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Table of Contents

Articles:	Increased Health, Life, and Disability Insurance Premium Costs: A New Class of Economic Damages in Toxic Tort Cases in Michigan	3
	How to Evaluate and Limit the Risks Involved in Protecting Buyers of Contaminated Property with CERCLA Prospective Purchaser Agreements	6
Committee Reports:		
	Environmental Litigation Committee	11
Casenotes		16
Environmental Law Section Council Meeting Minutes (November 14, 1998)		25
Environmental Law Section Council Meeting Minutes (February 6, 1999)		27
Seminars and Courses		30

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INCREASED HEALTH, LIFE, AND DISABILITY INSURANCE PREMIUM COSTS: A NEW CLASS OF ECONOMIC DAMAGES IN TOXIC TORT CASES IN MICHIGAN

By: Ernest P. Chiodo, Steve H. Huff, Donnelly W. Hadden*

This article proposes a new theory for recovery of damages in cases when persons have an increased risk of disease due to exposure to toxic substances. This theory is related to, but different from, the theory of monetary recovery for medical monitoring expenses. The basis for this theory is that persons with an increased risk of disease due to toxic exposure will be subject to increased health, life, and disability insurance premiums as a result of that increased risk. Under the proper circumstances, increased insurance premium costs that arise as a consequence of toxic exposures are allowable future damages in Michigan.

Under Michigan common law, any person who has been injured due to the acts or omissions of another is entitled to compensation in the form of monetary damages. The case of **Van Keulen & Winchester Lumber Co v Manistee & NER Co**, 222 Mich 682; 193 NW 289 (1923) summarizes the common law of damages in Michigan:

The general rule of damages in an action of tort is that the wrong-doer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been foreseen by him, provided the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated. Remote, contingent, or speculative damages will not be considered in conformity to the general rule above laid down. *Id.*, 687; see also **Sutter v Biggs**, 377 Mich 80, 86; 139 NW2d 684 (1966). Consequently, money damages to compensate a toxic exposure victim for any increase in insurance premiums due to an increased risk of disease are allowable in Michigan as long as they are not remote, contingent, or speculative.

Increased premium costs for health, life, and disability insurance as a consequence of an increased risk of disease due to a toxic exposure would in most circumstances fall into the category of future damages. The rule governing awards of future damages is set forth in **Brinstool v Michigan United Ry Co**, 157 Mich 172; 121 NW 728 (1909): It is the generally accepted rule that to entitle a plaintiff to recover damages presently for apprehended future consequences of an injury, there must be such a degree of probability of such consequences

as to amount to reasonable certainty that they will result from the original injury. *Id.*, at 180; see also **Kellom v City of Ecorse**, 329 Mich 303, 308; 45 NW2d 293 (1951).

While a diligent search does not reveal any Michigan cases concerning increased insurance premiums as future damages, case law from other jurisdictions evinces a trend toward allowing compensation for increased risk of future injury — as long as it can be shown to a reasonable degree of certainty that the defendant's wrongdoing created the increased risk. See **Anderson v Golden**, 661 NE2d 1137 (Ill, 1996); **Petriello v Kalman**, 215 Conn 377; 576 A2d 474 (Conn, 1990); **Davis v Gravis**, 672 SW2d 928 (Ky, 1984); **Feist v Sears, Roebuck & Co**, 267 Ore 402; 517 P2d 675 (Or, 1973); **Schwegel v Goldberg**, 209 Pa Super 280; 228 A2d 405 (Pa Super, 1967). These courts have found that an increased risk alone, is itself a present injury which should be as compensable as any other present injury.

Therefore under Michigan law, a victim of a toxic exposure may recover as money damages the amount of increased insurance premiums that are reasonably certain to occur due to the increased risk of disease as a result of the exposure to toxins. The sums of the increased insurance premiums are consequential future damages arising from the toxic exposure. The recovery of increased insurance costs is similar to recovery of medical monitoring expenses. It arises from the same central event of increased risk of disease due to a toxic exposure.

Recovery of medical monitoring expenses, as future consequential damages of an increased risk of disease due to a toxin exposure, has been considered and allowed in a number of jurisdictions throughout the United States. Medical monitoring costs have been considered in Michigan in the case of **Meyerhoff v Turner Construction Co**, 210 Mich App 491, 495; 534 NW2d 204 (1995). While **Meyerhoff** has resulted in some confusion due to evidentiary issues involving judicial notice, it appears that medical monitoring expenses may be allowable as damages in Michigan in proper circumstances.¹

An award of medical monitoring expenses does not compensate an exposed individual for the future development of disease. This would not be allowed since the development of disease is not reasonably certain to occur. Rather, medical monitoring expenses are future damages arising from the increased risk of disease due to exposure. The increased risk is

not a future event. It is physical damage occurring at the sub-cellular level at the time of exposure. Medical monitoring expenses serve as only one possible form of future consequential damages arising from the central event of an increased risk of disease. Increased insurance premiums are another form of future consequential damages arising from the increased risk of disease due to toxin exposure.

Premiums for health, life, and disability insurance are based upon the risk of disease in certain population groups. For example, cigarette smokers have an increased risk of disease due to their exposure to the toxins in cigarette smoke. Consequently, cigarette smokers are charged higher premiums for health, life and disability insurance than are non-smokers. Although in the case of cigarette smoking the increased risk of disease due to toxin exposure may arguably be self-inflicted, it is a clear illustration of increased insurance premiums charged due to the increased risk of disease from a toxin exposure. Similarly, victims of toxic exposures may be entitled to money damages equal to the sum of the increased future premiums for health, life, and disability insurance.

In order to recover increased health, life and disability insurance premiums as consequential future damages arising from a toxic exposure, the plaintiff must present expert medical testimony that he has suffered an increased risk of disease due to the toxin exposure. The plaintiff must then present testimony from an insurance expert that his increased risk of disease due to a toxin exposure is reasonably certain to result in increased insurance premiums. The insurance expert must also testify as to the amount of the increased insurance premium, so that the amount of future damages may be quantified. The amount of damages would be the expected years of life remaining for the exposed individual, times the differential of the insurance premiums for the individual with and without the history of the toxic exposure. There is no need to reduce the amount to present value if there is competent expert testimony that the rates of interest on investments, and the rates of inflation for health, life, and disability insurance premiums, are likely to remain approximately equal.

The fact that an individual is not currently covered by health, life, or disability insurance should not preclude him from obtaining increased insurance premiums as future damages. The analogy here to medical monitoring costs is clear. An individual need not show that he is engaged in a medical monitoring program in order to obtain medical monitoring costs as future damages. Similarly, a toxic exposure victim with current insurance coverage need not show that his insurance premiums have been increased due to the exposure. The fact that his insurance premiums have not increased may merely be because his insurance carrier has not yet learned of his exposure, or has not yet appreciated the increased risk of disease due to exposure. All that is required is that expert testimony be presented to show

that it is reasonably certain that the insurance premiums will increase due to toxin exposure.

Whenever a new theory is proposed, consideration is given as to why the theory did not arise before. In the case of future damages for increased insurance premiums due to a toxic exposure, that are two factors that explain why this theory did not arise previously. The first factor is that this new theory is a derivative on increased risk of disease due to exposure, The birth of this theory, like its sister theory of medical monitoring expenses, had to await the development of scientific knowledge of increased risk of disease arising from sub-cellular molecular damage from toxic exposures,. The second factor is the knee jerk reluctance on the part of attorneys to refer to insurance during the course of litigation. This arises from the prohibition against the admission of evidence of liability insurance for the purpose of showing that another party acted negligently. MRE 411 states the following:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.

While evidence of increased premiums for health, life, and disability insurance is not prohibited by MRE 411, the involvement of insurance may have paralyzed other proponents of medical monitoring costs from recognizing this new theory. Increased insurance premiums are at their core, only another future consequential damage arising from an increased risk of disease due to toxic exposure.

It should be emphasized that it is not proposed that the tortfeasor bear the total cost of health, life, and disability insurance. What is proposed is that the tortfeasor pay only the increased premium costs resulting from the increased risk of disease due to the toxic exposure. However, it is conceivable that in some circumstances an argument may be made that the tort-feasor bear the entire cost of insurance if the insurance would not have been necessary without the occurrence of the toxic exposure.

As a defense against this theory, the defendant in a toxic tort action might rely on the availability of insurance through health maintenance organizations. It may be argued correctly that health maintenance organizations licensed by the State of Michigan must charge the same premiums for individuals without regard for their risk of disease. Therefore, a victim of a toxic exposure would not experience an increase in the premiums for health coverage through a health maintenance

organization. The defendant will then argue that even if the victim of a toxic exposure can show that he would experience an increase in the premiums of conventional health insurance, he does not have a valid claim since he may purchase a health maintenance organization policy at no increased cost. This final argument is incorrect. Concerns about limited access to necessary care with health maintenance organizations have reached the level of common knowledge. There is a perception, with a possible kernel of truth, that coverage by a health maintenance organization provides second-class health care. While this perception may be false in many cases, there is no reason to require a person to limit his choice of health coverage to an HMO merely because he has been the victim of toxic exposure.

It is clear that medical monitoring costs and increased insurance premiums are future damages that are both derived from the increased risk of disease due to a toxic exposure. However, it is reasonable to ask whether a toxic exposure victim may recover both medical monitoring expenses and increase insurance premium costs. Would this be barred as a double recovery? In the case of increased life and disability insurance, there is clearly no double recovery since these insurance products do not involve coverage for health care services. In the case of health care insurance, there may at first glance be a risk of double recovery since health care insurance and medical monitoring expenses involve recovery for health care services.

These concerns are relieved with a deeper analysis. Medical monitoring expenses only cover screening for the early detection of serious disease; the prompt treatment of which would improve the chances of survival. Medical monitoring expenses do not cover treatment of disease. An award of medical monitoring expenses leaves the victim of a toxic exposure with a terrible dilemma. He is provided funds for the early detection of disease so that he may benefit from increased survival derived through the prompt treatment of disease. But he is not provided with resources for the treatment necessary to improve his survival. The victim of a toxic exposure is provided no net benefit from medical monitoring since without treatment he has no increased chance of survival from early detection.

The solution of this dilemma cannot be the provision of funds for treatment since it is not certain that disease will occur. Rather, the solution is to provide funds to cover any increase in health insurance premiums resulting from the increased risk of disease due to a toxic exposure. With this relief, health insurance will be available to provide treatment of any disease that the medical monitoring is designed to detect. Therefore, it is obvious that payment of both medical monitoring expenses and increased health insurance premiums is not a double recovery. They are each separate but necessary components of a plan geared to improve survival of persons with a toxic exposure.

The above discussion about the dual need for medical monitoring for early detection and treatment of curable toxin-caused disease and the availability of treatment to cure the disease brings focus upon another argument for allowance of increased health insurance premiums as future consequential damages. This argument centers upon the remedies provided to individuals in Michigan suffering a toxic exposure in the workplace. Under section 315(1) of the Worker's Disability Compensation Act of 1969, an employer shall furnish reasonable medical treatment to an injured worker, including "medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed."

Worker's compensation provides a worker suffering an increased risk of disease due to toxic exposure access to both medical monitoring and treatment. Victims of toxic exposures outside of the workplace would only have access to medical monitoring, but not treatment without allowance of recovery of increased premium costs for health insurance. There is no apparent reason why a worker suffering a toxic exposure should have better access to resources leading to improved survival than does an individual suffering an exposure outside of the work place.

In conclusion, increased insurance premiums are allowable future consequential damages in Michigan in the event of toxin exposure. These future consequential damages arise from the increased risk of disease due to a toxic exposure. The increased risk of disease due to toxic exposure is the common origin for both 1) future damages of medical monitoring expenses, and 4) increased insurance premium costs. Allowance of increased insurance premiums as future damages is necessary to achieve the medical monitoring goal of improved survival for toxic exposure victims. In addition to attempting to make toxic exposure victims whole, increased insurance premium costs combine with medical monitoring expenses serve the important public policy goal of deterring potential tortfeasors in toxic tort actions by making them bear the full cost of the damage arising from their activities.

Notes

¹In **Meyerhoff v Turner Construction Co**, 202 Mich App 499; 509 NW2d 847 (1993) it was held that in a proper fact scenario a plaintiff can collect the costs of medical monitoring as damages. The Michigan Supreme Court vacated that opinion and remanded the case to the court of appeals because it appeared that the trial judge had taken judicial notice of certain facts about the consequences of asbestos exposure that should have been established by evidence rather than by judicial notice. The court of appeals in turn remanded the case to the trial court for further factual development but reaffirmed the rule of law that "medical monitoring expenses are a compensable form of

damages where the proofs demonstrate that such surveillance to monitor the effect of exposure to toxic substances, such as asbestos, is reasonable and necessary." The court then enumerated factors to be considered in determining whether they are reasonable and necessary. 210 Mich App 491; 534 NW2d 204 (1995). An application for leave to appeal was at first denied, 514 Mich 922, 550 NW2d 535 (1996), but granted upon reconsideration, 454 Mich 872; 562 NW2d 781 (1997). On February 4, 1998 the Michigan Supreme Court vacated the granting of the leave to appeal because the factual record was not sufficiently developed to allow medical monitoring damages. It also said that "we vacate that portion of the court of appeals decision which holds that medical monitoring damages are a compensable item of damages." Then it remanded the case to the circuit court for further proceedings. The court of appeal's ruling that medical monitoring damages are collectible in Michigan was neither affirmed nor reversed. Rather it was simply vacated. It is likely that medical monitoring costs will be allowed as an element of damages if the factual record satisfies the factors enumerated in 210 Mich App 491. These requirements are: (1) the significance and extent of the exposure,

(2) the toxicity of the substance (3) the seriousness of the diseases for which the individuals are at risk, (4) the relative increase in the chance of onset of disease in those exposed and (5) the value of early diagnosis.

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HOW TO EVALUATE AND LIMIT THE RISKS INVOLVED IN PROTECTING BUYERS OF CONTAMINATED PROPERTY WITH CERCLA PROSPECTIVE PURCHASER AGREEMENTS

By: Christopher Dunsky*

I. Introduction

In recent years, the United States Environmental Protection Agency ("USEPA") has begun to shift the focus of the Superfund Program from identifying, listing, investigating and remediating National Priorities List ("NPL") sites, to encouraging the redevelopment and productive reuse of formerly contaminated property. While the number of NPL sites being remediated is declining, USEPA is expressing more and more interest in facilitating the redevelopment and reuse of formerly contaminated properties, including the approximately 6,500 sites at which USEPA has conducted remedial or removal actions.

A Prospective Purchaser Agreement ("PPA") is a means to encourage parties which are not currently liable for a particular Superfund Site to purchase or lease some or all of the Site property. In a PPA, USEPA covenants-not-to-sue a prospective purchaser for response costs related to a Site, in exchange for the purchaser's agreement to: 1) reimburse a portion of USEPA's costs, 2) perform certain cleanup activities, or 3) redevelop and

reuse the property in a way that will provide a public benefit, such as by providing new jobs. The number of Prospective Purchaser Agreements ("PPAs") negotiated by USEPA is increasing. USEPA has entered into approximately 100 PPAs since June, 1989, when it issued its first PPA Guidance.¹ USEPA's Acting Assistant Administrator for OSWER announced in January, 1998, that he hoped to complete 25 PPAs during fiscal year 1998.²

USEPA's first Guidance concerning PPAs, provided only modest protection to prospective purchasers and contained some terms which were unnecessarily onerous, including the payment of cash consideration to the Hazardous Substance Trust Fund. As a result, USEPA issued only about 14 PPAs under the 1989 policy. In 1995, USEPA issued a more liberal policy and a model PPA which contained terms which are somewhat more favorable to prospective purchasers.³ USEPA now encourages its Regions to negotiate PPAs to support USEPA's brownfield redevelopment effort. USEPA has issued approximately 86 PPAs since issuing its revised policy.

Anyone who is interested in purchasing or leasing property on which USEPA is conducting or has conducted a Superfund removal or remedial action should consider obtaining a PPA from USEPA, even if USEPA has completed the removal or remedial action.⁴ Practically speaking, a party who obtains a PPA from USEPA before acquiring a property should have little reason to be concerned about liability under CERCLA. However, even the “new, improved” 1995 Model PPA leaves a prospective purchaser open to some potentially substantial risks. The purpose of this paper is to identify some of these risks and suggest how they might be addressed.

II. History of U.S. EPA Guidances on Prospective Purchaser Agreements

A. 1989 Guidance

USEPA issued its first written guidance on Prospective Purchaser Agreements in June, 1989.⁵ The 1989 Guidance stated that it was generally USEPA’s policy not to become involved in “purely private commercial transactions.” However, it also acknowledged that in some cases it might be appropriate to enter into an agreement with a prospective purchaser resolving its liability under CERCLA, but only if the following criteria, among others, were satisfied:

USEPA must either have taken, or anticipate taking, an enforcement action relating to the property.

USEPA must obtain a substantial benefit, including either the payment of cash or the performance of cleanup work, which it would not otherwise receive.

The prospective owner’s operations at the property must not contribute to contamination or interfere with USEPA’s performance of the remedy.

The operations of the new owner must not present potential health risks.

A prospective purchaser must be financially viable.

USEPA did not publish a model agreement to accompany the 1989 Guidance. However, the Guidance stated that any PPA should include the following elements:

Consideration, usually in the form of a cash payment;

Waiver of any claims against the United States;

An irrevocable right of entry to USEPA to perform response actions;

A reservation of rights by the United States under which the purchaser is responsible for any release of hazardous substances resulting from the operation of its facility, the exacerbation of any pre-existing contamination, failure to cooperate with USEPA or its response action contractors, or failure to exercise due care with respect to any contamination at the facility.

The 1989 Guidance did not discuss a number of issues of great practical importance to prospective purchasers, including contribution protection and the right to transfer the PPA to a subsequent purchaser.

The 1989 Guidance did little to encourage either prospective purchasers or USEPA Regional Offices to enter into PPAs. USEPA negotiated only about 14 PPAs between June, 1989 and May, 1995, with the majority of these being concluded in 1994 and 1995.⁶

B. 1995 Guidance

In response to increasing criticism that the liability provisions of CERCLA and the rigidity of the Superfund Program were preventing the redeveloping of contaminated properties, USEPA issued a revised, more liberal, Guidance in May, 1995.⁷ The 1995 Guidance encourages USEPA Regions to negotiate PPAs under a broader set of circumstances than the 1989 Guidance justified. It also includes a Model PPA, which is intended to facilitate the quick negotiation and approval of PPAs. The 1995 Guidance encourages USEPA Regions to negotiate PPAs where the following criteria are satisfied:

A USEPA action at the property either has been taken, is on-going, or is anticipated. Unlike the 1989 Guidance, the 1995 Guidance includes sites where an NPL listing has been proposed, and sites where an action is only “anticipated” instead of “expected.” However, sites which have been removed from CERCLIS because no further response action is planned (“NFRAP”) are generally not eligible for a PPA.⁸

USEPA should receive a substantial benefit in cash or the performance of cleanup by the purchaser, or the public should benefit in terms of increased employment, etc. One of the most significant changes in the 1995 Guidance is its reduced emphasis on the need for USEPA to receive a substantial cash payment from the prospective purchaser. In support of USEPA’s increased interest in brownfield development, the 1995 Guidance allows USEPA Regions to negotiate PPAs which require little or no direct payment to USEPA, as long as the development at the property will benefit the public by

providing a substantial number of new jobs and investment.

The new operation of the property must not aggravate or contribute to existing contamination or interfere with USEPA's response action. This requirement is essentially the same as contained in the 1989 Guidance.

The new development at the property will not present health risks to the community or others present on the property. This requirement is substantially the same as set forth in the 1989 Guidance.

The prospective purchaser must be financially viable. The 1995 Guidance liberalizes this requirement by allowing more flexible arrangements for the purchaser to satisfy its obligations. USEPA has entered into several PPAs with non-profit institutions, which presumably have limited financial resources.

III. Potential Risks Associated with CERCLA Prospective Purchaser Agreements

A. Risk of Liability under Federal Statutes Other than CERCLA

In Paragraph 17 of the 1995 Model PPA, the United States covenants not to sue the purchaser under Sections 106 or Section 107(a) of CERCLA, 42 USC 9606 or 9607(a). Yet, a party who acquires contaminated property may, depending on the facts, incur strict liability under other federal statutes, such as the Clean Water Act ("CWA") 33 USC 1251 et seq., the Resource Conservation and Recovery Act ("RCRA") 42 USC 6901 et seq., the Toxic Substances Control Act ("TSCA") 15 USC 2601 et seq., the Clean Air Act ("CAA") 42 USC 7401 et seq., the Oil Pollution Act ("OPA") 33 USC 2701 et seq., and others. For example, hazardous substances may migrate from an NPL site through a point source into a lake or river, thus subjecting the new owner to liability for an unpermitted discharge under the Clean Water Act. Some courts have held that the migration of contaminated groundwater into a surface stream violates the Clean Water Act.⁹ A purchaser may unknowingly become the owner of a concealed underground storage tank, and thus become liable under RCRA. The existence of lagoons or other treatment units may render the purchaser liable for corrective action under RCRA, even though the PPA protects him from liability under CERCLA.

Numerous PPAs include covenants not to sue under RCRA 7003, as well as CERCLA 106 and 107. Recently, some USEPA Regions have issued PPAs which include covenants-not-to-sue under statutes other than CERCLA. In March 1998, USEPA Region V, the State of Illinois, and the natural resources trustee

announced a PPA for the American Western Refinery site which included covenants-not-to-sue under CERCLA, RCRA, CWA, OPA, and state law. 63 FR 14937 (Mar 27, 1998). Depending on the factual situation at the property, it may be prudent for a prospective purchaser to ask USEPA to include protection against liability under statutes other than CERCLA.

B. Risk of Liability Under State Law

Most states have legislation which, like CERCLA, imposes strict liability on current owners of property for releases of hazardous substances. A PPA executed by USEPA alone does not protect a prospective purchaser from liability under state law. The State of Michigan allows a purchaser to avoid or minimize its liability under state law by conducting a baseline environmental assessment before purchasing the property.¹⁰ However, many other states do not have such provisions, and those that do exist are not always sufficient to protect a prospective purchaser.

At many sites, USEPA conducts an emergency removal action and state agencies then assume responsibility for further investigation or long term remedial action. In some cases, states have conducted additional removal work at a site after completion of USEPA activities, because the state believes that more stringent cleanup standards are appropriate. A PPA signed by USEPA does not protect a purchaser from claims for injunctive relief or cost recovery by a state government based either on CERCLA or on state law. The contribution protection provision of the PPA protects the purchaser from claims for contribution by private parties, but not from claims for injunctive relief or cost recovery by states.

The 1995 Model PPA expressly provides for state governments, in appropriate cases, to execute a PPA along with USEPA, and to provide a covenant not to sue under state law. In recent years, State governments, including Michigan, have co-signed a substantial number of PPAs along with USEPA.

C. Risk of Liability for Natural Resource Damages

Many Superfund sites also involve releases which either have caused, or may cause, damage to natural resources. CERCLA authorizes natural resource trustees (which include federal and state agencies, and Indian Tribes) to sue responsible parties, including current site owners, for natural resource damages, even if the current owner acquired the property long after the hazardous substances were released. At sites where USEPA has conducted a surface removal action which removed all hazardous substances, and there is no apparent injury to natural resources, it may not be worth the time and effort to have the natural resource trustees involved in PPA negotiations. At large NPL sites which involved releases to an adjacent river

or lake, a prudent purchaser should ask USEPA to identify and contact the natural resources trustees involved and have the trustees cosign the PPA. A significant number of recent PPAs contain releases by natural resource trustees.

D. Risk That the Purchaser Will Incur Liability for Portions of the Site Beyond the Boundaries of the Property Purchased

Many prospective purchasers are interested in acquiring only a portion of a large Superfund Site, or acquiring only a leasehold interest in a Site. Some United States Department of Justice ("DOJ") attorneys argue that the covenant-not-to-sue in a PPA should be restricted so that a purchaser who acquires only a portion of a large Site should be protected only from CERCLA claims which relate to the portion of the Site which it has purchased. This would apparently leave the purchaser liable for response costs which relate to other portions of the Site. No prudent purchaser should acquire property under such conditions. Some DOJ attorneys are concerned that a prospective purchaser may acquire additional property at a Site without paying additional consideration to USEPA. It should be possible to negotiate terms that would prevent that "problem" from occurring without leaving the purchaser liable for response costs relating to non-purchased portions of a Site.

E. Risk That Parent Corporations, Subsidiaries, or Officers and Directors May Be Held Liable

The Covenant Not to Sue in Paragraph 17 of the 1995 Model PPA applies only to the entity or entities which signed the PPA, which is usually the entity which will purchase or lease the property. Parent corporations, subsidiary corporations, and officers or directors often do not sign PPAs, and, therefore, the United States does not covenant not to sue them. Depending on the facts, there may be a substantial risk that one of these entities might incur CERCLA liability, either because it controls operations at the property, or on a derivative basis because a corporate veil can be pierced. **United States v Bestfoods**, 118 S Ct 1876 (1998).

If this is a significant concern, a prospective purchaser should consider having its related corporate entities, and possibly its officers and directors, sign the PPA, recognizing that each signatory is responsible to carry out the purchaser's obligations. As an alternative, USEPA has sometimes expanded the scope of parties covered by the covenant not to sue to include the purchaser's "officers, directors, and employees in their capacities as such officers, directors, and employees . . ." **In the matter of Allied Paper/Kalamazoo River/Portage Creek Site**: Prospective Purchaser Agreement with Building Materials Corporation of America, et al. (63 FR 7168, Feb 12, 1998).

F. Risk of Inability to Transfer the PPA to a Subsequent Purchaser

Today's purchaser often becomes tomorrow's seller. Paragraph 24 of the 1995 Model PPA allows the rights, benefits, and obligations of a PPA to be transferred to a subsequent purchaser only if USEPA "in its sole discretion" consents to the transfer. Paragraph 27 provides that USEPA may consent to a transfer of the protection provided by the PPA to a new purchaser, while still requiring that the old purchaser remain liable to carry out any unfulfilled obligations (such as long term O & M). Thus, there is a risk that once a party acquires a property, it may encounter difficulties in reselling it if USEPA does not consent to a transfer of the PPA to a subsequent purchaser. There is also a risk that a purchaser may find itself "stuck" with the responsibility to continue long term O&M or other "due care" requirements long after its use of the property has ceased. Prospective lessees should be particularly concerned with this issue. Some PPAs have contained more favorable conditions concerning transfer to subsequent purchasers. **In the matter of D.C. Franche Site**: Prospective Purchaser Agreement with Wabansia Corp, 61 FR 15802 (Apr 9, 1996).

G. Risk That Remediation Activities May Interfere With Business Activities

Paragraphs 18 through 21 of the 1995 Model PPA require that the purchaser provide USEPA an irrevocable right of access to the property to implement and oversee response actions, and to cooperate with USEPA in implementing response actions. USEPA agrees "consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference" with the purchaser's use of the property. Paragraph 21 of the 1995 Model PPA.

H. Risk of Incurring Obligation to Perform Extensive "Due Care" Activities.

Although a PPA protects a purchaser from liability for any "Existing Contamination," this protection may be undermined by the purchaser's obligation under Paragraph 21 of the Model PPA to "exercise due care at the Site with respect to the Existing Contamination." Paragraph 21 provides that if the purchaser becomes aware of a release of hazardous substances "that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment," then the purchaser "shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release . . ." (emphasis added.) Under this provision, a purchaser who acquires a property which contains a capped lagoon might be responsible to collect and treat leachate escaping from a failed liner, at least if the leachate "constitutes an emergency situation." USEPA's traditional definition of "emergency" is a very broad one. Anyone who purchases

property in Michigan must also comply with the new rules regarding “due care” promulgated by the Michigan Department of Environmental Quality. MCAR 299.51001 et seq., effective March 11, 1999. Thus, the “due care” obligation could become significant for any purchaser who acquires a Site upon which a containment remedy has been or will be implemented.

A purchaser should attempt to negotiate changes to Paragraph 21 of the Model PPA, or at least persuade USEPA to add a statement that other parties, such as the previous owner, or settling defendants under an RD/RA Consent Decree, if there is one, are primarily responsible to respond to any future release or threatened release.

I. Risk of Liens

Section 107(l) of CERCLA, 42 USC 9607(l), provides that all response costs and natural resource damages for which a person is liable to the United States under CERCLA constitute a lien in favor of the United States upon all real property which belongs to such person and is subject to or affected by the removal or the remedial action. This lien arises when USEPA first incurs response costs, or when the owner of the property is provided written notice of potential liability, whichever is later. The 107(l) lien is subject to the rights of purchasers, lenders, or judgment lien creditors who perfect their interests under state law before USEPA has filed notice of lien with the appropriate state office.

A prospective purchaser should ensure that USEPA has not filed notice of a 107(l) lien on property which it intends to acquire. If USEPA has filed notice of such a lien, the 1995 Guidance contains a provision which states that USEPA will “remove any lien it may have on the property” after the prospective purchaser satisfactorily completes any payment or cleanup obligations under the PPA. This commitment is “subject to the Reservation of Rights in Section IX of this Agreement.” The reference to the Reservation of Rights suggests that if the purchaser exacerbates existing contamination, USEPA may be entitled to file notice of a lien on the property for the entire cost of all response action, possibly including response action which was not required to respond to the exacerbation caused by the purchaser. This appears to be an unfair and excessive remedy.

Counsel for a prospective purchaser should also consider the possibility that the property may be subject to a lien for cleanup costs incurred by a state government under state law. Many states, including Michigan, provide for liens to be placed on property at which the state has incurred response costs, if the property is owned by a party who is liable under state law.¹¹ Because a PPA will not resolve liability under state law, someone who acquires property under a PPA runs the risk that the state may file a lien against the property, for state response costs incurred either before or after the new owner acquired it. In

addition, at least six states, including Michigan, have superlien provisions, which provide for liens which are superior to prior recorded liens and/or superior to the rights of purchasers.¹² Counsel for a prospective purchaser should insure that the client is protected against any lien statute.

IV. Conclusion

Property on which USEPA has conducted or plans to conduct a Superfund cleanup may be well-located and attractively priced. Unfortunately, the boilerplate terms of USEPA’s 1995 Model Prospective Purchaser Agreement do not go as far as they should in limiting the risk that a prospective purchaser may become liable under CERCLA, other federal statutes, or state law, for environmental contamination which the purchaser did not cause. Counsel for prospective purchasers should carefully consider the terms of USEPA’s Model PPA in light of the facts of the particular transaction, and help the purchaser to evaluate whether the proposed deal is still attractive, considering the environmental risks that remain, even with a prospective purchaser agreement. When representing a client in negotiating a PPA, an attorney should:

- 1) identify the risks that are of most practical importance to the client, considering the facts of the case;
- 2) negotiate changes to the Model PPA that will eliminate or minimize those risks; and
- 3) make sure that the client understands the remaining risks and is willing to accept them.

USEPA has shown flexibility in negotiating many PPAs, and has been willing to modify some of the terms of the 1995 Model PPA to accommodate a purchaser’s needs. However, it is unlikely that USEPA will make substantial revisions in more than a few of its standard terms. Counsel for a prospective purchaser should help the client negotiate changes that will eliminate or minimize the most significant risks for that particular transaction.

Notes

¹Guidance On Landowner Liability Under Section 107(a)(1) of CERCLA, de minimis Settlements Under Section 122(g)(1)(B) of CERCLA, and Settlements With Prospective Purchasers of Contaminated Property, OSWER Directive #9835-9 (June 6, 1989), published at 54 FR 34235 (Aug 18, 1989).

²Toxics Law Reporter, January 7, 1998, at 876.

³Guidance On Settlements With Prospective Purchasers Of Contaminated Property, May 24, 1995, published at 50 FR 34792 (July 3, 1995).

⁴At least some USEPA staff are of the opinion that a party who becomes an owner of a property after USEPA has completed a removal action may be liable under CERCLA for the costs of the removal action.

⁵See footnote 1, supra.

⁶Geltman, *Prospective Purchaser Agreements: Reducing the Liability Risks of Contaminated Property* (American Bar Association 1997) at 5.

⁷See footnote 3, supra.

⁸This would appear to be inconsistent with the belief of some USEPA attorneys that a party which acquires a property after USEPA has completed a removal action may be liable for the cost of the removal action.

⁹**Mutual Life Ins Co v Mobil Corp**, 1998 WL 160820 (ND NY, Mar 3, 1998). But see, **Umatilla Water Quality Protection Assoc v Smith Frozen Foods, Inc**, 962 F Supp 1312 (D Ore, 1997).

¹⁰MCLA, 324.20129a.

¹¹See, e.g., MCLA 324.20138(1).

¹²Conn Gen Stat Ann 22A-452a; Maine Rev Stat Ann Titled 38 1371; Mass Gen Laws Ann ch. 21 E, 13; MCLA 324.20138(2); NH Rev Stat Ann 147-B; 10-b; NJ Stat Ann 58: 10-23.11f(f).

Bibliography

Geltman, *Prospective Purchaser Agreements: Reducing the Liability Risks of Contaminated Property* (American Bar Association 1997); Shanker and Hourcle', *Prospective Purchaser Agreements*, XXV Environmental Law Reporter 10035 (Jan 1995); Kamlet, *Protections For Prospective Purchasers Of Contaminated Properties*, Real Estate/Environmental Liability News, Jan 26, 1996, at 4. Note, *USEPA Continues Administrative Reform Of Superfund With New Guidance On Prospective Purchaser Agreements*, 2 Environmental Lawyer 445 (Feb 1996).

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ENVIRONMENTAL LITIGATION COMMITTEE

By: Steve Huff, Chair
and
Jeffrey A. Magid, Co-chair

FEDERAL CASE DEVELOPMENTS - CLASS ACTION LITIGATION

I. Federal Court Denies Certification of Class Based on Geographic Boundaries of the Alleged Contamination Area:

O'Connor v Boeing North American, Inc, 180 FRD 359 (CD Ca, 1997)

Past and present residents who lived near nuclear testing facilities in California brought a class action against the owners and operators of the facilities. The plaintiffs alleged violations of CERCLA, public liability under the Price-Anderson Act, negligence, strict liability, trespass and nuisance. In denying the Motion for Class Certification, the United States District Court for the Central District of California held that a definition of the Class which was based on the geographic boundaries of the alleged Contamination Area was not definite enough to

warrant class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

Class Organization: Plaintiffs brought the action on their own behalf and as representatives of the Class or Subclass they sought to certify. The organization of the class action consisted of a broad group of persons who allegedly were exposed to releases of hazardous, radioactive, toxic, and carcinogenic substances within a ten-mile radius of the plant (the Class). A subset of the Class included property owners within the Contamination Area (the Subclass).

The Class was defined as:

All persons or entities who presently reside or work, or have at any time since 1946 resided or worked, in the geographic area bounded by the Santa Susana Mountains on the north, the 101 Freeway on the south, the 23 Freeway on the west and the 405 Freeway on the east.

The Subclass was defined as:

All persons and entities within the Class who are owners of real property located in the Contamination Area and whose property has been affected in some manner by the release of hazardous substances into the environment from the Rocketdyne facilities.

Held: The court held that the plaintiffs' definition of the Class based on the geographic boundaries of the Contamination Area was not definite enough to satisfy the numerosity requirement of Rule 23(a)(1). Although the court acknowledged that other federal courts have held that a definable class may be established by geographic boundaries, it elected to follow a line of federal cases which held that in addition to the geographic boundaries, a plaintiff's class definition must have some relation to the defendant's activities. See e.g., **Diago Lee v Shell Oil Co**, 133 FRD 600, 602-03 (D Colo, 1990).

In order to determine whether the plaintiffs had adequately defined their Class based on the Contamination Area, the court examined evidence and listened to expert testimony with respect to the alleged release of radioactive and hazardous materials from the defendants' sites, as well as the extent of the contamination and concentration levels at various locations within a ten-mile radius. Because the levels of radioactivity in the test area were found to be very low and well within regulatory limits, (making it unlikely that the plaintiffs would succeed in proving the claim throughout the entire ten-mile radius), the court rejected the Motion to Certify the Class.

However, the court did point out that in a future Complaint it may be possible for the plaintiffs to sufficiently define a class exposed to the hazardous substances that the plaintiffs allege were released from the Rocketdyne facilities.

Holdings on Other Issues: Because the court was cognizant of the fact that plaintiffs may seek to certify the Class in the future based on a more definite class description, the court rendered decisions on whether the Class and Subclass met the other prerequisites required under Rule 23(a) of the FRCP, as well as whether the Class and Subclass met any one of the prerequisites under Rule 23(b) of the FRCP.

A party seeking class certification must first establish that all of the following prerequisites of Rule 23(a) are satisfied:

1. The Class is so numerous that joinder of all members is impractical; (Numerosity)
2. There are questions of law or fact in common to the Class; (Commonality)

3. The claims or defenses of the representative parties are typical of the claims or defenses of the Class (Typicality); and

4. The representative parties will fairly and adequately protect the interests of the Class. (Adequacy of Representation)

Further, the proponent must also demonstrate that any one of the following elements is met in accordance with Rule 23(b):

1. There is a risk that prosecution of separate actions would create a risk of incompatible standards of conduct for the party opposing certification or create a risk of prejudice to individual class members not parties to the action;

2. Injunctive or declaratory relief would benefit the Class as a whole; or

3. Common questions of law or fact predominate over questions affecting individual members and the class action is a superior method of fair and efficient adjudication of the case.

Numerosity: Because the plaintiffs did not produce sufficient evidence to demonstrate that releases of hazardous materials traveled throughout the entire Contamination Area, the numerosity requirement was not met by either the Class or the Subclass.

Commonality: Although damages may vary for each individual class member, the analysis under commonality focuses on whether liability for the "course of conduct" of the defendants is common to all defendants. It is not dispositive under this analysis that some plaintiffs will be entitled to less damages than others. In **O'Connor**, the Court found that the potential for an increased risk of health problems did not vary from class member to class member. Therefore, the key issues of fact and law regarding the defendants' conduct were common to the entire Class and Subclass. For this reason, the court held that the plaintiffs had satisfied the commonality requirement as it applied to both the Class and Subclass.

Typicality (The Class): Under Rule 23(a)(3), a court may only certify a class where "the claims or defenses of the representative parties are typical of the claims or defenses of the Class." **O'Connor**, 180 FRD at 372. While the class representatives' claims need not be identical to those of absent class members, the class representatives must, "possess the same interest and suffer the same injury as the class members." *Id.* (citing **General Tel Co v Falcon**, 457 US 156 (1982)). See also **CRLA v Legal Services Co**, 917 F2d 1171 (CA 9, 1990).

In order to determine whether the interests between the representatives and the remaining class members were similar, the court examined the circumstances of the representative plaintiffs. Of the eight representatives, half had been diagnosed with cancer. The other half of the representatives were without cancer themselves, but had a child or spouse with cancer. However, the majority of the remaining class did not have cancer. They were seeking relief in the form of a medical monitoring program for the early detection of disease potentially related to their exposure in the Contamination Area. The court held that, although claims of the entire class arose from the same conduct of the defendants, the harm that the class members had suffered was different: the representative plaintiffs suffered from cancer; the remaining class members only suffered from an increased risk of disease. Therefore, the court held that representative plaintiffs' claims were not typical of the Class they sought to represent and that the Class had failed to satisfy the typicality requirement of Rule 23(a)(3).

Typicality (The Subclass): Conversely, the court held that the Subclass did meet the typicality requirement because the representative plaintiffs would be seeking similar remedies as the rest of the class members, varying only in amount. For example, the court held that despite the fact that there are many different types of property within the Contamination Area (residential, commercial, and industrial), all owners of property within the Subclass would seek similar remedies for their claims: "mainly money damages for any injury caused to the property from defendants' alleged releases of harmful substances." **O'Connor**, 180 FRD at 374.

Adequacy of Representation (the Class): The court held that representation is "adequate" where counsel for the Class is qualified and competent, the representatives' interests are not antagonistic to the interests of absent class members and it is unlikely that the action is collusive. With respect to the Class, the court held that representation was not adequate because the plaintiffs cannot adequately represent the entire Class due to the disparity of conditions of the class members (some with cancer, some without). In this sense the adequacy analysis follows the typicality argument.

Adequacy of Representation (the Subclass): The court held that the representative plaintiffs would adequately represent the Subclass because any differences in situation between the representative plaintiffs and the absent members of the Subclass do not involve the subject matter of the litigation, but rather, differ only in the amount of damages sought by each individual member of the Subclass.

Rule 23(b) Requirements: The court held that neither the Class nor the Subclass satisfied any of the requirements of Rule 23(b). It gave a brief explanation as to why the class failed under each of the rule's three sections:

1. 23(b)(1): The court held that certification under this section was inappropriate because the plaintiffs failed to establish:

(A) that separate actions in their case would create a risk of "inconsistent adjudications . . . which would establish incompatible standards of conduct" for defendants; or

(B) that adjudications with respect to individuals would impair the rights of non-parties.

2. 23(b)(2): The court held that certification under this section was inappropriate because the predominant relief sought by the Class was monetary damages — not injunctive relief. The court reasoned that because:

A) the plaintiffs' request for relief for medical monitoring was in the form of money; and

B) the plaintiffs' other claims were for monetary relief, then it was clear that the plaintiffs' requests for relief were predominantly monetary — not injunctive.

3. 23(b)(3): Finally, the court held that neither the Class nor the Subclass could be certified under 23(b)(3) because the plaintiffs had failed to establish that common questions existed among the class members which predominated over questions that affected individual class members. The court held that although questions surrounding the defendants' activities at the Rocketdyne facilities were common to the Class, individual issues surrounding a plaintiffs' ability to establish entitlement to medical monitoring outweighed those common questions.

The court reasoned that the alleged release of hazardous substances as a cause of an individual's illness could not be established on a class wide basis; each claimant would have varying risk factors not associated with the defendants' conduct.

The court added that while a jury could find that the defendants had generally caused an increased risk of diseases for the Class, the jury would still be required to determine for each individual plaintiff whether this increased risk actually caused the Class member's illness. For this reason, the court concluded that the Class the plaintiffs had sought to certify lacked the cohesiveness necessary to meet the predominance criteria under Rule 23(b)(3).

II. Federal Court Finds Medical Monitoring Claim is A Claim for Money Damages, Not Injunctive Relief:

Cook v Rockwell Int'l Corp, 181 FRD 473 (D Colo, 1998)

Property owners and residents filed a class action complaint against operators of a nuclear weapons production facility

northwest of Denver, Colorado (Rocky Flats). The plaintiffs alleged that the government contractors which operated the facility released hazardous substances into the area which damaged their property and possibly their health. The court certified two classes: a class of residents certified for medical monitoring, and a class of property owners certified for purposes of property-related claims. The defendant filed a motion requesting that the United States District Court reverse itself and de-certify both classes.

Held: The district court upheld the certification of the property owner class. But the court also reversed itself and de-certified the class for medical monitoring claims. It relied on recent decisions by the Tenth Circuit and other federal courts which have held that medical monitoring lawsuits are essentially a claim for damages and not for injunctive relief.

When the court originally granted certification to the class requesting medical monitoring, it found that the type of relief the plaintiffs sought was injunctive relief: a medical monitoring program managed by a court-appointed and court-supervised trustee; where the plaintiffs were monitored by particular physicians (named by the plaintiffs), and the medical data made public as well as utilized in group studies.

In reversing itself, the district court relied exclusively on **Building & Construction Dep't v Rockwell Int'l Corp**, 7 F3d 1492 (CA 10, 1993) (**B&C**). In **B&C**, the Tenth Circuit Court of Appeals found that a request for a medical monitoring program was essentially a request for money damages — not injunctive relief. The district court also noted that the **B&C** case was filed by the same attorneys who filed the present case, and that the proposed “supervised” medical monitoring program which requires the establishment of a managed fund, was identical in both cases.

Further, the district court found that the tenth circuit had reiterated that the test for certification under Rule 23(b)(2) was not the relief sought by plaintiffs; rather the test was whether the crux of the action was for money damages. Citing **Boughton v Cotter Corp**, 65 F3d 823 (CA 10, 1995). While recognizing that certification of a medical monitoring class under Rule 23(b)(2) was legally permissible, the court in **Boughton** found that a district court had not abused its discretion in refusing to certify such a class when the relief sought was primarily monetary damages; a trial court is given wide discretion in deciding whether to certify a class.

Other Jurisdictions

The holding in **B&C**, that a request for medical monitoring is a request for money damages, has been followed by the third, seventh, ninth and tenth circuits. The sixth circuit has not decided the issue.

The holding in **Boughton**, that the test for certification of a class is whether the crux of the action is for money damages, has been followed by the first, third, fourth, fifth, seventh and eleventh circuits. The sixth circuit, which has not rendered a decision adverse to **Boughton**, also allows the trial court wide discretion in certifying or not certifying class actions. Although there are no recent decisions de-certifying classes or denying certification of a class on similar grounds in Michigan or in the sixth circuit, this is a potential argument for defendants.

III. Tobacco Litigation Update

According to the terms of the biggest civil settlement in U.S. history, Big Tobacco will pay \$206 billion to settle the remaining state claims over the costs of treating sick smokers under the terms of an agreement reached with negotiators for eight states. (The eight states involved in the negotiations were Washington, California, New York, North Carolina, Colorado, Oklahoma, North Dakota and Pennsylvania). The settlement, which apparently salvages parts of the broader tobacco agreement that died in Congress earlier this year, also places new limits on how tobacco makers market their products.

The states were given six days to accept the settlement. The cigarette makers had indicated that they needed a sufficient number of the 46 states that would receive money under the settlement to sign if they were to proceed with the settlement. In the end, the 46 remaining states (four states had already reached independent deals with the tobacco industry worth around \$40 billion) unanimously approved the agreement. They will receive the \$206 billion over 25 years beginning in 2000.

Michigan and a handful of other states demanded tough public health provisions as part of the settlement, including disclosure of all research on the effects of smoking by the tobacco companies. Under the terms of the agreement, tobacco companies will ban all tobacco advertising that targets youths. Also, there will be a permanent ban on billboard advertising, the use of cartoons in advertising, and merchandise featuring tobacco brand names. Moreover, tobacco companies now must provide public access to their documents and court files. The settlement does not shield tobacco companies from punitive damages or class-action liability lawsuits.

Under the settlement, Michigan will receive \$8.5 billion. Michigan will receive \$104 million in the spring of 2000 and annual payments through 2025. Former Michigan Attorney General, Frank Kelley, had sued the tobacco companies in August 1996 for \$14 billion. Most (about \$10 billion) was in punitive damages with the remainder for past and future health-related costs. (If Michigan or any other state had chosen not to join in the settlement, it could have continued its lawsuit independently.)

The next dispute in the context of tobacco litigation will be between the states and the federal government. The federal government contends that it has a right to some of the money. Many of the original state lawsuits were filed for the purpose of reclaiming state Medicaid spending for sick smokers. The federal government argues that because it pays for at least half of Medicaid in each state, the law requires that it receive at least half of any settlement. In 1997 the Clinton administration informed the states which had settled tobacco suits that the Health and Human Services Department would start deducting its share of the settlement from future Medicaid payments to the states. However, the states argued that many of their suits were unrelated to Medicaid, therefore the federal government had no right to the money. Nevertheless, the federal government could begin docking Medicaid payments anyway. The states would then have to sue the federal government to get the money back. In addition, President Clinton recently announced that the Justice Department was preparing to sue cigarette makers for recovery of federal money spent on smoking-related illnesses through Medicare and other programs.

In related news, the U.S. Supreme Court declined an opportunity to revisit its seminal **Cipollone v Liggett Group Inc**, 505 US 504 (1992) decision in which it found that most state tort claims for smoking harm are barred by the Federal Cigarette Labeling and Advertising Act (FCLA). It denied three certiorari petitions by or on behalf of smokers, letting stand March 2, 1998 rulings by the Fifth Circuit that FCLA preempts the Texas suits in which it is alleged that tobacco manufacturers fraudulently concealed their knowledge of smoking dangers. **Whirley v Brown & Williamson Tobacco Corp**, ___ US ___; 119 S Ct 162; 142 L Ed 2d 132 (1998); **Hulsey v Brown & Williamson Tobacco Corp**, ___ US ___; 119 S Ct 162; 142 L Ed 2d 132 (1998); **Oglesby v Brown & Williamson Tobacco Corp**, ___ US ___; 119 S Ct 162; 142 L Ed 2d 132 (1998).

IV. Breast Implant Litigation Update

In re Dow Corning Corp, No. 95-20512 (Bankr ED Mich, order issued July 8, 1998).

On September 10, 1998 Dow Corning Corp. announced a \$39.5 million settlement with 4,300 women in Australia and New Zealand to resolve their silicone gel breast implant claims against it. A week earlier, Dow announced a \$25 million settlement of 4,100 claims by Canadian women. These settlements are part of the \$3.2 billion settlement to which Dow Corning agreed in July 1998 as part of their plan to emerge from bankruptcy. The federal bankruptcy judge (Hon. Arthur Spector in Bay City) subsequently accepted the plan.

The settlement is intended to, among other things, resolve 177,000 claims worldwide by breast implant recipients. Under

the plan, Dow will:

- 1) pay from \$12,000 to \$300,000 to claimants with disease claims. Women have nearly 15 years to file a disease related claim.
- 2) pay up to \$25,000 to women who claim that their implants have ruptured.
- 3) pay \$5000 to women who have an implant removal.
- 4) pay \$2000 with no questions asked to settle any silicone related claim filed by a woman against Dow Corning.
- 5) allow for "gel claims" by women whose implants were not made by Dow Corning but were filled with its silicone gel.

Of course women may reject the offer and file lawsuits on their own. The plan provides a pool of up to \$400 million for individual claims. The end result is that within a year, women with breast implants may begin receiving money from Dow. (The company's first payment into the plan will be approximately \$1 billion.) Alternatively, individual claims will be allowed to move forward.

In related news, in December 1998, the National Science Panel published its report on the safety of silicone gel breast implants. After reviewing 2,000 studies, a panel of neutral scientists appointed by U.S. District Court Judge Samuel C. Pointer Jr. in Alabama concluded that there was no credible evidence that silicone gel breast implants cause disease. Judge Pointer is overseeing consolidated lawsuits against Bristol-Myers Squibb, 3M Corp. and Baxter International.

Worthy v Collagen Corp, ___ US ___; 118 S Ct 2372; 141 L Ed 2d 740 (1998)

Elsewhere, the U.S. Supreme Court declined to review a Texas Supreme Court ruling that the federal medical device law preempts a woman's claims against a manufacturer of an injectable skin treatment that underwent the Food and Drug Administration's premarket approval process. The Texas Supreme Court had stated that the premarket approval process was specific enough to trigger preemption under **Medtronic, Inc v Lohr**, 518 US 470; 16 S Ct 2240; 135 L Ed 2d 700 (1996).

Artiglio v Corning Inc, 957 P2d 1313; 76 Cal Rptr 2d 476 (Cal, 1998)

In early July, the California Supreme Court ruled that Dow Chemical Co. was not liable to women who received Dow

Corning implants. It found that the company's research on silicone toxicity did not create any duty by it to such plaintiffs. Plaintiffs had attempted to impose liability on Dow Chemical under Section 324A of the Restatement (Second) of Torts for negligently undertaking "silicon toxicology research contributing to Dow Corning's development of silicones for medical applications." *Id.*, at 1319. The opinion explained that:

When [Dow Chemical's] research was done [in the late 1940's and 1950's], any possible consequence for plaintiffs ... was exceedingly attenuated and remote. We conclude that, at the times Dow Chemical allegedly conducted or reported for Dow Corning the toxicology research services on which plaintiffs premise their section 324A claim, it cannot reasonable be concluded that Dow Chemical 'should [have]

recognize[d]' those services were 'necessary for the protection of' (324A) plaintiffs. Accordingly, under the theory articulated in section 324A, no duty of care running to plaintiffs arose from Dow Chemical's undertaking. *Id.*, at 1320.

SUGGESTED READING:

Burke, **The Use of Experts In Environmental Litigation: A Practitioner's Guide**, from *Analysis & Perspective*, 13 *Toxics Law Reporter*, No 17, pp. 563-568.

Hoffman, **Daubert's Application To Testimony From Non-Scientific Expert**, from *Analysis & Perspective*, 13 *Toxics Law Reporter*, No 15, pp. 492-502.

CASENOTES

These casenotes were written by members of the Environmental Law Society at the University of Michigan Law School.

Reports Covered:

Federal Cases:

118 S Ct 463 through 118 S Ct 2398
129 F3d 137 through 145 F3d 1347
974 F Supp 1 through 3 F Supp 2d 1265
[Sixth Circuit cases only]

State Cases:

456 Mich 304 through 458 Mich 287
225 Mich App 497 through — Mich App — (Feb 2, 1999)

I. Federal Appellate Cases

United States v Bestfoods, 118 S Ct 1876 (1998)

Plaintiff sued the parent corporation of a chemical manufacturing company for costs of industrial waste cleanup under CERCLA. The district court held that the corporate veil had been pierced and that the parent company was subject to derivative liability for its subsidiary's conduct under CERCLA. The court of appeals reversed in part. Justice Souter wrote for the majority of the Supreme Court and held that when the corporate veil may be pierced, a parent corporation can be held liable under CERCLA for derivative liability for its subsidiary's

conduct. The court further held that a participation-and-control test regarding the parent's supervision of the subsidiary cannot be used to identify direct liability under CERCLA. Finally, the direct parental liability under CERCLA's operator provision is not limited to the parent's sole or joint venture operation with its subsidiary. The Court of Appeals ruling was vacated and the case was remanded with instructions.

Troy Corp v Browner, 129 F3d 1290 (CA DC, 1997)

The court of appeals denied the chemical company's petition for rehearing of a decision upholding summary judgment in favor of the U.S. Environmental Protection Agency (EPA). The court of appeals determined that the district court properly affirmed EPA's decision to list 3-IODO-2-PROPYNYL BUTYLCARBAMATE (IPBC) on the Toxic Release Inventory under the Emergency Planning and Community Right to Know Act, on finding that the record was adequate to support EPA's decision to list IPBC and that EPA's decision was not inconsistent with its decision not to list phosphoric acid.

Donahey v Bogle, 129 F3d 838 (CA 6, 1997)

Plaintiff industrial property purchaser sued defendant vendor, corporate lessor and lessee's sole shareholder under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA). The court of appeals held that a stockholder of a corporation is not liable as an operator as defined by Section 107(a)(2) of CERCLA unless circumstances justify piercing the corporate veil.

Sierra Club v EPA, 129 F3d 137 (CA DC, 1997)

The Sierra Club challenged an EPA regulation providing for a twelve-month grace period during which transportation activities in designated non-attainment areas would be exempt from the transportation conformity requirements. The court of appeals held that the challenged grace period was contrary to the plain meaning of the Clean Air Act, which requires the EPA to establish the earliest practicable attainment date for each non-attainment area.

OZ Technology Inc v EPA, 129 F3d 631 (CA DC, 1997)

Petitioner, producer of substitute refrigeration chemicals, petitioned for review of the EPA's decision to put a chemical developed by the producer (HC-12a) on the list of unacceptable substitutes for ozone-depleting compounds. The court of appeals denied review of the petition on the grounds that the EPA's actions were not arbitrary or capricious.

Alaska Center for the Environment v Federal Highway Admin, 131 F3d 1285 (CA 9, 1997)

The Alaska Center for the Environment (ACE) and several other environmental organizations challenged the Federal Highway Administration's (FHWA) decision to approve and fund the construction of a twelve-mile road from Portage to Whittier on previously undeveloped land. ACE appealed the district court's decision granting summary judgment for the FHWA. ACE argued that FHWA violated Section 4(f) of the Department of Transportation Act because there were feasible and prudent alternatives to constructing the road. In addition, ACE argued that the district court erred because the FHWA's decision violates Section 138 of the National Environmental Policy Act because the Environmental Impact Statement failed to adequately discuss the safety concerns associated with the road and rail system alternatives. The court of appeals affirmed the motion for summary judgment, holding that the FHWA did not act arbitrarily, capriciously, or abuse its discretion by rejecting an alternative which would not satisfy the purpose of the project.

Montrose Chemical Corp v EPA, 132 F3d 90 (CA DC, 1998)

Petitioners filed for review of an alleged addition of the off-shore area of the Palos Verdes Shelf to the Montrose National Priority List site. The petitioners were dismissed for lack of jurisdiction. The court of appeals held that the alleged addition was a product of internal EPA memoranda, and such memoranda did not constitute a "regulation" reviewable under CERCLA. Proper amendment of a NPL site to include an additional area must be made only after notice-and-comment rulemaking pursuant to CERCLA requirements.

National Audubon Society v Hoffman, 132 F3d 7 (CA 2, 1997)

Defendants, employees of the United States Forest Service, appealed a district court order of summary judgment finding that defendants had violated procedural requirements of NEPA through their decision to extend logging roads into the Green Mountain National Forest of Vermont. Defendants also appealed a related order that they prepare a site-specific EIS. Plaintiffs cross-appealed a summary judgment decision that the defendants had not violated the National Forest Management Act (NFMA). On appeal, the court of appeals held that the defendants had violated NEPA because (1) they failed to take a "hard look" at all relevant factors in their evaluation, and (2) their determination that preparation of an EIS was unnecessary was arbitrary and capricious. The court of appeals held that the defendants had not violated the NFMA since the proposed extension of roads satisfied goals of forest management required by the NFMA. The Forest Service was ordered to reevaluate the environmental significance of the project, but the order to prepare a site-specific EIS was reversed.

Met Life Corp v M/V Emily S, 132 F3d 818 (CA 5, 1997)

Defendants appealed an order permitting damages claims to be asserted independently of the limitation of liability proceedings. The court of appeals affirmed the order, holding that (1) the 1990 Oil Pollution Act repealed the 1851 Limitations Act with respect to claims for removal costs and damages arising from spills covered by the OPA, and (2) admiralty rules governing procedure in limitations actions did not apply to OPA actions. The OPA contains adequate claims procedures of its own, which are inconsistent with Rule F of the Limitation Act. Because the OPA is later in time, it constitutes an implied repeal of the overlapping provisions of the Limitations Act.

Montana v EPA, 137 F3d 1135 (CA 9, 1998)

Plaintiffs, state and municipal entities who owned fee interests in land located within an Indian reservation, sued defendants EPA and the Confederate Salish and Kootenai Tribes, attacking EPA's decision to grant treatment-as-state status to the tribes pursuant to the Clean Water Act. The court of appeals upheld the district court decision to grant summary judgment in favor of EPA and the Tribes on the grounds that the authority to establish water quality standards was an inherent tribal power. The court also denied a motion to intervene brought by irrigators who owned land within the boundaries of the reservation on the grounds that they did not hold a National Pollution Discharge Elimination System permit and as such would not be affected by the transfer of the right to establish water quality standards from the state to the Tribes.

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

The defendants appealed their conviction of felony violations of the Clean Water Act for knowingly discharging fill and excavated material into wetlands of the United States without a permit. The court of appeals reversed and remanded for a new trial, holding that (1) the definition of waters of the United States to include waters whose degradation “could affect” interstate commerce that appears in 33 CFR 328.3(a)(3)(1993) was unauthorized by the Clean Water Act and was, therefore, invalid; (2) the district court erred in failing to apply the statutory mens rea to each element of the offense. Specifically, the court of appeals held that the Clean Water Act required the government to prove the defendant’s knowledge of facts meeting each essential element of the substantive offense, but need not prove that the defendant knew his conduct was illegal.

New York v EPA, 133 F3d 987 (CA 7, 1998)

The plaintiffs petitioned the court to review the EPA final rule granting the four states that abut Lake Michigan (IL, IN, MI, WI) an exemption from the limits on nitrogen oxide emissions required by the Clean Air Act. The petition for review was denied. The court of appeals held that the petition for review was filed in the appropriate appeals court because the action by the EPA was “regionally applicable” and three out of the four states subject to the challenged exemption were in the Seventh Circuit. The EPA’s interpretation of the Act allowing it to exempt a state from nitrogen oxide emission restriction upon a state’s petition and the EPA’s determination that those standards would not improve the ozone situation in those states was plausible and entitled to deference. The EPA’s method for deciding which states were entitled to an exemption was a plausible reading of the statute and also entitled to deference.

Kasza v Browner, 133 F3d 1159 (CA 9, 1998)

Former workers at a classified Air Force base brought a citizen suit against the Air Force and the EPA, alleging violations of RCRA. The court of appeals held that the RCRA provision that allows the President to exempt a facility from RCRA regulations does not preempt the state secrets privilege. On this basis, the court of appeals affirmed the district court’s grant of summary judgment for the Air Force because the Air Force was entitled to assert the state secrets privilege. The court of appeals likewise held that the suit against EPA was moot. The court of appeals reversed and remanded the district court’s decision on attorney’s fees, telling the district court to reassess what the lawsuits sought to accomplish and what they actually obtained.

American Lung Ass’n v EPA, 134 F3d 388 (CA DC, 1998)

The American Lung Association and the Environmental Defense Fund brought suit under the Clean Air Act against the EPA, challenging the agency’s decision not to revise the national ambient air quality standards for sulfur dioxide. The court of appeals held that the EPA failed to adequately explain its conclusion that the physical effects suffered by some asthmatics as a result of exposure to short-term, high level sulfur dioxide bursts did not amount to a public health problem. According to the report, the EPA must describe the standard that was used to make a decision and supports its conclusions with a plausible explanation. The court concluded that the characterization of the sulfur dioxide bursts as “localized, infrequent and site-specific,” was not sufficient to meet this requirement.

National Assoc of Mfrs v US Dep’t of the Interior, 134 F3d 1095 (CA DC, 1998)

Plaintiff petitioned for review of a Department of the Interior rule setting forth “Type A” standard procedures for simplified assessments of natural resource damages (NRD) under CERCLA. The court of appeals held that (1) the use of predictive computer submodels to determine the cause and injury in NRD without on-site empirical damage under Type A procedures was consistent with CERCLA; (2) the computer models adequately considered replacement values and were not required to consider acquisition values; (3) inclusion of calculations for lost “assimilative capacity” within the submodels did not violate CERCLA; (4) inclusion of “economic rent” losses was reasonable; and (5) Type A and Type B procedures could reasonably be used in conjunction with one another. The court also ruled that while challenge to the rule was timely, plaintiffs lacked standing to challenge the modeling subroutines for the discharge of oil and petroleum discharges.

Appalachian Power Co v EPA, 135 F3d 791 (CA DC, 1998)

Appalachian Power Company and Arizona Public Service Company brought suit under Title IV of the Clean Air Act, alleging that the EPA’s actions regarding nitrogen oxide emission standards for coal-fired electric utility boilers exceeded its statutory authority and were arbitrary and capricious. At issue was the inclusion in Title IV of the requirement that the EPA must determine that “more effective low nitrogen oxide burner technology is available” before revising the emission limits. Appalachian Power argued that this phrase meant that there must be a change in burner design for EPA to revise emission standards. The EPA based its revisions on the increase in effectiveness of existing burners. The court of appeals held that the EPA did not exceed its

statutory authority by enacting more stringent limits on nitrogen oxide emissions as burner technology permitted because EPA's interpretation of Title IV was reasonable and because deference is given to an agency rulemakings unless Congress specifically denies such deference.

United States v Henry, 136 F3d 12 (CA 1, 1998)

Defendant appealed his conviction of conspiracy to transport hazardous waste to a facility without a permit to receive such waste, mail fraud, and wire fraud. The court of appeals upheld the conviction, holding that (1) the district court's definitional instruction as to what constitutes hazardous waste was correct as a matter of law and the delegation by Congress to the EPA of the legislative authority to define hazardous waste was permissible; (2) the district court's questioning of witnesses in the case was permissible; (3) the district court properly applied the sentencing guidelines by focusing on the fraud convictions and properly excluded any benefit to the defrauded customers for removal of the contaminated soil in the calculation of the loss attributable to the defendant; and (4) the district court's denial of a motion for a new trial by the defendant was an appropriate use of discretion.

Tyler v Cisneros, 136 F3d 603 (CA 9, 1998)

Homeowners appealed the denial and dismissal of their motion for a preliminary injunction against the construction of a low-income housing project under the National Historic Preservation Act (NHPA) and NEPA. The court of appeals reversed and remanded the case back to the district court, holding that: (1) the district court erred in holding that the NHPA contained an implicit statute of limitations that was met when federal funds were released; (2) the district court was in error to hold that HUD had no continuing authority over the project because of a memorandum agreement signed by the State of California, HUD, and the Federal Advisory Council on Historic Preservation; and (3) the district court's ruling that the City of San Francisco's federal environmental review responsibilities ended once federal involvement in the project ended was erroneous.

Northcoast Environmental Center v Glickman, 136 F3d 660 (CA 9, 1998)

Several environmental organizations sought to overturn the district court's grant of summary judgment in the Department of Agriculture's favor in an action brought claiming failure to prepare an EIS under NEPA. The court of appeals affirmed the decision, holding that: (1) the district court did not abuse its discretion when it struck cumulative unnecessary documents outside of the administrative record; (2) the less deferential "reasonableness" standard of review applies to

threshold agency decisions that certain activities are not subject to NEPA's procedures; and (3) the district court's decision that no EIS was required because no specific activity was proposed was reasonable.

United States v Dico, Inc, 136 F3d 572 (1998)

The defendants appealed the district court's decision to grant summary judgment to the EPA on the defendant's counterclaim for reimbursement of costs expended under CERCLA. The defendant argued that the district court erred in dismissing its counterclaim because the requirement for exhaustion of remedies had been waived and, if not, the defendant exhausted its remedies by filing a petition for reimbursement before the EPA filed the lawsuit. Additionally, the defendant argued that questions of fact remained so as to preclude summary judgment for the government. The court of appeals held that Congress did not intend to allow for the waiver of the exhaustion requirement in CERCLA. Furthermore, the defendant's petition for reimbursement before the EPA's filing could not lead to exhaustion of remedies because the administrative proceeding remained open. The court of appeals, however, held that genuine issues of material fact did exist as to whether the defendant's possible disposal of TCE on the site contributed to groundwater contamination and the district court erred in granting summary judgment for the government.

Idaho Sporting Congress v Thomas, 137 F3d 1146 (CA 9, 1998)

Environmental groups sued the U.S. Forest Service, challenging the Forest Service's decision to sell timber in watersheds without producing an EIS. The Forest Service had initially prepared a less detailed Environmental Assessment (EA) rather than an EIS. The court of appeals overturned the district court's decision to grant summary judgment to the Forest Service and held that the Forest Service was required to prepare an EIS to evaluate the effects of the proposed timber sale.

American Forest & Paper Ass'n v EPA, 137 F3d 291 (CA 5, 1998)

An association sought review of an EPA rule prohibiting the issuance of a state permit to discharge pollutants in accordance with an NPDES permit if a state or federal agency found that the issuance would harm an endangered species. The EPA argued that the association did not have standing to sue the EPA and that the rule was based on the Clean Water Act. The Court of Appeals for the Fifth Circuit held that the association did have standing to sue the EPA because the association suffered an injury in fact through the possible denial of their permits. Furthermore, the court of appeals determined the veto power to be inappropriate because the statute

specifically refers to requirements that must be met in order to receive a permit and only after failure to meet the enumerated requirements could the veto power be invoked.

Waste Action Project v Dawn Mining Corp, 137 F3d 1426 (CA 9, 1998)

The Waste Action Project (WAP) sued the defendant, claiming that its discharge of pollutants violated the Clean Water Act (CWA) because the discharge occurred without an NPDES permit. In particular, WAP alleged that the uranium mill tailings produced by the defendant fell within the pollutant definition of the CWA and, therefore, necessitated an NPDES permit. The District Court for the Eastern District of Washington granted summary judgment for the defendant. Plaintiff appealed. In affirming the district court's ruling, the Ninth Circuit held that uranium mill tailings were not within the definition of a pollutant as described by the CWA. Therefore, the defendant's failure to receive an NPDES permit did not violate the CWA.

Neighbors of Cuddy Mountain v US Forest Service, 137 F3d 1372 (CA 9, 1998)

Petitioners appealed a district court's grant of summary judgment against two not-for-profit environmental protection groups who had filed suit claiming that the Forest Service had not adhered to required procedural review of the environmental impact of a logging enterprise. The Ninth Circuit found that the Forest Service had failed to comply with the requirements of the National Forest Management Act (NFMA) and reversed the summary judgment. Specifically, the court of appeals found that the Forest Service had failed to demonstrate that the logging project was in compliance with the long range management plan (LRMP) by showing that the logging project would not reduce the amount of old growth beyond the minimums in the LRMP. Additionally, the court found that the Forest Service had failed to give the required "hard look" to the project's impact on various management indicator species. For these reasons, the court of appeals reversed the grant of summary judgment, halted the logging and remanded the case directly back to the Forest Service with directions to conduct the studies required by the NFMA before proceeding with further logging.

Utah v Babbitt, 137 F3d 1193 (CA 10, 1998)

Defendants appealed the issuance of a preliminary injunction preventing them from proceeding with the inventory of lands in Utah for wilderness characteristics. The court of appeals vacated the preliminary injunction because of the plaintiff's lack of standing and remanded for further consideration the question of whether the defendants were imposing a **de facto** wilderness

management standard on non-wilderness study area public lands in violation of the Federal Land Policy and Management Act (FLMPA). Specifically, the court of appeals held that the plaintiff's alleged injuries by the defendant's actions of refusing to allow public participation in the inventory process in violation of FLMPA, of adopting a different definition of "roadlessness" then used in the original wilderness review process, and of failing to prepare an EIS in violation of NEPA, were not actual or imminent injuries-in-fact.

Los Angeles v Federal Aviation Admin, 138 F3d 806 (CA 9, 1997)

The City of Los Angeles disputed the FAA's claim that a proposed expansion of an airport terminal would not increase the use of the airport and thus, the expansion would not meaningfully increase the environmental impact of the airport. In preparing its EIS and Environmental Impact Report (EIR), the FAA concluded that the demand for the airport would increase regardless of whether the expansion occurred or not. The Ninth Circuit stated that in reviewing an EIS, "it doesn't matter whether we agree with the agency's conclusion '[I]f the agency discusses the main environmental effects reasonably thoroughly, that's enough.'" Thus, the court of appeals found that the FAA had thoroughly discussed the environmental impact of the terminal expansion and was satisfied by the FAA's evidence to support its conclusions and denied the petition.

California v Campbell, 138 F3d 772 (CA 9, 1997)

Defendants, trustees of a manufacturer, appealed a district court's order finding defendants liable under CERCLA and California law for the contamination of soil and groundwater as a result of the manufacturer's dumping of trichloroethylene over a twenty year period. The defendants also appealed the district court's decision to grant an injunction requiring the defendants to clean up the contamination. The ninth circuit denied the CERCLA appeal for lack of jurisdiction, affirmed the district court's summary adjudication on the California law claim and upheld the injunction. The court of appeals held that in regards to the CERCLA decision, the district court's order was interlocutory and not subject to appeal, as no damages had been assessed. Furthermore, the court of appeals found that the interlocutory order did not fall under the collateral order doctrine, the interlocutory-appeal statute or the inextricably intertwined doctrine, and thus, could not be appealed at this time. On the state law order, the court of appeals upheld the district court's grant of summary adjudication as the defendants were unable to raise a genuine issue of a material fact. Finally, the court found that although the injunction incorporated an outside order into its injunction, the defendants were given sufficient notice as to the proscribed acts as the order was attached to the injunction.

Comfort Lake Ass'n, Inc v Dresel Contracting, Inc, 138 F3d 351 (CA 8, 1998)

A citizens association brought suit against companies building a retail store for alleged violations of the CWA. The suit sought injunctive relief, civil penalties and attorney fees and costs. The court of appeals ruled that (1) the claim for injunctive relief was moot because, inter alia, the plaintiff had no evidence to show that there was a realistic prospect that the violations alleged would continue; (2) the administrative enforcement agreement between the Minnesota Pollution Control Agency (MPCA) and the defendant companies precluded plaintiff from seeking civil penalties, as the agreement was the result of a diligently prosecuted enforcement process; and (3) the district court properly denied the plaintiff's request for attorney fees and costs where plaintiff association actually impeded MPCA enforcement efforts.

Glisson v US Forest Service, 138 F3d 1181 (CA 7, 1998)

Environmentalists sought an injunction against the U.S. Forest Service's ecological restoration project in an area of the Shawnee National Forest. The court of appeals found that the Forest Service's interpretation of "native" in 36 CFR 219.19, which requires the service to maintain viable populations of existing native species, was reasonable. The court also held that, though the Forest Service's environmental assessment did not mention that the short leaf pine is on Illinois' endangered species list, remand was unnecessary. The district court's grant of summary judgment for defendant was, therefore, affirmed.

Columbia Falls Aluminum Co v EPA, 139 F3d 914 (CA DC, 1998)

Manufacturers of aluminum petitioned the court to review EPA rules establishing a treatment standard for Aspent potliner, a by-product of aluminum production. Petitioners also asked the court to vacate the prohibition on land disposal of Aspent potliner if it is untreated. The court of appeals vacated and remanded the treatment standard and prohibition on land disposal, finding that: (1) the court had jurisdiction over the petition; (2) the record under review was not limited to the record existing at the time of the EPA's initial rulemaking; and (3) the EPA's use of the Toxicity Characteristic Leaching Procedure test to measure compliance with the treatment standard for Aspent potliner was arbitrary and capricious.

Citizen Advocacy Center v DuPage Airport Authority, 141 F3d 713 (CA 7, 1998)

Plaintiff, Citizen Advocacy Center, sued DuPage Airport Authority because it failed to provide a suitable public hearing prior to extending an airport runway. The court of appeals

vacated the district court's decision to grant summary judgment for the defendants because of a lack of subject-matter jurisdiction. The court of appeals held that NEPA did not apply to the runway extension because it did not constitute a "major federal action."

East Bay Municipal Utility District v US Dep't of Commerce, 142 F3d 479 (CA DC, 1998)

Plaintiffs sued the government under CERCLA. The court of appeals affirmed the district court's grant of summary judgment for the government because the government was not liable as an operator under an actual control theory, an authority to control theory, or a duress theory.

Pneumo Abex Corp v High Point, Thomasville & Denton Railroad Co, 142 F3d 769 (CA 4, 1998)

Plaintiffs sued railroads seeking contribution under CERCLA for response costs of cleaning up contamination at a foundry. The court of appeals reversed the district court's allocation of costs. The court of appeals held that the fact that the defendants sold used wheel bearings to the foundry did not make them "covered persons" liable under CERCLA, and that CERCLA's contribution provision should guide apportionment of liability after dismissal of the defendants.

Motor & Equipment Mfrs Ass'n v Nichols, 142 F3d 449 (CA DC, 1998)

Associations representing businesses that deal in "after market" car parts intended to replace original manufacturers' parts challenged both (1) the EPA's decision to allow California to enforce its own regulations regarding onboard emissions diagnostic devices, and (2) the EPA's rule that deemed compliance with the California device regulations to constitute compliance with federal regulations. The court found that the associations had standing to challenge the EPA's actions and that their claims were timely; however, failure to exhaust administrative remedies barred review of one challenge, and revisions of California's regulations made portions of the petitions moot. The court deferred to the EPA's conclusion that the California regulations complied with the Clean Air Act, and held that the EPA did not violate the Regulatory Flexibility Act by promulgating the deemed-to-comply rule.

Sameric Corp of Delaware, Inc v Philadelphia, 142 F3d 582 (CA 3, 1998)

Plaintiff, theater owner, claimed that the City of Philadelphia violated its federal and state constitutional rights by designating the theater as an historic building and denying a permit allowing plaintiff to demolish the building. The court of appeals upheld the district court's grant of summary

judgment, emphasizing its reluctance to federalize land-use decisions made by local agencies. The court held that (1) although the City relied on a factor not permitted by the ordinance when designating the building as historic, this did not rise to the level of “improper motive” necessary to sustain a substantive due process claim; (2) the City’s reliance on the potential future use of the building when making its decision was not arbitrary and capricious; and (3) the plaintiff’s failure to exhaust the appeals process for denial of the demolition permit meant that its claim was not ripe.

Russian River Watershed Protection Committee v City of Santa Rosa, 142 F3d 1136 (CA 9, 1998)

Plaintiff filed suit under the CWA, alleging that the City of Santa Rosa was in violation of its NPDES permit. The Court of Appeals affirmed the district court’s decision, holding that (1) the seven-day averaging procedure established to measure compliance with discharge requirements of the permit was reasonable; (2) the procedure for monitoring chlorine and coliform by sampling in one of three chlorine contact chambers was proper; (3) the adoption of a method of compliance with the permit did not impermissibly modify the permit; and (4) plaintiff did not have standing under CWA because it could not prove ongoing violations or reasonable likelihood of continuing future violations.

Mt Lookout-Mt Nebo Property Protection Ass’n v FERC, 143 F3d 165 (CA 4, 1998)

Property associations sought review of FERC’s grant of city’s application to amend its license to operate a hydroelectric power plant. The associations objected to the location of the revised transmission route. The Court of Appeals rejected the associations’ objections, holding that (1) FERC’s notice to the community of the rerouted line was adequate, as it was published in two local newspapers and a public meeting to address the issue was held. Furthermore, the petitioners were on actual notice, as the associations bringing the lawsuit were formed as a response to the proposed extension; (2) FERC adequately consulted with affected government agencies; (3) FERC’s decision not to prepare an EIS was reasonable; and (4) since an EIS was not required, FERC only needed to briefly discuss alternatives and its discussion was reasonable.

Southwestern Pennsylvania Growth Alliance v Browner, 144 F3d 984 (CA 6, 1998)

A group of Pennsylvania manufacturers and governments sought review of the EPA’s redesignation of the Cleveland-Akron-Lorain geographic areas as an “attainment area” for ozone levels. The court of appeals held that the group had standing to challenge the redesignation because the Alliance was injured by the EPA’s process of dealing with the regional

transport of ozone. The court of appeals further found that based on the EPA’s issuance of a new rule regarding regional ozone transport, the EPA’s decision that interstate transport was not relevant to this case was not arbitrary and capricious.

Hill v Boy, 144 F3d 1446 (CA 11, 1998)

Property owners brought suit against the Army Corps of Engineers and the EPA over the issuance of a CWA discharge permit to a county water authority in conjunction with the construction of a dam and reservoir. The court of appeals held that the CWA did not authorize suits against the Corp or the EPA for issuing discharge permits. The court of appeals then reversed the district court, saying the record did not support the Corps’ assumption that an EIS was not required. The question of the necessity of an EIS was remanded to the district court.

City of New York v Slater, 145 F3d 568 (CA 2, 1998)

Plaintiff, City of New York, sought review of a decision by the Secretary of Transportation granting new slots for airlines at LaGuardia airport to increase competition among airlines. No EIS was conducted. The court ruled that the Secretary had discretion not to make the EIS because of the marginal increase in noise level of the new slots and because the Secretary gave the applications the “hard look” required by NEPA.

II. Federal District Court Cases (Sixth Circuit)

House v US Forest Service, 974 F Supp 1022 (ED Ky, 1997)

Plaintiffs, local environmental and community groups, brought suit against the Forest Service to prevent them from proceeding with the proposed timber sale on Leatherwood Fork, a tributary of Indian Creek in the Daniel Boone National Forest. Plaintiffs claimed violations of procedures of the Endangered Species Act, the National Forest Management Act, NEPA, and the Administrative Procedures Act. Plaintiffs claimed that the timber sale would harm the Indiana Bat, an endangered species. The court ruled that the various laws mandated them to place conservation above any other competing interest, and consultations with the Fish and Wildlife Service as to the impact of the timber sale on the Bat should be commenced before completion of the sale. The court also ruled that the timber sale may constitute a “taking” of the Indiana Bat.

Southwest Williamson County Community Ass’n v Slater, 976 F Supp 1119 (MD Tenn, 1997)

Plaintiff sought declaratory and injunctive relief to block construction of a highway, pending compliance with applicable environmental laws. Motions to dismiss were granted to the defendants principally because the six year statute of limitations

had run. Defendants asserted that the statute began to run from the defendant's Finding of No Significant Impact (FONSI), issued on May 18, 1990. Plaintiff had argued that the FONSI was not a "final agency action" which began the statute of limitation.

EPA v TMG Enterprises, Inc, 979 F Supp 1110 (WD Ky, 1997)

EPA sued TMG and others under CERCLA for cleanup of a hazardous waste site. EPA sought summary judgment on the issue of defendant's liability. The court held that the use of the terms "hazardous substance" and "hazardous waste" were not inconsistent and did not limit the liability of the defendant to cleanup of only waste from a manufacturing process. The court further held that inconsistency with the National Contingency Plan is only available as a defense to the recoverability of the costs of cleanup, not to liability. The court also held that a copper reclamation business "arranged for disposal" of hazardous wastes and, therefore, was liable under CERCLA.

Liddle v US Army Corps of Engineers, 981 F Supp 544 (MD Tenn, 1997)

Private landowners brought suit challenging the US Army Corps of Engineers' ("Corps") authorization of a lease of federally owned lakefront property to the YMCA for use as a summer day camp. The court found that the lease authorization was based on a permissible construction of the Flood Control Act which requires a lease to be made "for purposes...in the public interest" even though the YMCA lease restricted public access to the shoreline. The court held that because the public retained some access to the shoreline, the lease was not against the public interest. The court further held that the Corps' decision not to issue an EIS was not arbitrary and capricious because evidence showed that the Corps took a hard look at the potential environmental impact prior to granting the lease. The court also found that private citizens have no standing to challenge a lease of public property to a Christian organization under the First Amendment.

US v Akzo Nobel Coatings, Inc, 990 F Supp 897 (ED Mich, 1998)

The United States brought suit under CERCLA to recover costs incurred by EPA in cleanup of a landfill. The court held that work at the site which occurred more than six years prior to the government's filing of its complaint amounted to a preliminary investigation, and thus, did not trigger the running of a limitations provision. The court also held that the publication of a Record of Decision (ROD) did not signal the end of a removal action under CERCLA, and thus, did not trigger the running of a limitations provision.

United States v Akzo Nobel Coatings, Inc, 990 F Supp 892 (ED Mich, 1998)

The United States sued two hazardous waste generators for cleanup costs incurred by the EPA. The district court granted summary judgment for the government, holding that the EPA's decision to use a "total incineration" method of cleanup, instead of a "combination" method, was not arbitrary or capricious, nor inconsistent with the National Contingency Plan where the EPA evaluated other possible solutions pursuant to 40 CFR 300.68(h)(2)(I)-(vi). The court stressed the deferential standard by which the court reviews agency actions. Consequently, the district court approved the EPA's cleanup plan and granted the government's motion for summary judgment.

Kalamazoo River Study Group v Rockwell International, 991 F Supp 890 (WD Mich, 1998)

Plaintiffs, admitted potentially responsible parties (PRPs), brought suit against defendants for cleanup costs, including claims under CERCLA 107 for joint and several liability, and 113(f) for contribution. The district court held that PRPs cannot sue other PRPs under 107 for joint and several liability, but can sue under 113 for contribution. Only innocent parties that have undertaken cleanups can use 107. The court also held that the defense of divisibility of harm is only a defense for 107 claims, not for 113 claims. Consequently, the district court dismissed the plaintiffs claim under 107 but allowed the claim under 113.

Tolbert v Ohio Dep't of Transportation, 992 F Supp 951 (ND Ohio, 1998)

African-American residents filed a civil rights action to challenge defendant's refusal to erect sound barriers next to a new highway construction project. The district court dismissed the claim for violation of the statute of limitations. It held that a cause of action arising out of an improper EIS report accrues when the EIS is approved. The construction of the highway was not a continuing violation because the district court held that the continuing violation doctrine does not apply where such a plan is made outside the limitation and the execution of the plan is made within the statute. The court reasoned that the entire action stems from the decision-making process thus, implementing the plan was not a continuing violation.

National Steel Corp, Great Lakes Div v US Coast Guard, 995 F Supp 773 (ED Mich, 1997)

A steel corporation sought declaratory relief from a civil penalty levied by the Coast Guard. The penalty was the result of the corporation's discharge of a sheen of oil into the Detroit River, a violation of the CWA. The district court denied the Coast Guard's motion to strike the affidavit of the corporation's

acting manager and held that the Coast Guard's determination that the oil discharge was not exempt from the penalties of the CWA was insufficient to meet the requirements of the substantial evidence test. The district court remanded the matter to the Coast Guard for additional investigation and explanation.

Brewery District Society v Federal Highway Admin, 996 F Supp 750 (SD Ohio, 1998)

The Brewery District Society brought suit against the Federal Highway Administration (FHA) and EPA under the National Historic Preservation Act (NHPA). Plaintiffs alleged that the construction of highway off-ramps for a city arena adversely affected historic property in violation of the NHPA. The district court held that the plaintiffs had standing for action against the FHA but not the EPA. The district court also held that the plaintiffs had a private right of action against FHA to ensure compliance with the provisions of the NHPA, independent of the Administrative Procedures Act. The district court ruled that the plaintiffs were not required to join the city as a defendant.

Winchester Coalition for Responsible Development v US Dep't of Housing & Urban Development, 999 F Supp 1058 (SD Ohio, 1998)

Homeowners brought suit against HUD and the city metropolitan housing authority, seeking to prevent the construction of low-income housing on a tract of land adjacent to their neighborhood. The district court held that the homeowners had standing to challenge the construction project, that the housing authority used the proper methods in acquiring the project site, and that an appropriate environmental assessment was made before the project was approved.

Kalamazoo River Study Group v Rockwell International, 3 F Supp 2d 815 (WD Mich, 1997)

Plaintiff, paper companies, brought an action under CERCLA and the Michigan Natural Resources and Environmental Protection Act against an automotive parts manufacturer and other companies to obtain contribution for response costs incurred in responding to PCB contamination of the Kalamazoo River and of Portage Creek. On the manufacturer's motion for summary judgment, the district court held that the plaintiffs failed to establish a causal link between the release of PCBs by defendant and the costs incurred in cleaning PCB contamination from the river.

United States v Glidden Co, 3 F Supp 2d 823 (ND Ohio, 1997)

The United States brought an action under CERCLA, seeking recovery of costs incurred by EPA in the removal of hazardous waste from one parcel — out of three that were searched — of defendant's land. Defendant had acquired the three parcels through instruments that transferred ownership as a single unit, and the government placed a lien for recovery costs against the entire three parcels. On cross motions for summary judgment, the district court held that the defendant's three parcels were a "facility" within the meaning of 107(a) of CERCLA. The three parcels were thus, considered an entire waste site for civil forfeiture purposes, since according to legislative history and applicable case law, "the property must be defined according to the instruments and documents that created the defendant's interest in the property." The court also found (1) the innocent landowner defense unavailable since landowners were unable to prove that the release of the hazardous substances and resulting damages was the result of an act or omission of a third party or that defendants themselves exercised due care with respect to the wastes; (2) the removal act was consistent with the National Contingency Plan; (3) the placement of the lien on the property did not deny due process since the defendants had received notice and a hearing prior to perfection of the lien; (4) CERCLA applied retroactively because it was intended to impose liability on those parties responsible for inactive sites; and (5) no Commerce Clause violation occurred since it is within Congress' power to regulate activities that pollute water resources that are integral to interstate commerce and which know no state boundaries.

III. State Cases

Forest City Enterprises, Inc v Leemon Oil Co, 228 Mich App 57 (1998)

Plaintiff, commercial landowner, brought an action against tenant oil company under the Michigan Environmental Response Act, the Michigan Hazardous Waste Management Act, and the Michigan Natural Resources and Environmental Protection Act, seeking damages for cleanup of property. The trial court awarded the plaintiff nominal damages, from which both sides appealed. The Court of Appeals held that even if harms caused by the defendant were indivisible from harms caused by other parties, defendant could not be held liable for all the harm caused. The judgment below was affirmed.

Pitsch v ESE Michigan, Inc, 1999 WL 50513 (Mich App, 1999)

Plaintiff appeals from an order granting summary disposition to multiple defendants on claims for the recovery of the costs of remedying environmental contamination on his property. The Court of Appeals had to determine whether a private cause of action for the recovery of response activity costs exists under the Michigan Environmental Response Act (MERA). The Court of Appeals held for plaintiff and reversed the grant of summary disposition, holding that the statute

expressly creates the private right of action due to a "reasonable construction" of the phrase: "[a person] shall be liable for... necessary cost of response activity incurred by any other persons." The court backed this construction by pointing to an analogous section in CERCLA, on which MERA was based, which provides that a PRP "shall be liable for any other necessary costs of response incurred by any other person consistent with the national contingency plan." However, the court of appeals also upheld the dismissal of claims of negligence and misrepresentation against two of the defendants.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, November 14, 1998

Council Members Present:

Dickinson, Dunn, Gotthelf, Phillips, Rast, Robinson, Tatum, Tisdale, Wilczak, Holmes, Trigger

Council Members Absent:

Bohn, Calloway, Fink, Levine, Mikalonis, Ortega, Posa, Schroeder, Wilson,

Ex-Officio Members Present:

None

Ex-Officio Members Absent:

Baron, Churchill, Emery, Hadden, Maurer, Tripp

Committee Chairs and Vice Chairs Present:

Blais, Holmes, Hubbard, Lozen, Trigger

Liaisons Present:

None

Secretary/Treasurer Report

Robinson will have typed the minutes from the September, 1998 Council meeting and will present them at the next meeting. Secretary/Treasurer Gotthelf stated that the Section was in the black. However, she has not received recent financial reports.

Committee Reports

Tatum reported that there were several programs this summer. Committees that held programs included the Natural Resources and Wetland Committee, Superfund Committee, and

Surface Water/Groundwater Committee. Additionally, the Section held a joint program with ICLE and hosted the annual program. Tatum encouraged Committees to continue to have programs and stressed that the Program Committee is there to support Committees in planning the programs. The Program Committee is also considering several topics for a new program. The topic that appears to be getting the most support is Environmental Practice in Year 2010, Where are We Going. The Committee has already identified the number of speakers for this program. Other topics were also suggested. Chairperson Robinson suggested that we do a joint program with another section. Tatum will follow up on this suggestion. Trigger indicated that he has chaired the Environmental Committee of the Real Estate Section. The next meeting for the Program Committee is January 14, 1999 at Seyburn, Kahn, Ginn offices in Southfield.

Journal Committee Report

Blais and Chester sent Chairperson Robinson a letter expressing frustration with the lack of submissions of articles and committee reports. Blais indicated that this lack of committee report submissions is uniform. A number of suggestions were discussed, including reducing the number of issues, paying authors, publishing thinner Journals, using only e-mail to distribute the Journal, privatizing the publication, and putting more responsibility on the chairs. Other suggestions included sending out reminder letters or e-mails to chairs and publishing the name of the committee along with the chair in each Journal and if no report is submitted clearly state that no report was submitted. Another suggestion was to utilize law students. Holmes indicated that he would assist in these

contacts. There also was quite a bit of discussion concerning linking the web page with the Journal. The Journal Committee and Technology Committee will meet to discuss various ideas, including linking actual cases to the case law summaries that are provided.

Membership Committee Report

No report.

Air Committee Report

No report.

Environmental Ethics Committee Report

No report.

Natural Resources and Wetlands Committee Report

Wilczak indicated that the Committee is planning a follow up program at Crosswinds Wetland Park in the spring.

Real Estate Committee Report

Lozen reported that the Committee plans to do more brown bag programs and the first was in planned for January, 1999. Lozen also reported that the new co-chair is David Donzal.

Solid and Hazardous Waste/Insurance Committee Report

Gotthelf reported on behalf of Johnson that the last meeting was canceled due to lack of attendance. A new meeting has not yet been scheduled, but Johnson is considering holding the meetings via conference call.

Superfund Committee Report

Trigger reported that the September, 1998 Brownfield Program was a tremendous success. There were 75 attendees, including 8-10 representatives from the United States Environmental Protection Agency. Trigger also indicated that the handouts were very good and that he believes the program made money; however, he is still waiting for the final figures. Trigger also stated that Tatum's contribution was invaluable and the Program Committee's support was vital to making the program a success. A discussion was then held on re-instituting the practice of giving "thank you" gifts to speakers.

Grant also reported that the Section supports the Wayne State Library in keeping Part 201 documents. Wayne State has sent a bill in the amount of \$1,300. This bill covers a period of three (3) years. Trigger requested that the bill be paid. Gotthelf moved to pay the bill. Rast second it and the motion was passed

unanimously. Discussion was also held on the need to publish the availability of the documents more often.

Trigger reported that meetings are held approximately every other month and there are usually about twelve (12) people attending the meetings. The meetings take place in Lansing with a telephone hookup to Detroit. The next meeting will be in late January.

Surface Water/Groundwater Committee Report

Hubbard reported that the last meeting was held on September, 1998 after the Annual Bar. The meeting was attended by Michigan Department of Environmental Quality ("MDEQ") who discussed TMDL.

Toxic Tort Committee Report

No report.

Technology Committee

Tatum and Tisdale announced that the web page is now online and fully operational. The last two (2) Journals have been published on the Internet. Further, eleven (11) firms have asked to be linked with the web page. Any other firm that wants to be added to the link should e-mail Tatum. Tatum also reported that the Technology Committee will meet with the Journal Committee.

Publications

Robinson reported for Smary that Smary and Haynes will meet in November to discuss an update to the Environmental Law Desk Book.

Chairperson's Report

1. Chairperson Robinson announced that he received a letter from Jean Ligon of the State Bar Communication Committee. Ligon stated that the Committee wants to establish approximately four (4) environmental legal milestones around the State and put a plaque up at those sites to indicate the historic significance of the site. After much discussion it was decided that this might be a good project for the ex-officios to become involved with and assist in identifying sites. Tatum will contact some of the ex-officios to ascertain their interest.

2. A letter was received objecting to the lack of a State of the Law Book. Chairperson Robinson will send a response that the document is on the web page.

3. Scott Brinkmeyer is the Section Commissioner Liaison.

4. Mark Fancher, Senior Director of Special Projects, State Bar, asked about the Section's pro bono activities. Chairperson Robinson will send him a letter regarding the Section's activities, including the publication on the web site.

Old Business

Wilczak, on behalf of the Recycled Paper Committee, indicated that there are problems with the vendor because it has gone through several new owners. The current owner is trying to break the contract. Please contact Wilczak with any experiences you may have had with the vendor.

New Business

1. Chairperson Robinson received some brochures on the

Justice for All, 1997 Grant Reports, a report on Filing Fee Contracts and IOLTA Grants Supporting Civil Legal Services for the Poor in Michigan. The brochures were distributed.

2. Trigger recommended that the Section use the e-mail more often for minutes and programs. Tatum informed the Council that members could broadcast using envirolaw@listserve.michbar.org.

Next Meeting

The next meeting is February 6, 1999 at the Honigman, Miller, Schwartz, & Cohn offices in Lansing. Lunch will be available. The meeting was adjourned at 11:35 a.m.

MINUTES ENVIRONMENTAL LAW SECTION COUNCIL MEETING

Saturday, February 6, 1999

Council Members Present:

Bohn, Calloway, Gotthelf, Holmes, Mikalonis, Ortega, Phillips, Posa, Robinson, Schroeder, Tatum, Wilczak, Wilson

Council Members Absent:

Fink, Levin, Dickinson, Dunn, Rast, Tisdale

Ex-Officio Members Present:

Emery, Hadden, Via Telephone: Baron

Ex-Officio Members Absent:

Churchill, Maurer, Tripp

Secretary/Treasurer Report

Robinson will have typed the minutes from the September 1998 Council meeting and will present them at the next meeting, Secretary/Treasurer Gotthelf stated that the Section was in the black. We have approximately \$35,391 in the bank. In 1997, we received approximately \$27,000 and had total expenses of \$22,573.55. Therefore, overall we are a positive net.

Committee Reports

Tatum reported that there was a meeting several weeks ago. The Continuing Legal Education (CLE) proposal was published. Speaking or attendance can earn credits as currently drafted,

which provides incentives to speak. There also appears to be an ethics requirement. Newton has talked to Haynes and Fausone concerning the effect on our ethics subcommittee. The Program Committee will monitor this. The topic that appears to be getting the most support is Environmental Futures. Its currently scheduled at Lansing Center on April 22, 1999. Wilczak discussed the speakers for this program. Chairperson Robinson stated that Amy Van Kolken, Great Lakes Trading Coordinator, The Air Bank, offered to speak concerning the Bank, Nox, SIP call, and related issues. Chairperson Robinson reminded the Council that he previously suggested that we do a joint program with another section. Tatum will follow up on this suggestion, The next meeting for the Program Committee has not yet been scheduled.

Journal Committee Report

Chester said the Committee questions the value of committee reports and maybe the Journal should focus on better quality case notes and necessary articles. Chester reported that they are working on the quality of case notes. Holmes has contacted other law schools to prepare case notes. Blais wanted to prepare a Request for Proposal (RFP) to the law schools and award a two year contract. As to wages, the section pays \$6/hr. Discussion concerning payment methods was discussed. Ideas included flat fee, per case note accepted, and per case note written. Johnson pointed out that when he was at the University

of Michigan, the money went to the environmental society, not individuals. Calloway moved and Trigger seconded a motion to authorize the Committee to send an RFP to the law schools and authorize the Journal Committee to evaluate the RFP and award the contract. Further discussion was held. One topic was whether we should hire a private company, which may improve quality and be less expensive, or do we want to support and encourage participation by environmental societies of the law schools. After discussion, the motion was amended to provide for the Journal Committee to present a recommendation to the Council on awarding the contract. The amended motion was passed unanimously. The committee is planning three publications a year instead of the previous four issues. One will be State of the Law. Discussion was held on requiring each committee to submit a substantive report plus normal report. Bohn moved that we require that each subject matter committee chair or co-chair submit one substantive article a year. Seconded by Calloway. Discussion was held. Motion passed unanimously. Reilly moved and Bohn seconded a motion that all committees must submit a report for each issue. Motion was passed unanimously.

Air Committee Report

Schroeder reported that the Committee has been inactive but now will become more active. S. Lee Johnson is the new Chair. As to substance, EPA agreed with the state to remove Rule 901 from the State SIP.

Environmental Ethics Committee Report

No report.

Natural Resources and Wetlands Committee Report

Bohn reported that the Committee is planning a spring program at Crosswinds Wetland Park. No date set yet. It will be published on the list serve. As to substantive hot topics, there are draft amendments to the mitigation rule. These will be circulated on the list serve. As to case law, on February 2, 1999, the New Baltimore Marina permit was denied by the Corps of Engineers. The area is critical for May Flies. Typically, the Corps does not involve itself in submerged lands. Another topic is that Grosse Pointe Yacht Club wants to expand and there is a lot of controversy. This is an upcoming issue for the boat clubs, as boats get bigger. The Committee will include in the Journal a report on the above and takings issues.

Real Estate Committee Report

Tatum reported on behalf of Lozen and Wasserman that the Committee plans to do a number of smaller committee meetings and Lozen also reported that the new co-chair is David Donzal.

Solid and Hazardous Waste/Insurance Committee Report

Gotthelf reported on behalf of Johnson that a new meeting has not been scheduled, but Johnson is considering holding the meetings via conference call.

Superfund Committee Report

Trigger reported that Due Care and BEA Rules are going to be final soon. Brownfields legislation headed up by Kathy Wilson, DEQ, is being drafted. The legislation may include extending the SBT credit sunset to year 2012 and increasing the amount of the credit from \$1 million to \$30 million. Also considered is streamlining the Brownfield Authority process and allowing certain additional costs to be covered under the Brownfields program, including accounting and legal costs. Other ideas are to include language clearly allowing the shifting of the credits to tenant from landlord. Also, as to residential tax recapture in "flip" cases, language may be added to allow "flips" without recapture. Hopefully, the bills will be introduced in March. Trigger also asked questions about new co-chairs. All were reminded that we need recommendations for new co-chairs.

Surface Water/Groundwater Committee Report

No report.

Toxic Tort Committee Report

Huff reported that Magid is new co-chair. They are writing a journal article which will focus on **Daubert** and its possible extension. The Committee also recently submitted a different article to the Journal. Discussion was also held on the tobacco litigation. The next meeting in February 10, 1999.

Technology Committee

Calloway reported that the Technology Committee met with the Journal Committee. Calloway said there are three servers with no use and the Committee is interested in ways to increase that use. To that end, the survey being sent out to the membership will include questions on how to increase use of the list serve including asking about interest in publishing more reports and journals. Tatum reported that our web has more "hits" than any other bar section. The numbers are published monthly. The web page is <http://www.michbar.org/sections/envir>. Tatum indicated that we may also want to include when members are arguing before the Supreme Court and include briefs. Reminder members could broadcast using envirolaw@lists.michbar.org.

Chairperson's Report

1. Chairperson Robinson announced that he received a letter from Wayne State asking for copies of the journal. Chester will respond.

2. Gene Smary, ABA SONREEL Councilperson, received a letter concerning establishing a scholarship for law students interested in environmental law. Per Smary, if the Section commits to \$2,500, ABA SONREEL will commit \$2,500.

3. The State Bar indicated that they would like our section dinner to be held September 15, 1999, the day of the program rather than the evening before. Please mark your calendars.

4. Chairperson Robinson reported that the Bar has launched a public service campaign, as part of that campaign,

announcements will appear on TV and Cable over the next nine months. A videotape of the announcements was viewed.

Old Business

Tatum reported that Jeff Haynes has agreed to chair a committee nominating environmental legal milestones to the Bar. Todd Dickinson will work with Jeff.

Next Meeting

The next meeting in April 17, 1999 at the Honigman, Miller, Schwartz and Cohn office in Lansing, unless Chairman Robinson determines that the State Bar is available and so notifies the Council. The meeting was adjourned at 11:47 a.m.

SEMINARS AND COURSES

Environmental Regulation Course, sponsored by Executive Enterprises at the various times and locations set forth below:

San Francisco CA	July 1999
Boston MA	July 19-21, 1999
Las Vegas NV	August 11-13, 1999
Philadelphia PA	August 17-19, 1999
Chicago IL	September 1999
Hilton Head SC	September 13-15, 1999

The fee is \$995. Course includes intensive real-world case studies on air, water and waste regulations; overviews of federal environmental laws, compliance procedures; and in-depth training on the major environmental regulations. For more information or to register call (800) 831-8833.

Wetlands Law and Regulation, sponsored by the ABA, ALI, ELI and SONREEL at the time and location set forth below:

Washington D.C.	June 17-18, 1999
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The fee is \$695. Comprehensive substantive course on wetlands protection law and regulation. Includes in depth coverage of regulatory implementation of Clean Water Act's section 404, the revised nationwide permit, takings, and jurisdictional issues. To register, or for more information about this or other upcoming ABA-ALI courses call 1-800-CLE-NEWS.

Environmental Litigation, sponsored by the ALI-ABA and University of Colorado Law School at the time and location set forth below:

Boulder CO	June 21-25, 1999
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The fee is \$995. Comprehensive course covering core issues inherent in all environmental litigation. Includes discovery issues, case management, CERCLA, private party litigation, evidence, judicial and administrative forums, negotiation and settlement. To register, or for more information about this or other upcoming ABA-ALI courses call 1-800-CLE-NEWS.

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