ENVIRONMENTAL LITIGATION COMMITTEE

By Steven H. Huff, Co-Chair

STATE OF THE LAW: TRESPASS-NUISANCE LAW

On April 15, 2000, the Michigan Supreme Court rendered its "decision" with respect to the appeal taken by the City of Midland from *CS&P, Inc v City of Midland*, 229 Mich App 141; 580 NW2d 468 (1998). That case involved a trespass-nuisance claim with respect to sewage intrusions. Among other things, the Court of Appeals had held that negligence was clearly not an element of a trespass-nuisance claim. On appeal the defendant/appellant municipality asked the Supreme Court to reverse the Michigan Court of Appeals' decision.

The brief opinion, stated in its entirety, is:

On order of the Court, leave to appeal having been granted and the Court having considered the briefs and oral argument of counsel, the order of October 1, 1999 which granted leave to appeal is VACATED and leave to appeal is DENIED because the Court is no longer persuaded the questions presented should be reviewed by this Court. *CS&P, Inc v City of Midland*, ___ Mich ___ ; 609 NW2d 174 (2000).

In a more lengthy and substantive concurring opinion, Justice Corrigan explained:

Although this Court granted leave to address the question whether negligence is an element of the trespass-nuisance exception to governmental immunity, I cannot overlook a more fundamental question brought to this Court's attention by amicus curiae, the Michigan Municipal League. Amicus argued that the second sentence of MCL 691.1407(1); MSA 3.996(107)(1) "compels the conclusion that there is no trespass nuisance exception to a city's governmental immunity..." On its face, this argument seems to have considerable merit. Accordingly, I am persuaded that we should not address the finer points of the trespass-nuisance exception without first reconsidering the question whether there is statutory authority for the trespass-nuisance exception in the plain language of the governmental tort liability act... *Id.* at 174.

Justice Corrigan's opinion focused to a great extent on *Li v Feldt* (After Remand), 434 Mich 584; 456 NW2d 55 (1990) and the dissenting justice's "observations regarding the plain language of the statute", which she found "compelling". *Id.* at 175.

In a separate concurring opinion, Chief Justice Weaver stated:

I would note that if the Court were to reconsider the interpretation of MCL 691.1407(1); MSA 3.996(107)(1), as suggested in Justice Corrigan's concurring statement, the Court should consider the following:

(1) whether to adopt Justice Griffin's dissent in *Li v Feldt* . . ., which finds that the disputed language "was merely intended to prevent further erosion of the state's common-law immunity, rather than preserve any common-law exceptions to governmental immunity," and

(2) whether trespass nuisance is not a tort within the meaning of the governmental immunity statutes, but rather an unconstitutional taking of property that requires just compensation even if the taking is temporary. As Chief Justice Riley noted in her opinion in *Li v Feldt* . . ., "[t]he

Taking Clause of the constitution rests at the foundation of the trespass-nuisance exception." Accordingly, the statute providing governmental immunity for tort liability may not be implicated. *Id.* at 176.

UPDATE: EXPERT WITNESS TESTIMONY

The United States Court of Appeals for the Sixth Circuit recently decided the case of *Jahn v Equine Services, PSC, No 98-00009 (CA 6, Nov 21, 2000)* (Electronic Citation: 2000 Fed App 0398P (6th Cir.)), which involved a decision by the trial court with respect to the admissibility of certain expert testimony in connection with the death of a pony after it had received surgery for a breathing problem. The case has been recommended for full-text publication.

In that case, the district court decided, sua sponte, and without allowing additional briefing, that the proposed testimony of two veterinarians was inadmissible under *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993). After rejecting their expert testimony, the district court granted summary judgment against plaintiff on all of her claims because, without that testimony, she could not prove causation. The Sixth Circuit recognized that "the sole basis for the district court's decision to grant summary judgment was its exclusion of Jahn's expert testimony." Thus, citing *General Elec Co v Joiner*, 522 US 136, 143 (1997), it decided that in reviewing the ruling that the proffered expert testimony was inadmissible, it would apply an abuse of discretion standard – even in the context of summary judgment.

The Sixth Circuit criticized the district court, stating that "the district court's *Daubert* analysis both mischaracterized the methodology employed by [plaintiff's expert veterinarians] and ultimately employed a standard of admissibility more stringent than that expressed in Rule 702." Among other things, the Sixth Circuit explained that a veterinarian's "lack of hands-on familiarity with the surgery performed was not relevant to a ruling on the admissibility of [the veterinarian's] testimony regarding pre-operative testing and post-operative monitoring." The Court also explained that "by implying that specific knowledge of the precise physiological cause of [the pony's] death is a prerequisite to admissibility, we believe that the district court held the experts up to entirely too strict a standard when considering the admissibility of their testimony." Citing *Ambrosini v Labarraque*, 101 F3d 129, 140 (CA

DC, 1996), the Sixth Circuit explained that "[i]n order to be admissible on the issue of causation, an expert's testimony need not eliminate all other possible causes of the injury . . . 'The fact that several possible causes might remain "uneliminated" . . . only goes to the accuracy of the conclusion, not to the soundness of the methodology.'" *Id.*

Among other things, the trial court viewed the analysis performed by plaintiff's expert veterinarians as "stacking one guess on top of another," and rejected the testimony on that basis. Citing *Kumho Tire*, 526 US at 152, the Sixth Circuit determined that "[b]y off-handedly labeling this a 'guess,' the district court failed to explore whether the proposed testimony was based on 'the same level of intellectual rigor that characterizes the practice' of veterinary medicine."

Citing *Clay v Ford Motor Co*, 215 F3d 663, 667 (CA 6, 2000), the Sixth Circuit acknowledged that a "district court is not obligated to hold a *Daubert* hearing." The Court further stated, however, that "a district court should not make a *Daubert* determination when the record is not adequate to the task." It went on to explain that the record before it contained enough material for it "to have determined that the district court mischaracterized the testimony of [plaintiff's veterinarian experts] by weighing their opinions against the pathologists." The Court did not believe, however, that the record was complete enough for it to reverse the district court and directly rule that plaintiff's expert testimony was admissible. The Sixth Circuit concluded with the following statement:

A district court should not make a *Daubert* ruling prematurely, but should only do so when the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance. We believe that the record needs to be further developed to make an adequate *Daubert* determination in this case. With a more complete record before the district court, [plaintiff] will have an adequate opportunity to defend the admissibility of her experts' testimony, and [defendant] will have an adequate opportunity to argue against it.

Because summary judgment was based on the district court's "improper exclusion of [plaintiff's] proffered expert testimony", the Sixth Circuit vacated the decision to grant summary judgment and remanded "for proceedings not inconsistent with this opinion".

Note: Effective December 1, 2000, Fed R Evid 701-703 have been amended. Among other things, the rules codify *Daubert/Kumho Tire*, preclude many "lay experts" from testifying and bar the backdoor admission of hearsay through experts.

In the meantime, at the state court level, three West Michigan trial court judges have ruled that DNA evidence obtained from testing kits used by the Michigan State Police is admissible under the *Davis-Frye* standard. Each judge ruled, in separate opinions, that the DNA testing methods currently used by the State Police are "accepted" within the scientific community. The three cases are *People v Phillips* (Kent County Circuit Court), Judge Dennis C. Kolenda presiding, *People v Kopp* (Kent County Circuit Court, H. David Soet presiding) and *People v Cavin* (Lake County Circuit Court), with Judge Richard I. Cooper presiding. All three judges noted in their opinions that the purpose of a *Davis-Frye* hearing is not to impose judgment upon scientific principles. See 14 Mich LW 1967.

UPDATE: TOBACCO LITIGATION

On November 6, 2000, a Florida circuit court judge issued a 68-page order upholding the record-setting \$145 billion punitive damages award to Florida smokers in the *Engle v RJ Reynolds Tobacco Co* class action. The total award was \$157.57 billion. Judge Robert Kaye rejected the tobacco industry's requests to reduce the award and conduct a new trial. Back in July of this year, after a two-year trial, a Florida jury took less than five hours to decide that the nation's five largest cigarette makers should pay \$145 billion in punitive damages to sick Florida smokers. That final judgment opens the door to what is expected to be a lengthy appeals process.

A week or so before the November ruling, the U.S. Supreme Court had turned aside a challenge to a 2-year-old tobacco settlement in which the tobacco industry agreed to pay a total of \$246 billion over a 25-year period to several states. In the case of *Hise v Philip Morris*, No 00-337, the Court refused to consider whether smokers ended up paying illegally higher prices for their cigarettes as a result of that landmark settlement. A month after the 1998 settlement was signed, two men filed suit in an Oklahoma federal court claiming it violated antitrust laws. Their underlying theory was based on the claim that the country's largest tobacco companies went into the deal intending to pass on the costs to smokers. The federal

court ruled in favor of the tobacco companies in 1999, and the men appealed (unsuccessfully) to the Tenth Circuit.

In June 2000, the House voted 215-183 to allow the Justice Department to use funds from other agencies to fight what is expected to be a very expensive legal battle against the tobacco industry. The Department hopes to secure payments of \$20 billion a year from cigarette

makers to offset the federal costs of taking care of ailing workers. Its legal bills, for a case that likely will not be tried until 2003, are expected to be \$20 million a year. This federal tobacco suit mirrors the above-mentioned health-related lawsuits that multiple state attorneys general filed against the tobacco industry. The money paid pursuant to the previous tobacco settlement was to compensate the participating states for the cost of treating smoking-related illnesses of people on Medicaid.

PROGRAM COMMITTEE

By John Byl, Chair

The Program Committee held a meeting on November 28, 2000. Attendees included Sue Topp, Stuart Weiss, John Tatum and John Byl.

1. **Evaluation of Fall Update.** The Fall Update held on October 20, 2000 was a success. The program was well received by attendees. The section made a profit of over \$2,000.

2. **Committee Liaison Reports.** John Tatum provided a report on the Superfund Committee. The last program sponsored by the Superfund Committee was a presentation by Jim Sygo, Chief of the Waste Management Division. Mr. Sygo spoke about the Memorandum of Understanding (MOU) recently entered into between the MDEQ and the U.S. EPA. Under that MOU, the federal government has agreed that Part 201 cleanup criteria can be utilized at RCRA corrective action sites. The next Superfund Committee program will likely be on the Part 201 rules, which are expected to be released sometime in February. This may be a good topic for a spring program. There were no other committee liaison reports.

3. **New Committee Liaison Assignments.** Marc Shaye has agreed to join the Program Committee and is willing to serve as the Committee Liaison for the Solid and Hazardous Waste Committee.

4. Planning Programs for 2001.

Spring Program. As noted above, the anticipated Part 201 rules might be appropriate for a March program. At our next meeting, we will discuss whether we want to arrange a one-half day program in Lansing for this and other topics.

5. DEQ Regional Roundtables.

a. **Higgins Lake.** We discussed the possibility of utilizing the Friday afternoon at Higgins Lake (believed to be June 8) for an MDEQ roundtable. John Tatum will contact Al Howard about his participation. We will likely include other MDEQ personnel as well.

b. **Detroit.** We also agreed that it would be appropriate to have another roundtable in the Detroit area, preferably in the western suburbs, such as Livonia, Southfield, Northville or Novi. Possible locations include the Skyline Club at the Town Center in Southfield and the Novi Sheraton. Suggestions on other locations would also be appreciated. The timing, location and topics for such a roundtable can be discussed in greater detail in subsequent committee meetings.

SUPERFUND COMMITTEE

By Charles E. Barbieri, Chair
Christopher Dunsky, Vice Chair

Report from Waste Management Division Chief

The Superfund Section of the Environmental Law Section received an update about corrective action developments and other matters in the Waste Management Division of the Michigan Department of Environmental Quality on November 4, 2000, in Lansing.

James Sygo, the current Chief of the Waste Management Division, discussed his division's ongoing efforts to comply with Congress' Governmental Performance and Results Act which requires the United States EPA to achieve certain milestones at priority sites that require corrective action. According to Sygo, Michigan has 58 sites, of which MDEQ will be the lead agency at 38.

Sygo also reported that his division has been working on a memorandum of agreement with the United States EPA whereby the State and Federal governments will attempt to use Part 201 cleanup criteria at corrective action sites in Michigan. Sygo hopes that this agreement will assure the use of uniform criteria at corrective action locations in the State of Michigan. Sygo reported that Region V recently signed the memorandum.

Sygo also reported that the State expects to use corrective action consent orders and voluntary agreements as a means of addressing sites that are not high priority. Sygo lamented that one of the principal problems with the corrective action program is the inability to provide covenants not to sue. He hopes that permits, corrective action orders, post closure permits and plans and voluntary agreements will achieve corrective actions while at the same time produce letters or other documents assuring parties that the agencies have no further interest or concern.

Sygo also was questioned about new deed notice requirements for sites that require corrective action. He also answered a number of questions about brownfield opportunities. Although the EPA has encouraged prospective purchaser agreements, Michigan has not made extensive use of the same.

Sygo indicated that further discussions within the State would have to be conducted about whether new brownfield reimbursement programs should be available to new purchasers who may avoid Part 201 liability but still acquire RCRA or Part 111 liability at former treatment, storage and disposal facilities subject to corrective action. Some debate still exists on whether newly generated taxes can be recaptured for reimbursement of environmental expenditure by such parties.

The next meeting of the Superfund Section will be conducted on January 27, 2001 in Lansing.

TECHNOLOGY COMMITTEE

By Todd Dickinson, Chair

The Technology Committee has not had a formal meeting since the last report, but has pursued the following initiatives informally.

1. **PHONE CONFERENCING** The Environmental Law Section now has an account number (2158323), and a dedicated meet-me number (312) 461-9197 and a passcode (298963) for our conference calls. Reservations can be made on the web at <http://www.citizensconferencing.com> or by calling 800-598-4358 and the bridge is now only \$0.15 per conferee per minute. The contact is Deb Juarez.

2. **DESKTOP PUBLISHING OF JOURNAL** Linda Blais was consulted regarding any special needs the Journal Committee might have for assistance from the Technology Committee, and she advised that things seemed to be well under control at the present time.

3. **JOINT PROJECT WITH MICHIGAN WASTE REPORT** Jeff Dauphin of Waste Information & Management Services, Inc. (WIMS), the publisher of the Michigan Waste Report, has submitted a proposal for providing the Section with a weekly summary of state environmental legislative activities, the Michigan Environmental Legislation Update (MELU), in email format for distribution to members on the Section's listserv. The cost would be \$2,500 per year. The complete text of the proposal, together with a sample showing the format of the weekly summary, is attached hereto. The Technology Committee is currently seeking new members, and may send out an invitation on the Section Listserv, similar to the one recently sent out by Jeff Magid, on behalf of the Environmental Litigation Committee.

MICHIGAN ENVIRONMENTAL CASENOTES

These casenotes include Michigan state and federal decisions rendered from June 1, 2000 through August 31, 2000.

Mobil Oil Exploration v United States, 177 US 1331; 120 S Ct 2423; 147 L Ed 2d 528 (2000)

Several oil companies ("plaintiffs") paid the federal government \$156 million for the right to explore and develop oil off the North Carolina coast. The contract was conditioned on approval of the companies' plan under the Outer Continental Shelf Lands Act ("OCSLA") and the Coastal Zone Management Act ("CZMA"). The OCSLA required the Department of Interior ("Interior") to approve a plan within 30 days after submission, if the plan met all requirements. While the plan was being reviewed by Interior, the Outer Banks Protection Act ("OBPA"), which prohibited approval of any plan for at least 13 months, became law. After the 30-day deadline passed, Interior sent a letter to Mobil stating that although

the plan met the necessary requirements, it would not be approved for at least 13 months, and it suspended all North Carolina off-shore leases. The State of North Carolina also denied consistency certification under the CZMA. Plaintiffs filed suit claiming breach of contract. The trial court held that the government had repudiated the contract and granted plaintiffs restitution. The federal circuit court reversed and plaintiffs appealed.

On appeal, the government argued repudiation was inappropriate because it did not substantially breach the contract by delaying approval of the plan by 13 months, nor communicate its intent to breach the contract. It also argued that plaintiffs waived their right to restitution because they received partial performance after the claimed repudiation, and the repudiation did not hurt the companies because the state ultimately denied approval under the CZMA. The Supreme Court rejected all of these arguments.

The Supreme Court held that the government had materially breached the contract by failing to timely consider the plan, as required under the contract terms, and the Court required the government to return the \$156 million. The Court reasoned that the contract terms did not provide for OBPA regulations, and the regulations provided under the OSCLA did not give the government the authority to deny approval of a plan that met the necessary requirements or to suspend a lease. Further, the Court reasoned that the delay was material and that the government had communicated its intent to follow the OBPA. Therefore, the Supreme Court reversed and remanded

Terra Energy Ltd v Michigan, 241 Mich App 393; 616 NW2d 691 (2000)

Plaintiffs, Terra Energy Ltd. (“TERRA”) and J5 Inc. (“J5”), were producers of natural gas and oil. They acquired the right to explore natural gas resources in Montmorency County. Under their lease, TERRA and J5 were obligated to pay royalties to the owner of the minerals. A dispute arose among the defendants, the State of Michigan (“State”), the Department of Natural Resources (“DNR”), and Stokes Properties, Inc., as to who actually owned the minerals. To avoid multiple liabilities, TERRA and J5 filed an interpleader action to quiet title to the minerals. The trial court determined that, primarily, the State was the rightful owner of the minerals and ordered defendants in the interpleader action to pay plaintiffs’ attorney fees. The State and the DNR appealed contending the trial court erred when it awarded attorney fees to plaintiffs.

On appeal, the State and the DNR advanced several arguments, but the main argument was that, as a matter of law, plaintiffs in interpleader actions are not entitled to recover attorney fees. The Court of Appeals disagreed. The court reasoned that although there was no Michigan statute that addressed whether attorney fees were to be given to a plaintiff in an interpleader action, a common-law exception existed that allowed for the recovery of attorney fees. The court held that prior case law established a precedent to allow recovery of attorney fees by interpleader plaintiffs. Furthermore, the court reasoned that plaintiffs were disinterested stakeholders in the litigation and, in federal interpleader actions, disinterested stakeholders were allowed to recover attorney fees. In addition, the court found that the common-law exception did not apply to this particular case, and that there was no language in plaintiffs’ lease indicating they were

obligated to defend the state’s title or bear the expenses of litigation.

Richardson v Township of Brady, 218 F3d 508 (CA 6, 2000)

Richardson owned and operated a nursery-swine facility within the Township of Brady. To control the number of odor-producing animals permitted on the land within the township, a unit of measure was assigned, based on the odor-producing characteristic of the animals’ waste. The township granted Richardson a special exception use permit allowing up to 1,999 swine on his farm, but it refused to amend the text of the ordinance that would reclassify the size of the pigs by weight, which would have allowed Richardson up to 4,200 swine. Richardson sued claiming that the ordinance violated his substantive and procedural due process rights. The district court granted the township’s motion for summary judgment, and Richardson appealed.

On appeal, the court held that the township’s zoning ordinance did not amount to a facial violation of substantive due process. The court reasoned that the township’s restrictions were rationally related to its goal of reducing odor, and that the township was not required to take into account the weight of the pigs. The court held that the ordinance was not arbitrary or irrational since the assignment of the same animal-unit equivalency to all like animals, regardless of weight, is rational in light of the township’s administrative concerns.

Finally, Richardson argued that he had a property interest in the zoning ordinance procedures themselves and that by failing to swiftly execute its procedures, the township deprived him of that property right without due process. The court held that Richardson could not demonstrate any protected property interest merely by having an abstract or unilateral expectation as to the zoning ordinance procedures. Therefore, the court affirmed the district court’s grant of summary judgment for the township.

Steeltech v United States Environmental Protection Agency, 105 F Supp 760 (WD Mi, 2000)

Steeltech manufactured and processed toxic chemicals in excess of the threshold reporting amounts specified under the Emergency Planning and Community Right-to-Know Act. The Environmental Protection Agency

(“EPA”) filed a complaint against Steeltech for the violations and Steeltech was fined \$61,736. The penalties assessed by the EPA were based on the Environmental Response Policy (“ERP”), which allowed for adjustments by grading the seriousness of the violation. Steeltech appealed to the EPA’s Environmental Appeals Board (“EAB”), which affirmed the decision.

Steeltech then appealed to the Federal district court, claiming there was legal error because the ERP was applied as a rule of law. The court reasoned that the ERP does not have the force or effect of law, but it could be considered in assessing penalties. The court held that the use of an “extraordinary circumstances” standard in the Initial Decision, suggesting that the ERP was binding, was harmless error. Furthermore, the court held that the EPA’s decision not to adjust the penalties although the violations were unintended was reasonable to discourage lack of diligence by regulated facilities in the future.

Steeltech also claimed that the EPA did not properly apply the ERP, stating that it was entitled to both a 30 percent attitude reduction and a 25 percent justice reduction for certain counts. The court held that giving Steeltech an attitude adjustment and a voluntary disclosure reduction would compensate twice for the same factor, and that Steeltech’s level of cooperation and compliance did not warrant a double reduction. Finally, Steeltech claimed the denial of its motion to reopen the hearing for more testimony was arbitrary. The court held, however, that Steeltech was not prejudiced by the decision because it had been given ample opportunity to present evidence.

Adams Outdoor Advertising v East Lansing, 463 Mich 17; 614 NW2d 634 (2000)

The issue in this case was whether an East Lansing sign code, which prohibited rooftop signs effected a taking of property without just compensation. This dispute concerned existing rooftop billboards at two different locations in East Lansing. Adams owned the billboards and leased the rooftop locations where they were installed. The ordinance, which was adopted in 1975, made Adams’ rooftop billboards nonconforming and prohibited Adams from displaying them after May 1, 1987. The leases had been renewed by Adams in 1993 and 1996.

The trial court and Court of Appeals held that the city’s sign code effected a taking of Adams’ real property interests in rooftop leaseholds. The Michigan Supreme Court reversed.

The Supreme Court held that the sign code did not deprive the lessors of all economically beneficial or productive use of land, so the sign code did not effect a taking. Because the lessors of the buildings never had an absolute right to display signs on rooftops, the court concluded that the lessors could not have conveyed to Adams an absolute right to display signs on the leased rooftops. Further, in view of the city’s sign code, Adams had no reasonable expectation that it could maintain the signs after May 1, 1987. Therefore, the court concluded that Adams had not experienced a compensable taking.

Kalamazoo Oil Co v Boerman, 242 Mich App 75; 18 NW2d 66 (2000)

Plaintiff hired defendant to remove underground storage tanks from plaintiff’s property. Plaintiff alleged that defendant did not properly remove or cap a fuel pipe attached to an active petroleum loading dock. As a result, fuel contaminated the soil and groundwater. Initially, a default judgment was entered against defendant for failure to answer, but was later set aside. A default judgment was again entered against defendant because it both refused to comply with the court’s discovery order and failed to attend a court-ordered deposition. At the trial to determine damages, the court refused to permit defendant to present evidence of plaintiff’s comparative negligence. The jury entered a judgment against defendant. Defendant appealed.

On appeal, in a case of first impression, the court stated that although a default judgment settles the question of liability, comparative negligence includes aspects of both liability and damages. After analyzing out-of-jurisdiction decisions and Michigan law regarding default and discovery, the court held that the decision to exclude evidence of comparative negligence in determining damages in a default case should be left to the discretion of the sanctioning court. In the present case, the court found that the sanctioning court’s decision to exclude evidence of comparative negligence was appropriate, based on defendant’s conduct during discovery. Affirmed.

Leonard C Carnaghi, Inc v Amwest Surety Ins Co, 241 Mich App 686; 617 NW2d 49 (2000)

Plaintiff entered into a subcontract with Growth Environmental Consulting, Inc. (Growth). Growth entered into two contracts with the Township of West Bloomfield to perform underground environmental improvement work at two of its fire stations. One contract was executed on October 28, 1993 and the other, which amended the former and provided for additional environmental work that plaintiff performed, was signed in June 1995. The second contract required Growth to purchase performance bonds, which it purchased from defendant, Amwest Surety Insurance Company (Amwest). Before the second contract was executed, plaintiff performed and submitted to Growth an affidavit of payment totaling \$101,489.45. Later, Growth went bankrupt and never made payment to plaintiff. Plaintiff then filed suit to recover payment from the bonds issued by Amwest. The trial court granted summary judgment in favor of Amwest and plaintiff appealed.

Amwest argued that plaintiff was not entitled to payment under the bond because all of its work had been performed before the payment bond was issued. The Court of Appeals disagreed, reasoning that MCL 129.201; MSA 5.2321(1) required a principle contractor to provide a performance bond from a surety for the protection of a "claimant." A "claimant" was defined as someone who furnishes labor or material or both. The court determined that the underlying public policy behind the statute was to protect subcontractors and ensure recovery of payment since a mechanic's lien could not be placed on a public building. Following courts from other jurisdictions, the court held that plaintiff was entitled to payment even if the payment bond was issued after its performance. Further, the court reasoned that the triggering event was the failure to pay for the labor and materials, and because Growth failed to pay plaintiff, there was a claim for recovery under the bond. Consequently, the court reversed and remanded to the trial court.

Jones v City of Lakeland, Tennessee, 224 F3d 518 (CA 6, 2000)

Plaintiff riparian landowners sued the city of Lakeland alleging that its discharge of wastes and pollutants into Oliver Creek was a violation of its National Pollutant Discharge Elimination System (NPDES) permit. Plaintiffs claimed that the city was in violation of the Clean Water

Act and the Tennessee Water Quality Control Act (TWQCA). The District Court for the Western District of Tennessee granted defendant's motion for summary disposition, reasoning that the court lacked subject matter jurisdiction and that plaintiffs failed to state a claim upon which relief could be granted.

On appeal, the Sixth Circuit Court first looked to the facts in plaintiffs' complaint to determine if they were facially sufficient to give the court subject matter jurisdiction under the Clean Water Act. The Sixth Circuit held that the Act posed no limitations on plaintiffs' claim. The court reasoned that the diligent prosecution defense raised by defendant did not apply under the Act because the Tennessee Department of Environment and Conservation (TDEC) was a state administrative agency and not a court of the United States or a State. Furthermore, the Sixth Circuit held that the TDEC had not diligently prosecuted plaintiffs' concerns. The court reasoned that there were several examples that illustrated the TDEC's lax enforcement action against the city for its violations.

The court held that civil penalties were available to plaintiffs because there was no redress available to plaintiffs under TWQCA. The court also stated that the Clean Water Act afforded citizens an opportunity to initiate or participate in enforcement actions for violations of the Act. Therefore, plaintiffs' claim for civil penalties was properly brought under this Act.

In re Orth, 251 BR 333 (WD Mich, 2000)

Debtors (Orths) held a promissory note secured by a mortgage in their company OCT, Inc.'s real estate. In 1991, OCT Inc. filed company bankruptcy, appointed a trustee, and scheduled the promissory note and real property. After discovering contamination, the trustee abandoned the property and filed a no asset report. OCT, Inc. then sold its property conditioned on debtor's promise to clean up the contamination. The sale proceeds of \$7,599.49 ultimately passed on to debtors.

The trustee claimed that debtors failed to disclose the promissory note and property interest in bankruptcy and that the sale proceeds belonged to the estate because the land was not abandoned. Debtors claimed that they did schedule the asset and the trustee had abandoned the property, so the sale proceeds were actually earnings from their promise to clean up the land and were not the property of the estate.

The Bankruptcy Court held that because debtors failed to properly schedule the assets in question, and the trustee did not know of, and, therefore, could not abandon the property in debtor's personal bankruptcy, debtors were not entitled to the sale proceeds.

Kalamazoo River Study Group v Rockwell International, 107 F Supp 2d 817 (WD Mich, 2000)

The Kalamazoo River Study Group ("KRSG"), composed of several paper mills, filed suit against eight corporations under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), and the Michigan Natural Resources and Environmental Protection Act (NREPA), to recover costs related to the clean-up of PCB contamination in portions of the Kalamazoo River. The trial court held that KRSG and Rockwell, one of the original eight defendants, were liable for the contamination.

The court allocated the remediation costs between these responsible parties. The court reasoned that under CERCLA, the court may allocate costs between the liable parties using any equitable factors it determines are appropriate. The court used a list called the "Gore factors" in making its determination. The Gore factors allowed the court to take into account various circumstances that are not considered under a common law contribution action. The court stated that in this case the most important Gore factor was the quantity of PCBs released. The court held that because Rockwell's contribution was minimal in contrast to KRSG's contribution, and because Rockwell's contribution did not exceed background levels that would have resulted in a need for remediation, the entire cost of clean-up activities should be borne by the KRSG.

Coca-Cola Enterprises v Dept of Environmental Quality, unpublished opinion per curiam of the Court of Appeals, decided August 1, 2000 (Docket No. 214315)

The Michigan Underground Storage Tank Financial Assurance (MUSTFA) section of NREPA, Part 215, permits a party to file an appeal with the MUSTFA board within 14 days after a claim has been denied. This appeal may be filed by an owner or operator of an underground storage tank, which includes a person that has been assigned an approved claim.

Here, plaintiffs did not file their administrative appeal within the statutory 14-day period, so their appeal was denied. The trial court granted defendant's motion for summary disposition concluding that plaintiffs were properly notified of the 14-day period. Plaintiffs appealed the trial court's decision, claiming that defendant had a practice of accepting late appeals.

On appeal, the court found that only one letter had been sent to plaintiffs that addressed the statutory period. The court held that the letter did not give fair notice of defendant's intention of strictly enforcing the 14-day deadline. The court determined that plaintiff did not have proper notice of the statutory deadline and reversed the trial court.

Michigan Manufacturers Assoc v Browner, unpublished opinion of the US Court of Appeals, Sixth Circuit, decided August 24, 2000 (Docket Nos. 98-3399, 98-3400)

Congress delegated authority to the U.S. Environmental Protection Agency (EPA) to determine whether a proposed state implementation plan (SIP) provides for the attainment and maintenance of national ambient air quality standards (NAAQS), under the Clean Air Act. The EPA disapproved a Michigan SIP revision that allowed for an automatic exemption if a violation of the emissions standard occurred during certain situations, such as start-ups and shutdowns. Plaintiff appealed.

In reviewing the claim, the court stated that EPA memoranda have interpreted all excess emissions as violations of the CAA and require that a "notice of violations" be issued to the source. However, enforcement is discretionary on the part of the governing agency. Further, the EPA memoranda also specifically allowed discretionary enforcement against a source that violated the NAAQS due to a malfunction or during start-up or shutdown of the facility.

The court affirmed the EPA's decision. The court reasoned that although the Michigan Department of Environmental Quality had submitted a revised SIP, the revisions would still result in automatic exemptions. The court also reasoned that the EPA had determined that the rules violated the CAA because the state agency was not authorized to review a source's emission plan. Further, EPA's ruling was upheld because the EPA had determined that the automatic exemptions violated the CAA since the

state definition of malfunction failed to limit acceptable failures to ones that were infrequent and not preventable. Therefore, the proposed revisions to the Michigan SIP were too broad under the CAA and EPA's denial was appropriate.

Best Foods, f/k/a CPC International, Inc v Aerojet-General Corp, __ F Supp 2d __ (WD Mich 2000); 2000 WL 1238910 (WD Mich, August 24, 2000)

This case concerned a motion to enter a consent decree to allocate liability associated with a contaminated site in Muskegon County. The court had previously found that contamination was caused by the use of lagoons for chemical waste disposal. The district court had previously determined that Aerojet-General Corporation (Aerojet) and CPC International (Best Foods) were jointly and severally liable to the United States and the State of Michigan for clean-up costs. Defendants appealed claiming that they were not liable as parent corporations under Michigan corporate veil-piercing standards, absent proof of fraud.

The Sixth Circuit reversed, holding that a parent corporation may be liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) only if the state's corporate veil-piercing standards, including proof of fraud, were met. The United States and the State of Michigan appealed to the Supreme Court, which determined that a parent company may be directly liable under CERCLA, regardless of corporate veil-piercing principles.

On February 25, 2000, the United States moved to enter the consent decree. In considering this motion, the court stated that CERCLA encourages settlements between parties found responsible for contamination and offers contribution protection to parties who settle, and that the settlement should be approved if it is fair, reasonable, and consistent with the goals of CERCLA.

Best Foods argued that the settlement was unfair because Aerojet was jointly and severally liable and, according to the consent decree, would be relieved from a contribution action under the Superfund Amendments and Reauthorization Act of 1986. Best Foods further argued that the indemnification was also unreasonable and inconsistent with the purposes of CERCLA because it did not benefit the public or encourage prompt clean up. The court rejected the arguments and granted the motion to enter the consent decree.

Crumbaugh v Velsicol Chemical Corp, unpublished opinion per curiam of the Court of Appeals, decided August 29, 2000 (Docket No. 212295)

Defendant Velsicol Chemical Corporation created an easement and entered into a lease agreement in 1971 with plaintiffs. Several years later, the manufacturing plant shut down, was later demolished and the site remediated. Various federal and state agencies entered into a consent judgment with defendant regarding environmental contamination at the main site.

The consent judgment required defendant to wall and cap the main plant site and required that the wells on plaintiffs' property be used to decontaminate water and collect contaminated water, pursuant to either the Safe Drinking Water Act or the Resource Conservation and Recovery Act. Plaintiffs sought an injunction to prevent defendant from using the well for this purpose, which the trial court granted.

The court of appeals also ruled in favor of plaintiffs by permanently enjoining defendant from disposing of any substance in the underground well it had drilled. The court reasoned that defendant's proposed use of the land under the consent judgment did not fall within the terms of the lease agreement and, therefore, it was barred. The court of appeals affirmed the trial court's decision.

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

Helen Haessly, Rob Moon, Yolanda Nowlin, Michael O'Malley, Lina Farris, Eric Jonker, Scott Sachs, Roger Stark and Danielle Vaz

MINUTES ENVIRONMENTAL LAW SECTION ANNUAL MEETING

Wednesday, September 20, 2000

Chairperson Beth Gotthelf called the annual meeting of the Section to order at 9:10 am.

Bill Livingston of the Lawyers & Judges Assistance Program from the State Bar gave a presentation on the services available from the program.

Beth then presented the report of the Nominating Committee as contained in the Environmental Law Journal. The Nominations were:

Chairperson Elect: John L. Tatum

Secretary/Treasurer: Thomas P. Wilczak

Council: (3 year) S. Lee Johnson, Charles E. Barbieri, Joseph E. Quandt, and (1 year Term) Jeffrey A. Magid
The slate was elected.

Also elected to second terms on the council were: Saulius K. Mikalonis, Michael B. Ortega, Peter D. Holmes, and Thomas C. Phillips.

There was a concern expressed that the Nominating Committee may have recommended more candidates than there were positions authorized. Later review confirmed this. The nomination in excess of those authorized was for Joe Quandt. His nomination to the Council will be proposed again next year. Joe has agreed to remain Vice-Chair of the Program Committee and participate on the Council in that capacity.

Plaques will be sent to the outgoing Council Members, Linda Blais and David Fink, acknowledging their service on the Council and to the Section.

Beth then thanked a number of people in the Section who had greatly contributed to last year's outreach to Local Bar Associations and the MDEQ District Offices.

Beth presented the gavel to Charles Toy, the incoming Chairperson. Charles thanked Beth for her efforts at outreach including four programs throughout the state.

Charles outlined a number of initiatives for the 2000 - 2001 year:

1) a special program for the 20th anniversary of the section.

2) theme issue of the Michigan Bar Journal in Dec. 2001.

3) a cooperative effort with MDEQ to get the Administrative Law Judge Proposal for Decisions (PFD's) on the web.

4) electronic access enhancements with phone conferencing, email improvements and a potential legislative update by email.

The meeting was adjourned at 9:35 am.

John L. Tatum

Secretary

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, November 11, 2000

Call to Order at 10:08 a.m.

Present:

Toy, Tatum, Dickinson, Barbieri, Schroder, Byl, Dunn, and Phillips, with Holmes, Mikalonis, Trigger, Topp and Susan Johnson participating by telephone, and real property section liaison - Pat Paruch.

Absent:

Bond, Magid, Newlon, Ortega, S. Lee Johnson, Leffler and Wilson.

Minutes:

The minutes of the June 10, 2000 meeting were approved on motion by Phillips and seconded by Dunn, with a correction that Dickinson was present for the meeting.

The minutes of the September 20, 2000 meeting were approved on motion by Dickinson and seconded by Barbieri.

Secretary/Treasurer's Report:

Tom Wilczak reported that for the 12 month period ending September 30, 2000, the Section had total income of \$19,084 and total expenses of \$13,061.06, for a net income of \$6,022.94. When added to the fund balance, it resulted in a net remaining Section balance of \$25,763.75 as of September 30, 2000. Wilczak further noted that the Section had incurred approximately an additional \$6,600 in expenses related to the Fall Update Program and printing cost for the Environmental Law Journal, and that the Section had earned a couple thousand dollars in additional income from the Fall Update Program. John Tatum noted an anticipated \$19,000 in Section dues will be booked in October and November, and that the Section should then have approximately \$40,000 available at the beginning of 2001.

Program Committee Report:

a) John Byl reported on the Fall Update Program stating that approximately 40 people were in attendance. He further indicated that the October 28, 2000 Program Committee meeting was adjourned due to lack of participation. The next Program Committee meeting is scheduled for November 28, 2000 at 5:30 p.m. John Byl further reported that the Program Committee is planning a spring program, as well as continuation of the DEQ Round Table programs. It was suggested that one location for a DEQ Round Table be at the June 8, 2001 meeting at Higgins Lake.

Journal Report:

No report.

Technology Committee Report:

Todd Dickinson reported that the Technology Committee, with the assistance of John Tatum, had set up a call-in phone conference arrangement for the Section. There also was discussion concerning a proposal from Waste Information & Management Services, Inc. to provide a weekly Michigan Environmental legislative update in email format to members of the Section at a cost of \$2,500 for the first year. Grant Trigger moved that the proposal be accepted for a one year trial and his motion was seconded by John Tatum. After discussion, the motion passed.

Membership Report:

Grant Trigger reported that Membership intends to invite anyone who practices environmental law to join the Section. The Bar also will be asked to run a listing of all new members who join the Section in January 2001. Those members will be solicited to participate in the Section.

Publications:

There was discussion regarding an update to the Michigan Environmental Law Desk Book. Charles Toy reported for Jeff Haynes that Jeff and Gene Smary are selecting authors for revision to the book. Todd Dickinson moved that the Section allow them to select authors for the updates without further input from the Council. The motion was seconded by John Byl and passed by the Council.

The Michigan Bar Journal December 2001 edition will be dedicated to the Section's 20th anniversary. Charles Toy, Bob Schroder and Jeff Haynes will convene an ad hoc committee to communicate with Fred Baker, head of the Publications Committee of the Bar, to select authors, conduct peer review and make sure that appropriate articles are submitted by August 2001. It was discussed that the Committee will solicit articles from senior environmental practitioners on their reflections on environmental law over the past 20 years.

Subject Matter Committee Reports:**(a) Air Committee:**

It was reported that the Committee had participated in the Fall Update Program and intends to schedule a meeting in the near future.

(b) Environmental Ethics:

It was reported that the Committee had participated in the Fall Update Program and that it was actively soliciting new members.

(c) Environmental Litigation:

No report.

(d) Natural Resources/Wetlands:

No report.

(e) Real Estate:

No report.

(f) Solid/Hazardous Waste:

Sue Johnson has reported that she has a new co-chair, Marc Shaye, and that they are looking for a program for the spring 2001 Section program.

(g) Superfund:

Chuck Barbieri submitted a written report which noted that the Superfund Committee had participated in the Fall Update Program, had conducted a meeting on November 4, 2000 at which Jim Sygo of MDEQ spoke on corrective action requirements, and that the Committee has its next meeting scheduled for January 27, 2001 in Lansing.

Surface/Groundwater:

No report.

Liaison Report:**(a) State Bar Michigan Board of Commissioners:**

Jim Toy reported that he is the Section's liaison to the Board of Commissioners. He will work closely with our representative Tom Ryan.

(b) Real Estate:

Pat Paruch is the liaison to the Real Estate Section and she reported she intends to facilitate joint efforts on future programs.

(c) Administrative Law Section:

The Environmental Law Section does not yet have a liaison to this Section.

(d) Oil and Gas Law Committee:

Sue Topp reported that she is the Section liaison and that the Oil and Gas Committee will meet sometime next month. Sue Topp plans to attend that meeting.

Chairperson's Report:

Charles Toy reported that the Bar is seeking Access to Justice contributions from attorneys, corporations and the Section. No decision was made by the Section at this time, however, it was discussed that if the Section auctions off the original painting (see discussion below) that Access to Justice is a possible recipient of any funds.

Toy reported that the Section has been solicited for possible comments to proposed amendments to certain Michigan Rules of Evidence and Michigan Court Rules. After discussion, it was decided that comments would not be submitted.

Toy further reported that the Committee on Multidisciplinary Practice has requested a designee of the Section, and John Tatum volunteered to work with the Committee. John Tatum also will solicit input from the Ethics Committee.

Last, Charles Toy reported that the Michigan State Bar Foundation had submitted a letter report to the Section.

Old Business:

Charles Toy reported that Jeff Haynes is compiling a list of nominations for Legal Milestones which will be distributed to the members for comment.

He further reported there has been considerable discussion concerning the 20th anniversary celebration for the Section, which is scheduled to take place at the Annual Meeting in 2001. Grant Trigger submitted a report and proposal to obtain a commemorative painting from Russell Cobane, with 30 prints being made from the original painting. Twenty of the prints will be presented to the past 20 co-chairs, with 10 being held as gifts to future Chairs of the Section. Grant Trigger moved that the Section approve a \$9,000 budget to obtain the original painting with 30 prints, subject to comments to a summary memo that will be placed on the Section list serve for comments through the end of November 2001. The motion was seconded by Barbieri and was approved.

The commemorative prints will be distributed to the 20 past Section Presidents at a dinner program that is tentatively scheduled for the Tuesday evening before the Section program at the annual meeting (i.e., September 11, 2001, and tentatively to be held at the Michigan State Library/Historical Center). Charles Toy reported that he is working to secure a national speaker, possibly Robert Kennedy of the River Keepers organization.

New Business:

John Tatum reported that he is working with MDEQ's Office of Administrative Hearings on a project to put its past Proposal for Decisions (PFD) on the Office of Administrative Hearing's Web page. John reported that old printed opinions need to be scanned, proof read and converted to Web-ready documents. Most of that work has already been sent to volunteers with only two remaining stacks of approximately 16 opinions needing to be converted. John Tatum indicated that he expects expenses of approximately \$1000 in this conversion project. He moved with the support of John Byl that those expenses be reimbursed by the Section. The motion was passed.

Next Meeting:

January 20, 2001

Adjourned at 11:45 a.m.

Environmental Law Journal
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