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Peter D. Holmes, Chairperson BorgWarner Inc. 3850 Hamlin Road Auburn Hills, Michigan 48326 (248) 754-0889	Robert L. Schroder, Editor Robert L. Schroder, PLLC 8921 Margo Drive Brighton, Michigan 48114 (810) 229-0326	Peter D. Holmes, Assistant Editor BorgWarner Inc. 3850 Hamlin Road Auburn Hills, Michigan 48326 (248) 754-0889

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## The New Federal Environmental Due Diligence Rules

By R.Craig Hupp\*

The Federal Government assumed a direct role in environmental due diligence with the passage of the Small Business Relief and Brownfields Revitalization Act of 2001<sup>i</sup> (“Brownfields Act”) that amended the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”).<sup>ii</sup> The Brownfields Act directed USEPA to promulgate regulations to define the “all appropriate inquiry” (“AAI”) required to qualify for certain exemptions from liability under CERCLA. USEPA promulgated draft regulations in August 2004<sup>iii</sup> and finalized the regulations on November 6, 2005.<sup>iv</sup> There were only minor changes between the draft and final rules. In the same period, the American Society for Testing and Materials (“ASTM”), a national organization for the development of technical standards and protocols, revised its standard for Phase I environmental assessments, E 1527-00, to conform that standard to the changes wrought by the Brownfields Act and USEPA’s AAI rules. This article will briefly recap the draft rule, identify the changes and discuss how the newly revised ASTM due diligence standard interfaces with the federal rules.

### History of Due Diligence

The history and scope of the draft regulations are set forth in detail in “A Progress Report on the Promulgation of Rules for ‘All Appropriate Inquiry’ Under CERCLA.”<sup>v</sup> In brief, CERCLA, as amended by the Brownfields Act, provides three exemptions from CERCLA’s strict liability scheme affecting owners and operators of contaminated property, which exemptions are triggered when a prospective purchaser or tenant conducts all appropriate inquiry before acquisition or occupancy. Originally, the parameters of AAI were defined solely by criteria mentioned in the statutory language.<sup>vi</sup> In the 10 years after the AAI language was added to CERCLA in 1986,<sup>vii</sup> general practices coalesced around a procedure that became known as a Phase I environmental site assessment. Standard E 1527-97, “Standard Practice for Environmental Site Assessment Phase I Environmental Assessment Process” developed by the ASTM (updated in 2000 and reissued as E 1527-00) became the norm for such procedures. The Brownfields Act provided that until the USEPA promulgated AAI regulations the ASTM standard would serve as the interim standard.<sup>viii</sup>

The Brownfields Act sets forth 10 requirements for AAI, including due diligence performed by an “environmental professional,” record review, site visit, interviews with past and present owners and occupants, review of historical information and other criteria.<sup>ix</sup> The new rules address these factors in detail at 40 C.F.R. 312, “Innocent Landowners, Standards For Conducting All Appropriate Inquiries.” The regulations are effective on November 1, 2006,<sup>x</sup> and until that time, a prospective purchaser may rely on either the interim ASTM standard or the new AAI rules.<sup>xi</sup>

As is the case with most environmental regulations, the reader is encouraged to read the Preamble to the final rules that provides valuable insights as to the Agency’s views on environmental due diligence and the additional post-closing responsibilities for owners and operators desiring to maintain the exemptions from CERCLA liability.

## The Final AAI Rules

There are only four changes from the draft rules. First, the qualifications for an “environmental professional” were broadened slightly to permit individuals with 10 or more years of full-time relevant experience to meet the definition, without previously required educational or certification backgrounds.<sup>xii</sup> Second, the draft rules were unclear as to the “shelf life” of certain aspects of previous Phase Is. The changes in the final rule allow for the use of information contained in previously-conducted assessments when the information was collected more than one year before the date of property acquisition so long as *all* of the information is updated to reflect current conditions and current property-specific information.<sup>xiii</sup> As in the case of the draft rules, the final rules provide that if a previous Phase I is more than six months but less than 12 months old, only certain parts of the prior Phase I must be updated.<sup>xiv</sup>

Third, USEPA modified its requirement with regard to searches for institutional controls in governmental records. The draft rules required that records of institutional and engineering controls be researched for properties within one-half mile of the subject property. That requirement was eliminated and a search is required only for the subject property.<sup>xv</sup>

Perhaps the most important change from the draft rules is the treatment of information that the owner or operator seeking to qualify for the liability exception (the “qualifying person”) is charged with assembling. Under the draft and final rules, the qualifying person performing all appropriate inquiry must use whatever specialized knowledge and experience that person has,<sup>xvi</sup> must compare the purchase price with the value of the property assuming it is not contaminated<sup>xvii</sup> (*i.e.*, if the price paid is less than market value, does that suggest that the price has been discounted because of environmental problems?), and must avail himself of commonly known or reasonably available information about conditions at or affecting the property.<sup>xviii</sup> The wording of the rules make clear that the first two of these additional inquiries are not the environmental professional’s responsibility to perform, while the environmental professional and the qualifying person both are obliged to consider commonly known or reasonably ascertainable information (recognizing that what is commonly known to a locally-based qualifying person may not be commonly known to the out-of-town consultant and vice-versa). The draft rules required the qualifying person conducting the additional inquiries to provide the information gathered to the environmental professional for inclusion in the professional’s report. The final rules eliminated the requirement that the qualifying person share the information with the environmental professional, although the qualifying person may voluntarily choose to do so.<sup>xix</sup>

There are several practical considerations that flow from this change. First, the qualifying person is strongly advised to make a written record that these additional inquiries have been conducted, that they were conducted before property acquisition, and what they disclosed, regardless whether that is shared with the environmental professional. This record is necessary to be able to prove later that these additional inquiries were performed. Second, the practical effect of this change is to permit the qualifying person to keep out of the environmental professional’s report information obtained as the result of these additional inquiries that suggests the possibility that the property is contaminated. Knowledge of human nature suggests that the qualifying persons will choose not to divulge this information when the additional inquiries suggest that the property was contaminated. Thus, third parties will not be able to rely on

environmental professionals' reports as being complete because the professional may not necessarily have been provided with the additional inquiries performed by the qualifying person. From this time hence, prospective purchasers who ask for prior Phase Is will be well advised to ask whether the Phase I includes the results of the additional inquiries that the person commissioning the Phase I was required to perform. USEPA suggests that when the environmental professional is not provided with the qualifying person's additional inquiries, the environmental professional should assess the impact that the lack of this information might have on the ability to render an opinion with regard to conditions indicative of releases at the property. This author's opinion is that, in general, the environmental professional will be unable to assess the impact, not knowing what he does not know, and thus the lack of this information is not likely to affect his opinion one way or the other. The careful environmental professional will specifically state in his report whether or not he has been provided with the results of the qualifying person's additional inquiries.

### Revisions to the ASTM Standard

The ASTM worked closely in coordination with the AAI rulemaking process to update E 1527. In the fall of 2005, ASTM approved revisions to its standard and reissued the standard as ASTM E 1527-05. The new standard satisfies all of the AAI requirements and may be used in lieu of the new AAI rule.<sup>xx</sup> In fact, the ASTM standard is somewhat broader than the final rule. The principal differences are as follows.

First, the ASTM standard continues to include an inquiry into the presence of petroleum products,<sup>xxi</sup> not included in the AAI rule because petroleum is excepted from CERCLA's definition of hazardous substances.<sup>xxii</sup>

Second, the ASTM standard requires that the qualifying person provide the results of that person's additional inquiries to the environmental professional<sup>xxiii</sup> and includes a user questionnaire in the appendix to E 1527-05.<sup>xxiv</sup> Information arising out of the qualifying person's specialized knowledge and commonly known or reasonably ascertainable information should be provided to the environmental professional before the site reconnaissance.<sup>xxv</sup> The environmental professional is required to note in the report whether or not the qualifying person provided any of this information to the environmental professional.<sup>xxvi</sup> While, consistent with the AAI rule, an environmental professional is not required to perform site visits, E 1527-05 requires that the environmental professional be involved in planning the site reconnaissance and interviews and also establishes requirements for the person conducting those activities.<sup>xxvii</sup> In addition, there is no exception with regard to conducting a site visit, unlike the AAI rule's limited exception.<sup>xxviii</sup>

While USEPA's final rule provides that the task of reviewing records for liens can be performed by either the qualifying person or the environmental professional,<sup>xxix</sup> the ASTM standard places that responsibility on the qualifying person.<sup>xxx</sup>

The ASTM standard requires that the environmental professional provide a rationale for determining whether or not a Recognized Environmental Condition exists<sup>xxxi</sup> and also comment on any data gaps and their significance.<sup>xxxii</sup> In limited circumstances, the environmental professional must also opine whether there is a need for a further investigation, if any.<sup>xxxiii</sup> The standard states that this opinion is required only when greater certainty regarding an identified REC is needed.

## Recommended Practices

In general, the ASTM standard covers what some would see as gaps in the AAI rule. In addition, the ASTM standard provides a more thorough discussion of how to conduct the due diligence process. For that reason, most users and consumers of Phase I environmental due diligence services and reports should specify the ASTM standard as opposed to the AAI rules in the Phase I scope of services.

It is also important to keep in mind that there are a number of environmental issues affecting property use and development that are not within the scope of the AAI rule or the ASTM standard. These include the presence of asbestos or potential asbestos-containing building materials, lead-based paint, mold, fungi or microbial growth, naturally-occurring radon or methane gas, potential presence of arsenic in aquifers that might be accessed for site drinking water or lead in municipal drinking water, restrictions on use of septic systems, and the presence of regulated wetlands on the property. It will be good practice to include each of those issues in most scopes of work for Phase I site assessments.

*\*R Craig Hupp is a partner with Bodman LLP.*

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<sup>i</sup> Pub L107-118, 115 Stat 2356 (2002).[Craig, the Journal uses the Michigan Uniform Citation System]

<sup>ii</sup> 42 USC 9601 *et seq.*

<sup>iii</sup> 69 Fed Reg 51541 (August 26, 2004).

<sup>iv</sup> 70 Fed Reg 66070 (November 1, 2005).

<sup>v</sup> Michigan Real Property Review, Winter 2004, p. 215.

<sup>vi</sup> 42 USC 9601(35).

<sup>vii</sup> By the Superfund Amendment and Reauthorization Act of 1986.

<sup>viii</sup> Brownfields Act, Section 232(2)(B)(iv)(11).

<sup>ix</sup> Section 223 of the Brownfields Act, codified at 42 USC 9601(35)(B).

<sup>x</sup> 70 Fed Reg at 66070.

<sup>xi</sup> 70 Fed Reg at 66072.

<sup>xii</sup> 40 CFR 312.10.

<sup>xiii</sup> 40 CFR 312.20(c).

<sup>xiv</sup> 40 CFR 312.20(c).

<sup>xv</sup> 40 CFR 312.26(b)(6) & (7); 70 Fed Reg at 66093 ("The final rule requires that government records and available lists of institutional and engineering controls be searched only for

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information at the subject property.”), 70 Fed Reg at 66094 (“The final rule requires that available lists of institutional controls and engineering controls only be searched for information on the subject party.”), but see 40 CFR 312.26(c)(2)(ii), which can be read to require a search for engineering controls on properties within one-half mile. The intent of the rule, notwithstanding potentially ambiguous language, is not to require a search for such controls beyond the subject property. Private communication with Patricia Overmeyer, Office of Brownfields, Cleanup and Redevelopment, USEPA (December 20, 2005).

<sup>xvi</sup> 40 CFR 312.28.

<sup>xvii</sup> 40 CFR 312.29.

<sup>xviii</sup> 40 CFR 312.30.

<sup>xix</sup> 40 CFR 312.22(a), discussed at 70 Fed Reg at 66076 and(?). 66097 (recommended that results of qualifying person’s additional inquiry based on specialized knowledge be provided to the environmental professional), and 70 Fed Reg at 66099 (“...the final rule allows for, but does not require” valuation information be provided to the environmental professional).

<sup>xx</sup> 40 CFR 312.11(a).

<sup>xxi</sup> ASTM E 1527-05, § 1.1.2.

<sup>xxii</sup> 42 USC 9601(14).

<sup>xxiii</sup> ASTM E 1527-05, § 6.

<sup>xxiv</sup> ASTM E 1527-05, Appendix X3.

<sup>xxv</sup> ASTM E 1527-05, § § 6.3, 6.4, 6.6.

<sup>xxvi</sup> ASTM E 1527-05, § § 7.3.2, 12.3.

<sup>xxvii</sup> ASTM E 1527-05, § 7.5.1.

<sup>xxviii</sup> 40 CFR 312.27(c) (exception for unusual circumstances where an onsite inspection cannot be performed).

<sup>xxix</sup> 40 CFR 312.22 and 312.25(b); 70 Fed. Reg. at 66092.

<sup>xxx</sup> ASTM E 1527-05, § 6.2.

<sup>xxxi</sup> ASTM E 1527-05, § 12.6.

<sup>xxxii</sup> ASTM E 1527-05, § 12.7.

<sup>xxxiii</sup> ASTM E 1527-05, § 12.6.1.

**STEWART FREEMAN  
ENVIRONMENTAL LAW ESSAY CONTEST  
2005 WINNER**

Each year the Environmental Law Section of the State Bar of Michigan sponsors an environmental law essay contest open to all students enrolled in any U.S. or Canadian law school. The winning essay receives a cash prize and the opportunity to be published in the Michigan Environmental Law Journal.

This year the Environmental Law Section honors the memory of Stewart Freeman, who helped establish the Environmental Law Section and subsequently served as ELS Chairperson. Stewart Freeman was a member of the Michigan Attorney General Office for 38 years, serving as Assistant in charge of Environmental Protection over the span of three different administrations.

The 2005 winning environmental law essay, published below, was written by Tammy L. Helminski, a student at the University of Michigan Law School, Ann Arbor, Michigan.

**Construction Permits for  
Privately-Owned Wastewater Treatment Plants  
After *Lake Isabella***

**By Tammy L. Helminski**

**I. INTRODUCTION**

In Lake Isabella Development, Inc v Village of Lake Isabella & Dep't of Env'tl Quality<sup>1</sup>, the court found that the Michigan Department of Environmental Quality's ("DEQ") regulatory scheme for authorizing privately-owned wastewater treatment plant construction permits was flawed. The DEQ had given local governments the ability to essentially veto such permits. The court held the DEQ could not give away this power to municipalities because the approval for construction permits was solely for the DEQ. However, in remedying its approval process in accordance with the ruling, the DEQ violated the Michigan Administrative Procedures Act (APA).

Wastewater treatment is a service vital to every household. In some settings, treatment is purely private, meaning that it serves only the one house from which the wastewater flows. Private systems in Michigan almost always consist of septic tanks. In other settings, wastewater treatment is public, meaning that the treatment system serves multiple households. Most often such public treatment systems are also public in another sense because they are owned, operated and maintained by the local unit of government (LUG), such as a city, township, or county. The type of public wastewater treatment system at issue in this paper is not owned by the LUG, but by a private entity. This paper will refer to such a system as a privately-owned wastewater treatment plant.

The regulation of all wastewater treatment plants (WWTPs), whether private septic tanks, publicly owned WWTPs or privately-owned WWTPs, falls to the DEQ.<sup>2</sup> In 1999, the DEQ promulgated Administrative Rule 299.2933, more commonly known as Rule 33. This rule establishes general criteria for the submittal of plans and specifications to the DEQ prior to the issuance of a construction permit for a new sewerage system or alterations to an existing system. Section four of Rule 33 provides:

When the owner of the proposed sewerage system is not a governmental agency, the application for a permit shall include a resolution from the local government agency having jurisdiction, stating that the government agency shall assume responsibility for the effective continued operation and maintenance of the proposed sewerage system if the owner in any way fails to perform in this capacity. A copy of contractual or other arrangements between the owner and the governmental agency, which provide for the continuity of service agreement, shall also be submitted.<sup>3</sup>

Essentially this section requires those seeking to build privately owned WWTPs to obtain agreement from the appropriate LUG that the LUG will take responsibility for the facility if the private owner fails to provide wastewater treatment to the households that discharge to the WWTP. While the rule on its face does not sound unreasonable, problems emerged through its application to proposed developments. Rule 33 provides no guidance on how an LUG should evaluate a request for resolution that they take on secondary responsibility for a private owned WWTP; it only states that a non-governmental entity must submit such an LUG resolution.<sup>4</sup> Therefore, an LUG could refuse to pass such a resolution for the sole reason it did not want the development. A statute with a purpose of ensuring safe wastewater treatment had, in the eyes of some developers, been transformed into a form of zoning. Without approval from the LUG, the homes would have no sewer service, and without sewer, the developer could not build the development. Rule 33 only applied when developers wanted to build a privately-owned WWTP.<sup>5</sup> It could be avoided by providing sewer service through other means.

With sewer access, there are essentially three options for the developer to consider: 1) individual septic systems for each lot, 2) tying the homes to existing publicly owned WWTP, or 3) building a privately owned WWTP to service the new development. Septic systems are not a desirable option because the Michigan Legislature has declared that septic systems pose a threat to the public health safety and welfare of the residents of this state.<sup>6</sup> Additionally, septic tanks require specific soil percability conditions and adequate lot size that may not be present at the site being developed.<sup>7</sup> Tying the homes into an existing WWTP run by the LUG may be the most desirable option for the developer, but it is not always an option that is available. A WWTP may not be able to handle the additional flow from more users or the proposed development may not be located near existing sewer main pipes.

If installing septic systems to the home sites and tying the new homes to existing WWTPs are not feasible options, the developer may then consider building its own WWTP. The design criteria and the effluent parameters for the quality of the water after it has been treated are the same for WWTPs owned by LUGs and those that are privately owned.<sup>8</sup> The main difference is that privately owned systems were subject to Rule 33. The fact that LUGs began using Rule 33 as an anti-growth tool is what spurred Lake Isabella Development, Inc. to challenge the validity of the rule.<sup>9</sup>

## **II. LAKE ISABELLA**

### **A. Overview of the case**

Lake Isabella Development, Inc. (hereinafter “the Developer”) submitted a site plan for the construction of thirty-eight single family homes on twenty-five acres of land adjacent to Lake Isabella.<sup>10</sup> The site plan was permitted under local zoning, and the planning commission for the Village of Lake Isabella (hereinafter “the village”) conditionally approved the project provided that the developer obtain all required permits.<sup>11</sup> The development included constructing a privately-owned WWTP because the village did not have a public treatment facility, and the lakeside soils were not suitable for septic systems.<sup>12</sup> The DEQ, however, refused to review the Developer’s construction permit application for the WWTP because the application did not contain the resolution required under Rule 33. The village refused to pass the resolution accepting secondary responsibility, and the proposed development project was effectively blocked.<sup>13</sup>

In response, the Developer brought an action against the village for regulatory taking and violation of due process. The Developer also asked for injunctive and declaratory relief against the DEQ.<sup>14</sup> The trial court granted summary disposition for the Developer, and the Michigan Court of Appeals granted leave for an appeal from the DEQ. The sole issue on appeal was the trial court’s declaration that Rule 33 “does not comply with the legislative intent underlying the enabling statute and is arbitrary and capricious.”<sup>15</sup> The court of appeals upheld the order and found Rule 33 invalid.<sup>16</sup>

The appellate court used a three part test to evaluate the validity of Rule 33: 1) is the rule within the subject matter of the enabling statute; 2) does the rule comply with the legislative intent of the DEQ’s enabling statute; and 3) is the rule arbitrary or capricious.<sup>17</sup> The court found that Rule 33 was within the legislative intent of the DEQ’s enabling statute because the Michigan Legislature gave the DEQ authority over sewerage systems in Part 41 of the Natural Resources and Environmental Protection Act.<sup>18</sup> However, it invalidated the rule based on the second and third parts of the test.

To support its holding that Rule 33 does not comply with the legislative intent underlying the DEQ’s enabling statute, the court highlighted the fact that the rule effectively confers an indirect veto power to municipalities.<sup>19</sup> A municipality can choose whether or not to pass the resolution required under Rule 33, but without this resolution a developer cannot get a permit application approved by the DEQ. “Undoubtedly, a municipality’s exercise of discretion pursuant to Rule 33 cannot guarantee that the DEQ will grant a permit for a proposed sewerage system, but it can guarantee that a permit will not be granted.”<sup>20</sup> Allowing the municipality this discretion is against the intent of the statute. MCL 342.4105(1) - (2) provides that both individuals and government agencies must get permits from the DEQ. As such, the statute grants exclusive jurisdiction to the DEQ over the issuance of WWTP permits. Transferring decision-making authority to municipalities is contrary to this legislative intent.<sup>21</sup>

While the court acknowledged that Rule 33 was an enforcement mechanism, it rejected the DEQ’s argument that Rule 33 was merely enforcing preexisting duties. The DEQ argued that the statute already gave LUGs responsibility for all sewer systems, whether or not it was a municipality or private owner that operated such system. The court, though, did not agree. First, the court did not agree that the statute imposed strict liability upon municipalities for sewer discharge originating within its boundaries.<sup>22</sup> Second, the court ruled that statutory provisions regarding the general duty of villages to provide for public welfare were irrelevant because the WWTP was not being provided by a village.<sup>23</sup> Likewise, the court rejected DEQ’s argument that all sewerage systems were “public utilities.” Just because a “sewer system serves the public and is, therefore, a public utility in the ordinary sense of the word,” the sewer is not necessarily a “public utility.”<sup>24</sup> The sewerage system at issue is a closed system servicing only those private individuals within the development, not accessible to the public at large. Therefore, the statutory provisions relating to public utilities did not apply in the instant case. The court concluded that the enforcement mechanism of Rule 33 created, for developers, a new burden

and a new remedy for wastewater treatment plant permit approval that was not supported by the statute.

In holding that Rule 33 was arbitrary and capricious, the court disagreed with the DEQ's argument that Rule 33 was rationally related to the purposes of the statute because local municipalities are in a better position than the DEQ to take over responsibilities for abandoned WWTPs.<sup>25</sup> The court stated that the DEQ was truly in the better position because, like municipalities, it could directly assess the costs of the system on the users, plus the DEQ has access to experts and resources needed to quickly make abandoned systems operational to prevent pollution to waters of the state.<sup>26</sup> The court went further and stated Rule 33 was arbitrary and capricious because it was an impermissible delegation of power. Administrative agencies are allowed to delegate power, but it must be accompanied by at least some standards regarding the exercise of that power. Rule 33 contains no criteria for an LUG to use when deciding whether or not to pass the resolution. Since the DEQ had not articulated any criteria for the LUG, it was an impermissible delegation.<sup>27</sup>

Understanding how the court invalidated Rule 33 is important to understanding the current allocation of responsibility for privately-owned WWTPs. To summarize, the court stated clearly what provisions do *not* govern privately-owned WWTPs. They are not to be automatically treated as being under the domain of municipalities because municipalities do not have strict liability for sewage originating within their boundaries. They are not covered under the general duties of villages because they are not built and operated by a village. Finally, they are not covered under public utilities because they are not "public" in the sense used in the statute. What provisions then do govern privately-owned WWTPs? The court in *Lake Isabella* only offered the provisions of the statute that require both individuals and government agencies to obtain permits from the DEQ.

## **B. DEQ's response to court's ruling**

What the court's analysis in *Lake Isabella* reveals is that the state's statutory and regulatory scheme was not designed with privately-owned WWTPs specifically in mind. The Legislature gave DEQ the authority over sewage systems in general, but the specific statutes and regulations providing detail about how the DEQ shall regulate such systems are virtually silent regarding privately-owned WWTPs. The statutory provisions relied upon by the DEQ only apply to systems owned and operated by LUGs. Rule 33 acted as a supplement to address privately-owned WWTPs and as an attempt to bring them under the LUG's umbrella of responsibility. However, the court invalidated this rule.

On June 10, 2004, seven months after the *Lake Isabella* decision, the chief of the DEQ's Water Division sent an "interoffice communication" to all water division supervisors establishing a new policy "as a direct result of an adverse ruling from the Michigan Court of Appeals invalidating Rule 33(4)."<sup>28</sup> The memo reaffirmed the DEQ's statutory authority to require specific conditions before issuing a construction permit for a sewerage system.<sup>29</sup> Pursuant to that statutory authority, Michigan Administrative Rule 299.2941 (Rule 41) provides that the DEQ does not have to issue a permit unless one of two conditions to protect the public health and prevent unlawful pollution are met: 1) proper devices are or will be available and in satisfactory operation prior to discharge; or 2) a definite program or agreement satisfactory to the department leading to the construction and operation of such system has been accepted by the department. Rule 41 does not specify the kind of program nor the type of agreement that would be satisfactory. Instead, it was Rule 33 that provided one such agreement. With Rule 33 in place, the DEQ approved construction permits because there was an agreement with the municipality that was satisfactory to the department that privately-owned WWTPs would be operated properly. With Rule 33 invalidated, the DEQ Water Division implemented a new

process to make sure that construction permit applications met the conditions to protect health and prevent pollution. The June 2004 interoffice communication describes the new two-step alternative process.

In preparing a construction permit application, the developer must first approach the LUG and request that it pass a resolution agreeing to assume responsibility for the WWTP in the event the private owner/entity is unable to continue the system's operation.<sup>30</sup> If the LUG passes the resolution, then the parties will have to enter into a binding agreement where the LUG expressly agrees to the responsibility. The developer incorporates this agreement into the construction permit application. If the LUG declines the resolution, then the developer moves on to the second step of the process.

In the second step, the developer submits a letter from the municipality stating that the municipality refused to enter into an agreement with the developer.<sup>31</sup> Further, the developer establishes a legal entity that will be the owner of the WWTP and serve as the user association. This entity can take on any legal form such as a limited liability company, professional corporation, limited liability partnership, or general partnership. The user association then establishes a perpetual funding mechanism, or escrow, "to ensure sufficient funding is available and restricted for the sole purpose of continuing uninterrupted system operation and maintenance in the event that the primary funding mechanism from user fees or other assessments is inadequate or becomes unavailable."<sup>32</sup> The developer also establishes a covenant running with the land that incorporates the escrow and requires each sewerage system user agree to pay the user fee. The escrow initially needs to be funded at a level necessary to maintain the system for two years. The covenant must include the requirement that within two years after the system operation commences, the escrow will be funded at a level to maintain the system for five years.<sup>33</sup> All of these actions, including creating a legal entity, establishing the two-year escrow, and implementing a covenant running with the land, must be completed to show the existence of a definite program or agreement that is satisfactory to the DEQ under Rule 41. They are now required as part of the construction application process when the municipality refuses to assume secondary responsibility for the system.

### III. DEQ'S RESPONSE VIOLATES APA

The DEQ's response to the *Lake Isabella* decision avoids the regulatory and statutory issues detailed in the case by re-inventing the spirit of Rule 33. As recognized in its memo, the policy is designed to help the DEQ face two major problems: "difficulty in imposing liability against individual users; and due to the court ruling in the Lake Isabella case, the DEQ is unable to force a municipality to comply with Rule 33(4)"<sup>34</sup> as a condition precedent to issuing a WWTP construction permit. The policy in the DEQ memo maintains a preference for municipalities to accept secondary responsibility for privately-owned WWTPs, but it does not allow a refusal by the municipality to act as a direct veto on the project. Instead, the policy sets up a mechanism that, in the absence of the backing of a municipality, ensures there is a legal entity that bears responsibility for the system, that this entity has access to funds for the continuing operations, and that there are funds available in the event that entity is no longer able to run the system. Though this may sound like a plausible solution to the two problems the DEQ mentions, there are concerns with the policy as announced. Is establishing this policy a valid exercise of DEQ's authority? Assuming that it is valid, is it the best way to meet the concerns and objectives of the interests involved?

### **A. Policy announced in DEQ memo is invalid under the Michigan Administrative Procedures Act.**

There are two striking features about the policy announced by the DEQ. First, the DEQ specifically calls it a “policy” in the memo. Second, the memo is labeled an “interoffice communication.” The requirements outlined in the memo go beyond a policy and instead establish a new rule. New rules are not allowed to be implemented via an interoffice communication. They are not valid until they are promulgated in accordance with the Michigan Administrative Procedures Act (APA).<sup>35</sup>

The memo acknowledges that it is establishing a policy as a direct result of Rule 33 being invalidated.<sup>36</sup> It is interesting to observe that the DEQ did not respond by replacing Rule 33 with a new “rule,” but instead a “policy” announced through an internal communication. A rule is defined in part by the APA as “an agency regulation, statement, standard, policy, ruling or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency.”<sup>37</sup> The Legislature defined “rule” broadly so as to defeat the inclination of “agencies to label as bulletins, announcements, guides, interpretive bulletins . . . [those] which, in legal operation and effect, really amount to rules.”<sup>38</sup> It does not matter that the DEQ refers to the requirements in the memo as a “policy.” “The agency’s label is not dispositive and the inquiry must focus on the ‘actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule.’”<sup>39</sup>

The policy announced by the DEQ falls within this definition of “rule.” It is a policy that helps the DEQ implement and enforce the portion of NREPA the DEQ administers dealing with sewerage systems. Additionally, it prescribes the agency practice for approving WWTP construction permits. The DEQ’s label of “policy” does not matter because the effect of the memo’s requirements is to change the rights of the public. Those developers, the members of the public that are the object here, that wish to build privately-owned WWTPs must now take the specific actions outlined in the DEQ policy before the DEQ will grant them a permit. The policy acts like a rule. As a rule, it is not valid unless it is properly promulgated under the APA.<sup>40</sup> Merely announcing the policy through an interoffice communication does not meet the requirements for promulgation.<sup>41</sup>

The DEQ may defend its policy based on the voluntary nature of building WWTPs. The policy only applies if the developer wishes to build its own system. Therefore, it is not a rule because it is only binding when the developer voluntarily opts into the program. This argument, though, has been rejected by Michigan courts. In American Federation of State, County, & Municipal Employees v Dep’t of Mental Health, the State argued that a standard contract for services with the Department of Mental Health was merely a guideline because it only binds providers if they voluntarily enter into a contract with the department. The court struck down this logic because there really was no choice for the providers; they often solely exist to contract with the Department of Mental Health. If they want to be in business, then they have to abide by the form contract. Therefore, the requirements in the form contract were not voluntary and must be promulgated.<sup>42</sup> In so holding, the court relied on Delta County v Dep’t of Natural Resources where the DNR conditioned granting a license to build and operate a landfill on various guidelines and internal policies.<sup>43</sup> The court held that these were effectively rules. The guidelines and policies affected the rights and practices available to the public. “The rights of the public may not be determined, no licenses denied, on the basis of unpromulgated policies.”<sup>44</sup> As with the landfill at issue in Delta County, the DEQ cannot base its determination of whether to grant a WWTP construction permit on a policy contained in an interoffice communication. Such a policy must be promulgated.

The DEQ has another defense that its policy is not a rule, and therefore still valid. The DEQ could try to argue that the policy falls within one of the exceptions to the definition of a rule. One exception says “intra-agency memorandums” are not rules. However, this provision further states that it is only memorandums that do “not affect the rights of, or procedures and practices available to, the public.”<sup>45</sup> Clearly the requirements contained in the DEQ memo affect the public in that they provide a new procedure which must be complied with before a privately-owned WWTP can be built. Furthermore, it is not altogether clear whether the document is an “intra-agency memorandum.” The heading of the document may say “INTEROFFICE COMMUNICATION,” but in reality the document has been disseminated to interested members of the public to communicate the new construction permit application requirements for privately-owned WWTPs. It has not been confined to the offices of the DEQ Water Division and does not only bind DEQ employees. It has been provided to the public and allegedly binds that public to new duties and responsibilities.

Another exception excludes “an interpretive statement, guideline, informational pamphlet, or other material that in itself does not have the full force and effect of law but is merely explanatory” from the definition of rule.<sup>46</sup> This exception has been narrowly construed because “[w]hen an action taken by an agency alters the status quo, those who will be affected by its future application should have the opportunity to be heard and to participate in the decision-making.”<sup>47</sup> However, it is not always easy to determine if a statement or policy is merely an explanatory interpretive statement of if it is a rule changing the public’s rights. The court in Faircloth v Family Independence Agency attempted to distinguish between a rule and an interpretive statement:

Michigan courts have focused on the effect of an unpromulgated policy only where the agency establishes policies and procedures under a broad grant of authority to administer the program. Under those circumstances, the agency policies may have the force and effect of law because the relevant statute does not provide specific standards for eligibility and administration of the program. The policies are not interpretive statements because they do not merely interpret or explain the statute or rules from which the agency derives its authority. Rather, they establish the substantive standards implementing the program. By contrast, where an agency policy interprets or explains a statute or rule, the agency need not promulgate it as a rule even if it has a substantial effect on the rights of a class of people because an interpretive statement is not, by definition, a rule under the APA.<sup>48</sup> [Citations omitted.]

The policy contained in the DEQ memo does not merely explain a statute or a rule, but establishes substantive standards according to its broad grant of authority over sewerage systems. Under the principles explained in Faircloth, the policy is a rule.

The DEQ memo references the statutory authority under which it is acting in setting up the new policy for privately-owned WWTPs, namely Part 41 of the NREPA granting DEQ authority to regulate sewerage systems.<sup>49</sup> The DEQ further states that it has authority under two rules. Rule 41, promulgated under Part 41 of the NREPA, provides that proper devices or a definite program governing the operation of sewerage systems be in place before they issue a construction permit. Rule 55 requires that the sewerage system operators maintain their systems to avoid unlawful discharges.<sup>50</sup> Arguably, new requirements for obtaining a construction permit could be viewed as an explanation of its requirements under these rules. This would place it in the second half of the Faircloth analysis, meaning the policy is an interpretive statement. However, the DEQ also recognizes that it is acting under its “broad authority to reject or require modifications to a construction permit application if it finds that the proposed sewerage system plans and specifications submitted by the applicant do not adequately protect the public health or may not prevent unlawful pollution of the waters of the state.”<sup>51</sup> Actions taken under a broad authority fall in the first half of the Faircloth analysis. The

policy set out in the DEQ memo goes beyond explanation and creates substantive standards under their broad authority over construction permit applications, most drastically exhibited by the escrow requirements.<sup>52</sup> For example, Rule 41 does not say that a permit application must establish an escrow system or even a financial assurance mechanism for the operation of the system. If it did, then the DEQ's argument would be stronger that the new policy is merely explanatory because the financial criteria would already be contained in the rule and the memo's details of the escrow system would be merely explaining those financial criteria. But Rule 41 is silent in this regard. The DEQ memo, in establishing new financial requirements for construction permit applications, presents substantive standards that act as new rule. Further, as discussed above regarding Delta Co., the requirements of granting permits cannot be based on unpromulgated rules. The courts have already recognized that such standards go beyond explanation and create substantive requirements.

While the DEQ memo may attempt to classify the requirements contained therein as a "policy" merely explaining existing rules that were promulgated under their broad grant of authority, this is just not so. The requirements establish substantive standards that amount to a rule. This new rule is invalid until the DEQ undergoes the administrative procedures of the APA.

### **B. Without proper promulgation, it is unclear if DEQ policy is the best way to meet the concerns and objectives of the interests involved**

The previous section showed that the requirements in the DEQ memo are being implemented without proper procedures, but what about the substance of the new requirements? Do they address the concerns of the DEQ that spurred them to implement Rule 33 in the first place, the concerns of the court in invalidating Rule 33, and the concerns of the developers that led them to challenge the rule? What about the concerns of other interested parties?

The case suggests that the DEQ's main concern is to oversee sewerage systems to prevent pollution to waters of the state, including ensuring that there are funds available to manage sewage systems in the event the primary owner is no longer able to do so.<sup>53</sup> The DEQ's memo states that the policy is designed to help the DEQ face their concerns that it is difficult to impose liability against individual users and that they can no longer "force" a municipality to comply with Rule 33(4).<sup>54</sup> Considering all of these concerns together, the policy does, on its surface, seem to alleviate them. The policy requires that the user association be some form of legal entity so that there is no danger of having to enforce compliance against individual users of the sewerage system. By setting up the escrow system, first for two years of operation and then for five years, the policy also ensures that if something were to happen to the primary owner/operator, then there would be funds to continue the operation for two to five years. Examining the policy a little deeper, the question remains as to what happens to the WWTP after the escrow funds run out. If something happens to the primary owner/operator so that it is no longer able to provide treatment service and after the escrow funds are spent five years later, what then? The policy in the DEQ memo does not address what would happen and does not provide any mechanism for establishing additional funds to maintain the current system or for providing alternative treatment service.

The court's concern, and the reason it invalidated Rule 33, was that the rule effectively transferred to municipalities the authority to approve construction permits for privately-owned WWTPs without also providing any substantive criteria for which to grant or deny approval. Shifting this veto authority to municipalities is contrary to the statute's intent.<sup>55</sup> The policy set out in the DEQ memo seems to cure these problems. Though municipalities are still able to reject or accept secondary responsibility for the systems without following any specific criteria,

this does not signal the end of the project. The developer then has alternative steps it can take to still satisfy this part of its construction permit application. Municipalities no longer have the level of authority that was of concern in Lake Isabella.

Removing complete veto power from the municipality also alleviates the concern of developers that led them to challenge Rule 33.<sup>56</sup> Municipalities can no longer use the WWTP construction permit process as an alternative means to control development. The new policy gives developers the opportunity to ensure the viability of privately-owned sewerage systems on their own and not be dependent on the LUG. The alternative step allows developers to establish a legal entity that will bear the long-term responsibility for the system and an escrow account as a perpetual funding mechanism in the event the legal entity fails to operate the system as it should.

At first take, the DEQ has established a new policy that seems to address its goals within the limits established by the court in Lake Isabella. However, it is unclear if the policy is really the best way to ensure the safe and continued operation of privately-owned WWTPs. The new policy creates many unanswered questions for developers of the kind that challenged Rule 33 as well as for municipalities and other interested parties.

For developers, forming the legal entity and a covenant running with the land are not unusual steps to take in developing a new subdivision. The concerns, though, lie in the details of the covenant regarding the escrow system. The two year escrow required for the initial application will most likely have to be paid for by the developer. Will these financial requirements make the project financially infeasible? Further, the initial funds for the five year escrow will most likely be assessed by user fees. In subdivisions where the homes are built out over a number of years, will the user fees be sufficient? Will the user fees be too high and discourage residents from living there? Another issue is establishing the amount of escrow. Following the internal communication announcing the new policy for sewerage system construction permit approval, the DEQ Water Division published the "Financial Workbook for Private Wastewater Systems Operation and Maintenance."<sup>57</sup> The workbook contains worksheets to be filled out by a licensed professional engineer or certified WWTP operator to calculate the amount of escrow needed for the operation and maintenance of the treatment system. Do these worksheets portray an accurate picture of the costs over a two year time period or a five year time period?

Municipalities may also share this concern over the escrow. Are the funding levels sufficient to cover the operating costs for five years? Perhaps more importantly for LUGs, what happens at such time where the initial owner/operator is no longer operating the system and the five-year escrow funds are running out? Who will take over the costs and operation of the system? What mechanism is there for resolving this problem? After all, it will be the LUGs' residents that are in need of a basic service and its waters that are in danger of being polluted.

In addition to the concerns of developers and municipalities, there are other parties who have interests in the construction application process. For instance, there are companies that are hired by homeowners associations ("HOAs") to operate privately-owned WWTPs. They have an interest in the new DEQ policy because it is their operating costs that set the escrow levels, and their business survival depends on the viability of developers building privately-owned treatment systems. Additionally, potential residents of developments have interests in this process because sewer systems are essential to their daily life. Financially, they will want to make sure that the fees are not set too high because it is ultimately their user fees that fund the treatment systems, and they will not want them set too low because they will want the system to be adequately funded to run properly. Personally, they may be uncomfortable

knowing that their HOA may bear the ultimately liability for their sewage and may want other requirements built into the permitting process that provide more protection.

Many other parties may have concerns that are as of yet unknown. Their concerns are unknown because the DEQ never gave them a chance to voice them. Had the rule been properly promulgated, the DEQ could have avoided this problem. The APA requires the agency to provide notice of a proposed rule and allows for a public hearing.<sup>58</sup> Concerns from all parties could have been heard and addressed through the administrative procedures. Allowing the policy to be promulgated into a rule in accordance with the APA would allow for a better understanding of all the interests involved.

### III. CONCLUSION

The Lake Isabella decision is ultimately about the proper role of an LUG regarding privately-owned WWTPs. Rule 33 tried to insert them into the direct line of responsibility with veto power over the decision to not build the treatment plant. The court disagreed with this approach and said that the DEQ's authorizing statute does not allow for municipalities to have this much say. The court's position was that approval of WWTP construction permits was for the DEQ. The DEQ, though, still wants municipalities involved. The new policy does not do away with municipalities' participation altogether. Instead, it tries to strike a compromise with the role of the LUG by allowing them to voluntarily accept responsibility but also allowing for other means of ensuring safe, continued operations of the treatment systems. The DEQ policy also hints that the DEQ still believes, despite the court's rejection of this argument, that municipalities are strictly liable for these wastewater treatment systems. The first paragraph of the policy states: "Initially, it is noted that under Section 3109(2) of Part 31, Water Resources Protection, of the NREPA, a municipality . . . is liable for the direct or indirect discharge of raw sewage within its borders that enters the waters of the state." This leaves the court and the DEQ still at odds over the role of municipalities.

The problem with discussing the proper role of LUGs regarding privately-owned WWTPs is that neither the public's, nor the LUGs', nor the developers' positions on this matter are known. The question of whether LUGs should be allowed any power over the building of privately-owned WWTPs within their boundaries still lingers, let alone the degree of that power. Lake Isabella only said that LUGs do not have a say under the current system. The DEQ's new policy puts a band-aid on the construction application process so that it meets the requirements laid out by the court. It provides for municipality acceptance of secondary liability or the alternative implementation of the escrow system. The policy does not address whether this is truly the best way to handle privately-owned WWTPs, and it leads to further questions regarding the ultimate role of LUGs. It only serves as a means for exposing that the state has no clear position. This policy is invalid under the APA and should have been implemented through the administrative process.

Why did the DEQ not handle it differently? Perhaps they did not think it was necessary, or perhaps they were limited by lack of resources or political will. If they had gone through the administrative process, the state's position on the role of LUGs could have been determined. Municipalities, developers, and citizens could have spoken up about who should be making decisions about where, and if, privately-owned WWTPs are allowed to be built. The statute's current purpose is limited to ensuring the safe and continued operation of treatment plants in order to protect the environment. The administrative process could have exposed the inadequacy of this purpose in dealing with the link between privately-owned WWTPs and LUGs' role in managing development. Perhaps this would have encouraged the legislature to act in considering a strict liability regime for LUGs, perhaps not. The APA was passed because

legislative bodies have recognized a need to “ensure that none of the essential functions of the legislative process are lost in the court of the performance by agencies of many law-making functions once performed by our legislatures.”<sup>59</sup> The Lake Isabella court ruled on what the current law allows, but whether the new DEQ procedures match this law and whether the law even addresses the real concerns with privately-owned WWTPs are questions that remain unanswered. The main problem is that the role of LUGs has not been discussed in the public forum.

[T]he APA is essential to the preservation of a democratic society. Put simply, without public oversight and scrutiny of legislative action undertaken by administrative agencies, such agencies would rule without the normal safeguards of our republic. Indeed, the APA is a bulwark of liberty by ensuring that the law is promulgated by persons accountable directly to the people.<sup>60</sup>

The new policy implemented by the DEQ is more than just a policy. It is a rule that establishes a substantive standard, and its implementation is a legislative action by the DEQ. The APA’s function is to ensure that the DEQ takes such action in a way that considers the potential impacts as raised by the people. Because the DEQ did not follow the APA, we are left not knowing whether the content of the new DEQ policy is appropriate and not knowing the proper role for LUGs in approving construction permits for privately-owned WWTPs.

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<sup>1</sup> Lake Isabella Dev, Inc v Village of Lake Isabella and Dep’t of Env’tl Quality, 256 Mich App 393 (2003).

<sup>2</sup> Part 41 of the Natural Resources and Environmental Protection Act (NREPA), MCL §324.4101 et. seq.

<sup>3</sup> Mich AC, R 299.2933.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> MCL § 333.12752 provides:

Public sanitary sewer systems are essential to the health, safety, and welfare of the people of the state. Septic tank disposal systems are subject to failure due to soil conditions or other reasons. Failure or potential failure of septic tank disposal systems pose [sic] a threat to the public health, safety, and welfare; presents a potential for ill health, transmission of disease, mortality, and economic blight; and constitutes a threat to the quality of surface and subsurface waters of this state. The connection to available public sanitary sewer systems at the earliest, reasonable date is a matter for the protection of the public health, safety, and welfare and necessary in the public interest which is declared as a matter of legislative determination.

<sup>7</sup> See generally “How a House Works – What happens after the flush” by Spike Carlson, available at: [www.epa.gov/npdes/pubs/what\\_happens\\_after\\_the\\_flush.pdf](http://www.epa.gov/npdes/pubs/what_happens_after_the_flush.pdf), last accessed 3/20/05 (describing the basics of how septic tanks work); George Tchobanoglous & Franklin, Burton, Metcalf & Eddy, Inc., Wastewater Engineering (3rd. ed. 1991) [hereinafter Metcalf & Eddy], at 1041-70 (detailing specific engineering design considerations for septic systems).

<sup>8</sup> MCL § 324.3112(1) provides: “A person shall not discharge any waste or waste effluent into the waters of this state unless the person is in possession of a valid permit from the department.” The statute does not define a person to only be a LUG or only a private party.

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<sup>9</sup> Lake Isabella, n1 supra at 393.

<sup>10</sup> Lake Isabella, n1 supra at 396

<sup>11</sup> Lake Isabella, n1 supra at 396

<sup>12</sup> Lake Isabella, n1 supra at 396

<sup>13</sup> Lake Isabella, n1 supra at 397

<sup>14</sup> Lake Isabella, n1 supra at 397

<sup>15</sup> Lake Isabella, n1 supra at 397

<sup>16</sup> Lake Isabella, n1 supra at 396

<sup>17</sup> Lake Isabella, n1 supra at 398, citing Dykstra v Dep't of Natural Resources, 198 Mich App 482 (1993).

<sup>18</sup> Lake Isabella, n1 supra at 398; MCL § 324.4101 et seq. gives the Department authority to promulgate and enforce rules regarding the operation of sewerage systems, including sewage treatment works.

<sup>19</sup> Lake Isabella, n1 supra at 409

<sup>20</sup> Lake Isabella, n1 supra at 407

<sup>21</sup> Lake Isabella, n1 supra at 407.

<sup>22</sup> Lake Isabella, n1 supra at 404. MCL § 324. 3109(2) provides:

The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, *a municipality responsible for the discharge may be subject to the remedies provided in section 3115*. If the discharge is the subject of a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties prescribed in section 3115. [Emphasis added].

The court, though, did not believe this created strict liability because they found the remedies in MCL § 324.3115 to require actual knowledge, constructive knowledge, or disregard and not strict liability.

<sup>23</sup> Lake Isabella, n1 supra at 406.

<sup>24</sup> Lake Isabella, n1 supra at 405, citing Butcher v Grosse Ile Twp, 24 Mich App 389, 399 (1970).

<sup>25</sup> Lake Isabella, n1 supra at 409.

<sup>26</sup> Lake Isabella, n1 supra at 411-12.

<sup>27</sup> Lake Isabella, n1 supra at 411.

<sup>28</sup> Interoffice Communication from Richard A. Powers, Chief, Water Division to All Water Division Supervisors; Subject: Public Sewerage System Construction Permit Approval, and Owner/User Obligations Pursuant to Part 41, Sewerage Systems, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended ("NREPA"). June 10, 2004. [hereinafter "DEQ memo"].

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<sup>29</sup> MCL § 324.4107.

<sup>30</sup> DEQ memo, n 28 supra at 2.

<sup>31</sup> DEQ memo, n 28 supra, at 2.

<sup>32</sup> DEQ memo, n 28 supra at 3.

<sup>33</sup> DEQ memo, n 28 supra at 4.

<sup>34</sup> DEQ memo, n 28 supra at 4. The DEQ's statement is not quite accurate. The DEQ could never force a municipality to follow Rule 33. They could only force a private owner of WWTP to follow the rule by obtaining a resolution from a municipality.

<sup>35</sup> MCL § 24.207. See also Danse v City of Madison Heights, 466 Mich 175, 181 (2002) (per curiam) (holding that the Assessor's Manual prepared by the state tax commission did not have the force of law, but was only a "guide" because it was not promulgated as an administrative rule); Goins v Greenfield Jeep Eagle, Inc, 499 Mich 1, 10 (1995) (holding that the requirements in a manual sent by the Secretary of State to car dealerships did not have the force and effect of law and therefore did not proscribe certain actions by dealers); Dep't of Natural Resources v Bayshore Assoc, Inc, 210 Mich App 71, 84 (1995) (per curiam) (holding that the Department of Natural Resources's lack of properly promulgated rules for the renewal of operating permits for marinas violated of due process).

<sup>36</sup> DEQ memo, n 28 supra at 1.

<sup>37</sup> MCL § 24.207.

<sup>38</sup> Detroit Base Coalition for the Human Rights of the Handicapped v MI Dep't of Social Service, 431 Mich 172, 184 (1988) (quoting Cooper, State Administrative Law, p. 108).

<sup>39</sup> Detroit Base Coalition, n 38 supra at 188 (quoting Schinzel v Dep't of Corrections, 124 Mich App 217, 219 (1983)); see also American Fed'n of State, County, & Mun Employees v Dep't of Mental Health, 452 Mich 1, 9 (1996) (summarizing review required to determine if agency action is a rule).

<sup>40</sup> MCL § 24.207.

<sup>41</sup> MCL § 24.241-43.

<sup>42</sup> AFSCME, n 39 supra at 10-11.

<sup>43</sup> Delta Co v Dep't of Natural Res, 118 Mich App 458 (1982).

<sup>44</sup> AFSCME, n 39 supra at 10-11 (quoting Delta Co, n 43 supra at 468).

<sup>45</sup> MCL § 24.207(g).

<sup>46</sup> MCL § 24.207(h).

<sup>47</sup> Detroit Base Coalition, n 38 supra at 184-85.

<sup>48</sup> Faircloth v Family Independence Agency, 232 Mich App 391, 404 (1999).

<sup>49</sup> DEQ memo, n 28 supra at 1.

<sup>50</sup> DEQ memo, n 28 supra at 2.

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<sup>51</sup> DEQ memo, n 28 supra at 1.

<sup>52</sup> DEQ memo, n 28 supra at 3-4.

<sup>53</sup> Lake Isabella, n1 supra at 411.

<sup>54</sup> DEQ memo, n 28 supra at 4.

<sup>55</sup> Lake Isabella, n1 supra at 409.

<sup>56</sup> See § IIB, supra.

<sup>57</sup> State of Michigan Department of Environmental Quality, Financial Workbook for Private Wastewater Systems Operation and Maintenance, July 2004.

<sup>58</sup> MCL § 24.241-43.

<sup>59</sup> Detroit Base Coalition, n 38 supra at 177 (quoting Bonfield, State Administrative Rule Making, §1.1.1, p. 4).

<sup>60</sup> AFSME, n 39 supra at 14-15.

## ***COOPER INDUS, INC v AVIALL SERVICES, INC:*** <sup>1</sup>

### **Voluntarily Clean Up and Involuntarily Pay the Entire Bill**

**By Melissa Bozell**

#### I. INTRODUCTION

Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability. Recognition of the right reflects the view that when two or more persons share the responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.<sup>2</sup>

On December 13, 2004, the United States Supreme Court significantly decreased the incentive for owners of contaminated property to voluntarily clean it up by disallowing them to seek contribution<sup>3</sup> under Section 113(f)(1)<sup>4</sup> of the Comprehensive Environmental Response, Compensation, and Liability Act<sup>5</sup> (CERCLA) from other potentially responsible parties (PRPs) unless the current owner has first been sued under Section 106<sup>6</sup> or 107(a)<sup>7</sup> of CERCLA.<sup>8</sup> In *Cooper Indus, Inc v Aviall Services, Inc*, seven of the nine Supreme Court Justices held that where a private party has not been sued under CERCLA Section 106 or 107(a) it may not sue other PRPs for contribution under Section 113(f)(1).<sup>9</sup> As this casenote will show, public policy and legislative intent in enacting CERCLA do not support this interpretation of contribution rights under Section 113(f)(1).<sup>10</sup>

Section 113(f)(1), known as the enabling clause, was added by the Superfund Amendments and Reauthorization Act of 1986 (SARA)<sup>11</sup> and was examined in depth by the Court. The enabling clause provides that any person “may” seek contribution from any other person liable or potentially liable under CERCLA Section 107(a) “during or following any civil action” under CERCLA Section 106 or 107.<sup>12</sup> The savings clause of Section 113(f)(1) goes on to provide that “[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action” under Section 106 or 107.<sup>13</sup> SARA, under Section 113(f)(3)(B)<sup>14</sup>, created a separate express right to contribution available to PRPs who have entered into an administrative or judicially approved settlement.<sup>15</sup> However, this Casenote will not address that right to contribution since Aviall did not enter into any form of settlement with either the state or federal government.<sup>16</sup> The issue that the Court addressed in interpreting the enabling clause was whether the word “may” in Section 113(f)(1) should be read to mean “may only” or read permissively to allow the suit for contribution where the PRP has not been subject to either a Section 106 or 107 action and has not entered into a settlement.<sup>17</sup> The Court held that Section 113(f)(1) should be read to mean “may only” and therefore, since Aviall was not subject to either a Section 106 or 107 action and did not enter into a settlement with the government, it was not able to bring a Section 113(f)(1) suit for contribution against another PRP.<sup>18</sup>

Beginning in Section II, this Casenote will outline the legislative history of CERCLA as it relates to contribution actions by one PRP against another. It will then provide a brief overview of the various interpretations the courts have given to Sections 106, 107 and 113 of CERCLA. In Section III, this Casenote will offer an analysis of *Cooper*.<sup>19</sup> This Casenote will identify how this decision is contrary to the intent of the legislature in enacting CERCLA and contrary to public policy. This will be accomplished by examining the legislative history as well as caselaw that supports the legislative intent. It will explore the common arguments against allowing a PRP who voluntarily cleans up to obtain contribution under Section 113(f)(1) absent a Section 106 or 107 action and provide counterarguments to each. In addition, this Casenote will explore the main arguments against allowing a PRP to pursue a Section 107 action against another PRP and provide counterarguments to each.<sup>20</sup> This Casenote will examine the strong public-policy argument in favor of allowing a current owner who voluntarily undertakes clean up to obtain contribution from another PRP even when no government actions have been taken under either Section 113 or 107. This Casenote will then show how a clarification by Congress of a PRPs right to contribution, even absent a settlement with the government or a Section 106 or 107 action by the government, could: (1) encourage rapid voluntary cleanups, (2) increase settlements by PRPs with the government, (3) reduce litigation expenses of the PRPs and the government and (4) encourage brownfield redevelopment.

## II. BACKGROUND

### A. *An Overview of the History of CERCLA on Contribution Rights*

When CERCLA was enacted in 1980, Congress intended it to encourage prompt and voluntary cleanup<sup>21</sup> and “to hold responsible parties liable for the costs of these cleanups.”<sup>22</sup> However, CERCLA, unlike other environmental statutes, did not establish a partnership with the states in its implementation and enforcement.<sup>23</sup> Under CERCLA, PRPs are subject to strict, joint and several, and retroactive liability.<sup>24</sup> As written, CERCLA did not expressly provide a right of contribution to liable parties against other parties who contributed to the harm.<sup>25</sup> Although the liability set under CERCLA may seem harsh, since generally there is a right of contribution among two or more tortfeasors liable to the same person for the same harm,<sup>26</sup> courts typically found an implied right to contribution in CERCLA.<sup>27</sup>

Some courts found this implied right to contribution rooted in federal common law.<sup>28</sup> In *City of Philadelphia v Stepan Chemical Co*, 544 F Supp 1135 (E.D. Pa. 1982)<sup>29</sup>, the city of Philadelphia, itself a PRP, brought an action against Stepan Chemical Company and other PRPs to recover costs that it incurred cleaning up waste which the companies illegally dumped on city property.<sup>30</sup> At the time the city cleaned up the waste, it was not subject to a government action under Section 106 or 107 and it had not entered into any settlement with the government.<sup>31</sup> The defendant companies in the case argued that the term “any other person” as used in Section 107(a)(4)(B) of CERCLA<sup>32</sup> did not include a PRP since that party is itself liable under CERCLA.<sup>33</sup> Although the court conceded that the defendant’s argument “possesse[d] a degree of analytical neatness”<sup>34</sup> it rejected the argument since the end result would not comport with the legislative history or objectives of CERCLA. The natural result of the defendant’s argument would be the city, which voluntarily cleaned up, being precluded from recovering its costs from the companies who caused the problem.<sup>35</sup> That result would have been contrary to one of the main objectives of CERCLA – “to facilitate the

prompt clean up of hazardous dump sites by providing a means of financing . . . private responses and by placing the ultimate financial burden upon those responsible for the danger.”<sup>36</sup> Therefore the court held, under the theory of a federal common law right to contribution, that the “action is not barred because of some theoretical inconsistencies with statutory provisions. . . .”<sup>37</sup>

Others looked to the statute itself, in particular, Section 107(a),<sup>38</sup> as impliedly authorizing a right of contribution.<sup>39</sup> In *Tanglewood East Homeowners v Charles-Thomas*, 849 F2d 1568 (CA 5, 1988)<sup>40</sup> the Fifth Circuit looked to the language of Section 107 in reaching its conclusion that prior action taken by the government was not required before a PRP could recoup its response costs under Section 107 from another PRP.<sup>41</sup> In *Tanglewood*, one of the defendants, a bank, financed the development of a subdivision on land previously contaminated by a creosote company.<sup>42</sup> The plaintiff homeowner filed an action to recoup their response costs among other things.<sup>43</sup> The homeowners were not sued by the government and they did not enter into a settlement with the government.<sup>44</sup> To determine whether the homeowners had a cause of action, the court examined Section 107(a) of CERCLA.<sup>45</sup> In reading the statute to allow for recovery absent government action, the court relied on a Ninth Circuit opinion, *Wickland Oil Terminals v Asarco, Inc*, 792 F2d 887 (CA 9, 1986)<sup>46</sup> which analyzed the statute, regulations and legislative history and based its interpretation on the preamble to the rules revising the 1972 National Contingency Plan.<sup>47</sup> The preamble states that “it [is] absolutely clear that no Federal approval of any kind is a prerequisite to a cost recovery . . . .”<sup>48</sup> Therefore, the court held that the language of the statute itself, when coupled with its legislative history, provided a cause of action even where no prior governmental action had taken place.<sup>49</sup> The Supreme Court upheld this interpretation in dicta in *Key Tronic Corp v United States*, 511 US 809; 114 S Ct 1960; 128 L Ed 2d 797 (1994).<sup>50</sup>

Several Supreme Court decisions in the early 1980s cast doubt on the legitimacy of the federal courts reading implied rights of contribution into a federal statute.<sup>51</sup> In *Northwest Airlines, Inc v Transp Workers*, 451 US 77; 101 S Ct. 1571; 676 L Ed 2d 750 (1981),<sup>52</sup> the Court addressed whether courts have the power to create a right of contribution absent legislation<sup>53</sup> under the Equal Pay Act of 1963<sup>54</sup> and Title VII of the Civil Rights Act of 1964.<sup>55</sup> The Court recognized two instances in which a right to contribution may arise: (1) through express or clear implication by Congress or (2) “through the power of the federal courts to fashion a federal common law of contribution.”<sup>56</sup> In another decision, *Texas Indus v Radcliff Materials*, 451 US 630; 101 S Ct 2061; 68 L Ed 2d 500 (1981),<sup>57</sup> the Supreme Court held that courts only have the authority to fashion federal common law in very limited circumstances: (1) when a “federal rule of decision is ‘necessary to protect uniquely federal interests’ and (2) . . . [when] Congress has given the courts the power to develop substantive law. . . .”<sup>58</sup>

Congress sought to clarify this right to contribution by enacting an express right of contribution in SARA.<sup>59</sup> In 1986, Congress added an express right of contribution against PRPs in Section 113(f)(1) of SARA.<sup>60</sup> However, the first and last sentences of Section 113(f)(1) could be read to conflict with each other.<sup>61</sup> While the first sentence appears to only allow a contribution claim during or following a civil action,<sup>62</sup> the last sentence, known as the savings clause,<sup>63</sup> could be interpreted to allow PRPs to bring action against another PRP even absent a civil action under Section 106 or 107.<sup>64</sup> The legislative history of Section 113(f) does not provide much insight on the apparent conflict.<sup>65</sup> Therefore, it has been left largely to the courts to interpret and resolve any ambiguities.

### III. THE ANALYSIS OF COOPER INDUSTRIES, INC. V. AVIALL SERVICES, INC.

#### A. *The Facts of the Case*

In 1981, Cooper Industries, Inc. sold four of its Texas properties<sup>66</sup> to Aviall Services, Inc.<sup>67</sup> A few years into its ownership of the properties, Aviall discovered that both it and Cooper had contaminated the property with hazardous substances<sup>68</sup> that leaked into the ground and groundwater.<sup>69</sup> Aviall reported each discovered leak of hazardous substances to the Texas Environmental Regulatory Agency.<sup>70</sup> The State of Texas threatened to issue an administrative order, and thus, Aviall, under the state's supervision, "voluntarily" cleaned up the property.<sup>71</sup>

Aviall sought recovery of its costs from Cooper in the United States District Court for the Northern District of Texas under several causes of action, including Sections 107 and 113 of CERCLA.<sup>72</sup> Because of the Fifth Circuit's decision in *Geraghty & Miller, Inc v Conoco, Inc*, 234 F3d 917 (CA 5, 2000),<sup>73</sup> Aviall reframed its Section 107 claim by combining its Section 107 and Section 113 claims into one claim.<sup>74</sup> This was interpreted by the district court and Cooper as an abandonment of Aviall's Section 107 claim.<sup>75</sup> The district court, interpreting Section 113 as only allowing for a contribution claim during or following a civil action,<sup>76</sup> granted Cooper's motion for summary judgment.<sup>77</sup> The Fifth Circuit Court of Appeals affirmed the district court decision.<sup>78</sup> During a rehearing, en banc, a divided Fifth Circuit Court of Appeals reversed the district court decision.<sup>79</sup> The panel majority held that the savings clause of Section 113(f)(1) allows contribution suits even absent a Section 106 or 107 action by the government.<sup>80</sup> It reasoned that in examining the "plain" language of a statute, the court may draw from the history of the enactment and the legislative intent so that the interpretation "does not become absurd"<sup>81</sup> citing to a United States Supreme Court case<sup>82</sup> and other Fifth Circuit cases<sup>83</sup> for support.<sup>84</sup> Ultimately, the Supreme Court reversed the Fifth Circuit decision and held that Aviall is not entitled to contribution under Section 113(f)(1) since it was not a party to any governmental action or settlement, but it failed to rule on the Section 107 issue since Aviall had amended its Section 107 claim to combine it with the Section 113 claim.<sup>85</sup>

#### B. *The Comparison of Cooper with other Cases*

Most of the circuits, prior to the Court's decision in *Cooper*, have held consistent with Aviall's position and the Fifth Circuit opinion allowing for a right of contribution absent governmental action.<sup>86</sup> Prior to SARA, the courts allowed right of contribution among PRPs under the federal common law.<sup>87</sup>

After SARA, the courts continued to allow right of contribution among PRPs even absent governmental action.<sup>88</sup> Despite such overwhelming case law<sup>89</sup> and legislative history supporting a PRPs right of contribution even absent governmental action, the Supreme Court held that a PRP is only authorized under Section 113(f)(1) to bring a contribution claim "during or following" a civil action under Section 106 or 107(a).<sup>90</sup> The Fifth Circuit correctly observed that "it would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts' development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution."<sup>91</sup>

C. *The availability of contribution for a PRP who voluntarily cleans up*

1. The Right of Contribution under the Common Law

Before Congress enacted SARA, which provided an express right to contribution, courts interpreted the right to contribution as coming from the federal common law.<sup>92</sup> In *Texas Indus v Radcliff Materials*,<sup>93</sup> the Supreme Court set the requirements for courts fashioning a right to contribution in the federal common law.<sup>94</sup> It found that courts only have the authority to fashion this right in two circumstances: (1) when it is “necessary to protect uniquely federal interests<sup>95</sup> and (2) . . . Congress has given the courts the power to develop substantive law.”<sup>96</sup>

Although the Supreme Court did not find it appropriate to fashion a right to contribution in the federal common law under the antitrust laws,<sup>97</sup> the district court of Delaware found it appropriate under CERCLA in *Artesian Water Co v New Castle County*, 642 F Supp 1258 (Del 1986).<sup>98</sup> The court reasoned that CERCLA’s legislative history supports fashioning a right to contribution in the federal common law quoting parts of the floor debate on the bill that would become CERCLA.<sup>99</sup> Senator Randolph, expressing that liability issues that were not expressly addressed in the bill would be governed by common law principles, stated:

[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tortfeasors will be determined under common or previous statutory law.<sup>100</sup>

Additionally, the court found that unique federal interests would be enhanced.<sup>101</sup> By allowing for a right to contribution, expeditious settlement with the government by the PRPs would be encouraged since those parties could then implead other PRPs and thereby minimize their own liability.<sup>102</sup> Furthermore, since settlements will be more advantageous to PRPs, the expenses of litigation for both the government and the PRP will be greatly reduced.<sup>103</sup> By allowing PRPs to sue other PRPs for contribution, the court reasoned, parties will be more likely to clean up sites rather than leaving the clean up for the government.<sup>104</sup> Therefore, the Superfund resources will be less likely to be depleted.<sup>105</sup>

It has been suggested that a common law right of contribution does not exist where the payment made by one tortfeasor was wholly gratuitous and does not eliminate the underlying liability of a joint tortfeasor.<sup>106</sup> This argument is based on the theory that if the underlying liability is not discharged, the joint tortfeasor may find himself subject to double liability.<sup>107</sup> The argument, as it relates to a PRP who “voluntarily” cleans up, is flawed for two reasons. First, cleanups by PRPs should not be seen as gratuitous since they are commenced with under compulsion.<sup>108</sup> Even without an order that would legally compel cleanup, the PRP, by definition, is potentially liable.<sup>109</sup> Secondly, the underlying liability would be effectively distinguished after cleanup.<sup>110</sup> Cleanup costs are not recoverable unless they are consistent with the National Contingency Plan (NCP).<sup>111</sup> Where the cleanup is approved as being consistent with the NCP, the government would have no cause to require additional costs be incurred and thus, no double-liability would occur.<sup>112</sup>

## 2. The Right of Contribution under Section 107

Because Aviall amended its complaint by combining its Section 107 and Section 113 claims in an effort to comply with the established practice of the Fifth Circuit, the Supreme Court failed to reach the merits as to whether a PRP could claim a right of contribution under a Section 107 action against another PRP.<sup>113</sup> However, the Supreme Court addressed the issue of a Section 107 cause of action in dicta in *Key Tronic*.<sup>114</sup> And the dissent in *Cooper* urged the Court to rule on the matter rather than unnecessarily deferring its decision.<sup>115</sup> It is important that a Section 107 cause of action by a PRP who has not been subject to a Section 106 or Section 107 action by the government be allowed to proceed since, after the decision in *Cooper*, it is the only remaining contribution remedy available under CERCLA.<sup>116</sup> Removing all available remedies under CERCLA may lead to an excessive number of suits in the state courts seeking state remedies.

The possibility of allowing a Section 107 action does not look hopeful. Since the decision by the Supreme Court was handed down in *Cooper*, other courts have held that a Section 107 action is not available under the circumstances of *Cooper*.<sup>117</sup> In *Elementis Chem, Inc v T H Agric And Nutrition, LLC*, 373 F Supp 2d 257, 2005 U.S. Dist. LEXIS 1404 (SDNY January 31, 2005),<sup>118</sup> Elementis bought various chemical manufacturing and distribution facilities from the defendants<sup>119</sup> which it later found to be contaminated with hazardous substances which had been used by the former owner.<sup>120</sup> When Elementis brought a Section 107 action against the defendants to recover its cleanup costs, the court held that since Elementis is, itself, a PRP under the meaning of the term in Section 107(a), it is barred from bringing a cost recovery action against another PRP unless it can claim one of the three defenses<sup>121</sup> set forth in Section 107(b).<sup>122</sup> Another court has gone as far as to hold that neither an Administrative Order of Consent (AOC) nor a Unilateral Administrative Order (UAO) are sufficient to give rise to a Section 113 or 107 contribution action since they constitute neither an action for purposes of Section 106 and Section 107 nor a settlement.<sup>123</sup>

If these decisions are upheld, a PRP would have no remedy under CERCLA absent a government settlement or a suit. This raises the question of whether a settlement could even be construed as a valid contract since the PRP would have no reasonable alternative to settlement.<sup>124</sup> The PRP would be left, under CERCLA, with the options of (1) waiting to be sued, and racking up daily fines in the interim; (2) cleaning up immediately to avoid fines, and lose all chance of recovering costs from other PRPs under CERCLA or (3) settling with the government in what, under the circumstances, is sure to be a settlement advantageous to the government. This hardly seems a just result for a PRP who is willing to cooperate and voluntarily commence with cleanup. Therefore, at a minimum, Congress should clarify Section 107 to be a proper avenue for PRPs to pursue cost recovery from other PRPs without having to first enter into a settlement or be sued. If Congress clarifies Section 107 to be a proper avenue for cost recovery by PRPs who haven't been sued or entered into a settlement, the diverse decisions that would have been made by the various circuits on the issue can be diverted and the issue will never have to reach the Supreme Court as happened with the Section 113 issue.

### 3. The Right of Contribution under Section 113(f)(1)

As the various opinions in *Aviall* from the district court up to the Supreme Court indicate, Section 113(f)(1) is vague at best and even appears to conflict at times.<sup>125</sup> However, now that the Supreme Court has ruled that contribution under Section 113 will be limited to those PRPs who have been subject to an action under either Section 106 or 107, it is doubtful that this will change.<sup>126</sup> Because this decision clearly overrules established caselaw and legislative intent, Congress should be urged to re-clarify its intent to allow for contribution by revising or adding to the CERCLA statutes.

#### *D. The Benefits of allowing a Right of Contribution for a PRP Without Governmental Action or Settlement as a Pre-requisite*

##### 1. Encourages Rapid Voluntary Cleanup

If PRPs are left with a means of obtaining contribution from other PRPs after cleanup is completed without having first been a party to either a settlement or a lawsuit, they will be more likely to begin clean up immediately.<sup>127</sup> Under CERCLA, PRPs are fined on a daily basis for each violation.<sup>128</sup> It therefore benefits the PRP to begin cleanup as quickly as possible. However, by taking away the PRP's ability to sue for contribution unless they have either settled with or been sued by the government,<sup>129</sup> the PRP is at a disadvantage if it starts cleanup without first settling or being sued. Therefore, the PRP will likely delay any cleanup action. This is not in the best interest of anyone since it leads to an increase in the number of lawsuits and longer exposure to hazardous waste.

To remedy this situation, Congress should once again clarify the PRP's right to contribution under CERCLA by expressly allowing PRPs to seek contribution, where the cleanup is done in accordance with the NCP, without first being sued or settling with the government. This would clear up any ambiguities and result in more timely cleanups.

##### 2. Increases Settlements Between PRPs and the Government

Under the terms of Section 113(f)(2),<sup>130</sup> a person who settles with the government, even if they settle for an amount less than the actual cost of cleanup, will not be liable to anyone for any additional cost associated with the terms of the settlement. By allowing past owners to be liable to PRPs who voluntarily cleanup, the past owner will be more likely to reach a settlement with the government thus lowering the burden for both the government and the PRP doing the cleanup.<sup>131</sup> Conversely, in addition to a past owner potentially being sued by a current owner who has settled, the past owner can also be sued by the government for any additional costs associated with cleanup.<sup>132</sup> The Supreme Court decision in *Cooper*<sup>133</sup> actually encourages past owners to refrain from settlement until the current owner is sued or settles because the past owner could not be sued for contribution until that took place and the government has little incentive to pay for suits against more than one PRP since CERCLA liability is joint and several.<sup>134</sup>

### 3. Reduces Litigation Expenses of the Government and the PRP

Since, under *Cooper*, PRPs are without a right to contribution from other PRPs absent governmental action or a settlement, PRPs may wait for the government to initiate a lawsuit before beginning cleanup.<sup>135</sup> By waiting for a suit, the PRP will leave open the option of seeking contribution from other PRPs.<sup>136</sup> This leads to increased litigation expenses for the government and the PRP. The PRP may find that the litigation expenses are less of a financial burden than picking up the bill for the entire clean up; therefore, waiting for the government to sue may very well be a viable option. However, for the government, this merely adds needless expense. By allowing the PRP to seek contribution absent a government action or settlement, the PRP is able to avoid an accumulation of fines and litigation fees and the government will not have to pay for litigation to compel cleanup.

### 4. Encourages Brownfield Redevelopment

Brownfield<sup>137</sup> cleanup programs have offered incentives to developers such as reduced cleanup standards which in turn could result in lower cleanup costs.<sup>138</sup> These plans rely on voluntary action by the purchaser since under the brownfield programs government lawsuits and settlements do not occur.<sup>139</sup> Furthermore, facilitating brownfield remediation and redevelopment can benefit the environment, developers, taxpayers, and residents of the community.<sup>140</sup> In addition to making use of property that might otherwise be left abandoned, additional jobs would be created and taxes generated.<sup>141</sup> One of the main reasons a developer would choose not to purchase and develop a brownfield is fear of unforeseen liability.<sup>142</sup>

Prior to the Court's decision in *Cooper*, the developer assumed that cost recovery from other PRPs was an option and was therefore more willing to take the risk in purchase of a brownfield site.<sup>143</sup> Because *Cooper* took away a PRP's right to contribution under Section 113(f)(1) absent a government suit or settlement, potential purchasers of brownfield sites must assume that the entire bill for cleanup will rest with them.<sup>144</sup> This will most likely serve to discourage further brownfield development. As Frona Powell<sup>145</sup> noted,

[A] failure to encourage redevelopment of brownfield sites may lead to uncertainty about costs and liabilities associated with developing a given piece of property, which in turn might lead industrial developers to seek only those properties that they know are free of environmental problems . . . [which] can lead to increased urban sprawl, increased transportation costs, escalation in the industrialization of 'greenfield sites,'<sup>146</sup> and deterioration of the urban economic base.<sup>147</sup>

Because of the importance of brownfield redevelopment to the environment and community and the possible negative impact that *Cooper* will have on future brownfield development, Congress needs to take action to once again clarify the right to contribution of a PRP absent government action or settlement.

### E. Conclusion

If CERCLA is not revised by Congress to clearly allow a Section 113 or 107 right to contribution by PRPs who have not been subject to governmental action or a

settlement, PRPs will be less likely to voluntarily cleanup<sup>148</sup> and may even force the government to sue them before they will begin any cleanup.<sup>149</sup> This will impede CERCLA's goal of prompt cleanup. Costs will be raised for the PRPs since it will be subject to daily fines and will most likely incur additional legal fees.<sup>150</sup> The government, and thus the taxpayers, will also incur additional costs as a result of the Court's removing the incentive of contribution from PRPs who voluntarily cleanup.<sup>151</sup> In filing a suit against a PRP to compel cleanup, the government incurs legal expense and if the government settles with the PRP, it may lose money by settling for less than the actual cost of cleanup. Alternatively, this will overload the state system since the federal remedies have been virtually extinguished and will create problems where the states have inconsistent rules amongst themselves.<sup>152</sup> In addition, this will discourage brownfield redevelopment because it increases the risk that the developer will incur costs that it will not be able to recover.<sup>153</sup> A decrease in brownfield redevelopment hurts the environment as well as the surrounding community.<sup>154</sup> Therefore, it is in the interest of property owners, the government and society as a whole to allow for contribution for those PRPs who cleanup in accordance with the NCP without waiting for a lawsuit or demanding a settlement. This Casenote urges Congress to take immediate action to clarify the ambiguities of sections 113 and 107 and thereby further promote the purposes of CERCLA.

\* *Melissa Bozell is a law student at Cooley Law School, Lansing, Michigan. The article above was submitted as an entry in the 2005 Environmental Law Essay contest. In accordance with ELS bylaws and policies, the Michigan Environmental Law Journal periodically publishes student articles which may be of interest to its readers.*

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<sup>1</sup> *Cooper Indus, Inc v Aviall Services, Inc*, 543 US 157; 125 S Ct 577; 160 L Ed 2d 548 (December 13, 2004). The decision reversed the *en banc* decision of the U.S. Court of Appeals for the Fifth Circuit, *Aviall Services Inc v Cooper Indus Inc*, 312 F3d 677 (CA 5, 2002).

<sup>2</sup> *Northwest Airlines v Transp Workers Union of Am*, 451 US 77, 87-88; 101 S Ct. 1571; 67 L Ed 2d 750 (April 20, 1981).

<sup>3</sup> *Id.* (The Supreme Court defined the essential elements of a claim for contribution: "... a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability.").

<sup>4</sup> 42 USC 9613(f)(1) (Provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title . . . [n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.").

<sup>5</sup> 42 USC 9601 et seq.

<sup>6</sup> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected

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State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 USC 9606(a).

<sup>7</sup> 42 USC 9607(a) (Providing in part that those considered potentially responsible parties shall include “(1) the owner and operator of a . . . facility, (2) [the owner or operator] at the time of disposal of any hazardous substance . . . .” This subsection also sets for the liabilities of such persons as “liable for (A) all costs of removal or remedial action incurred by . . . [the government] not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .”).

<sup>8</sup> Robb & Waldmann, *Supreme Court Limits Potentially Responsible Parties’ Right to Bring Contribution Claims Under CERCLA Section 113*, Daily Environment Report, January 19, 2005, at B-1.

<sup>9</sup> *Cooper*, n 1 *supra* at 580.

<sup>10</sup> *Bethlehem Steel Corp v Bush*, 918 F2d 1323, 1326 (CA 7, 1990) (describing CERCLA’s legislative intent to encourage voluntary private cleanup action).

<sup>11</sup> *Cooper*, n 1 *supra* at 577.

<sup>12</sup> 42 USC 9613.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (allowing “[a] person who has resolved its liability to the [government] for some or all of a response action or . . . the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement . . . .”).

<sup>15</sup> *Id.*

<sup>16</sup> *See generally, Cooper*, n 1 *supra*.

<sup>17</sup> *Id.* at 577.

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

<sup>19</sup> *Id.*

<sup>20</sup> The Supreme Court did not reach a decision as to a 107 action in the majority opinion, however, the dissenting Justices expressed their frustration with the deferment of such decision and cited to *Key Tronic Corp v United States*, 511 US 809; 114 S Ct 1960; 128 L Ed 2d 797 (June 6, 1994) in support of reaching a decision.

<sup>21</sup> Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Persons*, 21 Harv Envtl L Rev 83, 86 (1997).

<sup>22</sup> H.R. REP. NO. 99-253, pt. 3, at 15 (1985).

<sup>23</sup> Powell, Article, *Amending CERCLA to Encourage the Redevelopment of Brownfields: Issues, Concerns, and Recommendations*, 53 Wash U J Urb & Contemp L 113, 120-21 (1998).

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<sup>24</sup> *Id.* at 118.

<sup>25</sup> Hernandez, n 21 *supra* at 83, 91.

<sup>26</sup> Restatement Torts, 2d, § 886(A) p 337.

<sup>27</sup> *Key Tronic*, n 20 *supra* at 816.

<sup>28</sup> See e.g., *Artesian Water Co v New Castle County*, 642 F Supp 1258, 1265-68 (D Del, 1986); *City of Philadelphia v. Stepan Chem Co*, 544 F Supp 1135 (ED Pa, 1982).

<sup>29</sup> *Philadelphia*, n 28 *supra*.

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

<sup>31</sup> *Id.* at 1141.

<sup>32</sup> Stating that a PRP “. . . shall be liable for . . . any other necessary costs of response incurred by *any other person* consistent with the national contingency plan . . . .” (emphasis added).

<sup>33</sup> *Philadelphia*, n 28 *supra* at 1141.

<sup>34</sup> *Id.* at 1142.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1142-43.

<sup>37</sup> *Id.*

<sup>38</sup> Defining parties liable, joint and severally, to include: “(1) the owner and operator of . . . a facility, (2) any person who at the time of disposal . . . owned or operated any facility at which such hazardous substances were disposed of, (3) any person who . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment . . . and (4) any person who accepts or accepted . . . for transport to disposal or treatment facilities. . . .”

<sup>39</sup> See e.g. *Key Tronic*, n 20 *supra* at 816 and *Tanglewood East Homeowners v Charles-Thomas, Inc*, 849 F2d 1568, 1575 (CA 5, 1988).

<sup>40</sup> *Tanglewood*, n 39 *supra*.

<sup>41</sup> *Id.* at 1572.

<sup>42</sup> *Id.* at 1571.

<sup>43</sup> *Id.* (Homeowners sought damages, response and cleaning costs, and injunctive relief).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1574. (citing 42 USC 9607(a)(4) which provides that PRPs shall be liable for “(A) all costs of removal or remedial action incurred by the United States Government or a State. . . not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .”).

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<sup>46</sup> *Wickland Oil Terminals v Asarco, Inc*, 792 F2d 887 (CA 9, 1986).

<sup>47</sup> *Tanglewood*, n 39 *supra* at 1575.

<sup>48</sup> 50 Fed Reg 47, 934 (1985).

<sup>49</sup> *Tanglewood*, n 39 *supra* at 1575.

<sup>50</sup> *Key Tronic*, n 20 *supra* at 814-815.

<sup>51</sup> See *Texas Indus, Inc v Radcliff Materials, Inc*, 451 US 630, 639-40; 101 S Ct 2061; 68 L Ed 2d 500 (1981); *Northwest Airlines*, n 2 *supra* at 91-95.

<sup>52</sup> *Northwest Airlines*, n 2 *supra*.

<sup>53</sup> *Id.* at 90-91.

<sup>54</sup> 29 USC 206(d).

<sup>55</sup> 42 USC 2000(e).

<sup>56</sup> *Northwest Airlines*, n 2 *supra* at 90-91.

<sup>57</sup> *Texas Indus.*, n 51 *supra* (examining whether the courts could find a right to contribution using the federal common law under the Sherman Act or the Clayton Act).

<sup>58</sup> *Id.* at 640 (quoting *Wheeldin v Wheeler*, 373 US 647, 651-52; 83 S Ct 1441; 10 L Ed 2d 605 (1963)).

<sup>59</sup> 131 Cong Rec 24,450 (1985) (statement of Sen Stafford) (predicting that Section 113 would “remove any doubt as to the right of contribution”).

<sup>60</sup> 42 USC 9613

<sup>61</sup> See, e.g., *Rockwell Int'l Corp v IU Int'l Corp*, 702 F Supp 1384, 1389 (ND Ill, 1988) (“The parties dispute the application of this provision to Rockwell’s contribution claim.”).

<sup>62</sup> 42 USC 9613 (“Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following a civil action under section 9606 of this title or under section 9607(a) of this title.”).

<sup>63</sup> *Id.* (“Nothing in this subsection shall diminish the right of any person to bring an action for contribution *in the absence of a civil action* under section 9606 of this title or section 9607 of this title.”) (emphasis added).

<sup>64</sup> See *Ninth Ave Remedial Group v Allis Chalmers Corp*, 974 F Supp 684, 690-91 (ND Ind, 1997).

<sup>65</sup> HR Rep No 99-253, pt I, at 79 (1985) (reprinted in 1986 USCCAN 2835, 2861) (Indicating that the purpose of 113(f) was to “clarify” and “confirm” the implied right to contribution that existed before SARA.).

<sup>66</sup> The property sold to Aviall by Cooper included several aircraft engine maintenance facilities in Texas.

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<sup>67</sup> *Cooper*, n 1 *supra* at 577.

<sup>68</sup> Including petroleum and other unspecified hazardous substances

<sup>69</sup> *Cooper*, n 1 *supra* at 577.

<sup>70</sup> Brief for Respondent at \*6, *Cooper Indus, Inc v Aviall Services, Inc*, 543 US 157; 125 S Ct 577; 160 L Ed 2d 548 (December 13, 2004) (No 02-1192).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (citing to JA 8A and 16A).

<sup>73</sup> *Geraghty & Miller, Inc v Conoco, Inc*, 234 F3d 917 (CA 5, 2000), *cert. denied*, 533 US 950; 121 S Ct 2592; 150 L Ed 2d 751 (2001) (interpreting a PRP's cost-recovery action as arising jointly through the operation of sections 107 and 113).

<sup>74</sup> Brief for Respondent, n 70 *supra* at \*7.

<sup>75</sup> *Id.* (citing JA 92A – 94 A).

<sup>76</sup> *Aviall*, n 1 *supra* at 679.

<sup>77</sup> *Id.*

<sup>78</sup> *Aviall Services, Inc v Cooper Indus, Inc*, 263 F3d 134 (CA 5, 2001).

<sup>79</sup> *Aviall*, n 1 *supra* at 679.

<sup>80</sup> *Id.* at 680.

<sup>81</sup> *Id.* (citing to *Crandon v United States*, 494 US 152, 158; 110 S Ct 997; 108 L Ed 2d 132 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”)).

<sup>82</sup> *Crandon*, n 81 *supra* at 158 (holding that when interpreting a statute, the courts look beyond the language to the “design of the statute as a whole and to its object and policy . . .”).

<sup>83</sup> *Accord, Perrone v GMAC*, 232 F3d 433, 440 (CA 5, 2000); *United States v A Female Juvenile*, 103 F3d 14, 16-17 (CA 5, 1996); *In re Timbers of Inwood Forest Assocs, Ltd*, 793 F2d 1380, 1384 (CA 5, 1986).

<sup>84</sup> *Aviall*, n 1 *supra* at 680.

<sup>85</sup> *Cooper*, n 1 *supra* at 577.

<sup>86</sup> Graham, Sigel, Vroman, & Truett, *U.S. Supreme Court Changes Superfund Cost Recovery Options*, (2004), at [http://www.jenner.com/news/pubs\\_item.asp?id=000012829124](http://www.jenner.com/news/pubs_item.asp?id=000012829124) (noting that “[t]he Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits had agreed with the Fifth Circuit that contribution suits could be brought prior to enforcement actions . . .”).

<sup>87</sup> *Philadelphia*, n 28 *supra* (allowing the City of Philadelphia, a PRP, to sue another PRP for cleanup costs even though neither the state or federal governments had brought a suit against

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the City. There was no indication in the in the opinion that the City had even been the object of a CERCLA administrative order).

<sup>88</sup> *Tanglewood*, n 39 *supra* at 1575 (holding that prior government action was not required in order to recover response costs under section 107 by one PRP against another). See also *United States v Colorado & E.R.R. Co*, 50 F3d 1530, 1536 (CA 10, 1995) (“There is no disagreement that both parties are PRPs . . . therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution.”).

<sup>89</sup> *Id.*

<sup>90</sup> *Cooper*, n 1 *supra* at 577.

<sup>91</sup> *Aviall*, n 1 *supra* at 685.

<sup>92</sup> See e.g., *Artesian Water*, n 28 *supra* at 1265-68; *Philadelphia*, n 28 *supra*.

<sup>93</sup> *Texas Indus*, n 51 *supra*.

<sup>94</sup> *Id.* at 638.

<sup>95</sup> *Id.* at 640 (quoting *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 426; 84 S Ct 923; 11 L Ed 2d 804 (1964)).

<sup>96</sup> *Id.* (citing *Wheeldin*, n 58 *supra* at 651).

<sup>97</sup> *Id.* at 639.

<sup>98</sup> *Artesian Water*, n 28 *supra* at 1265-68.

<sup>99</sup> *Id.* at 1266.

<sup>100</sup> *Id.* (quoting 125 Cong Rec S 14,967 (daily ed November 24, 1980) (statement of Sen Randolph) [Chairman of the Committee on Environment and Public Works and floor manager of S 1480] ).

<sup>101</sup> *Id.* at 1268-69.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Brief for Respondent, n 70 *supra* at 15 (referring to the Petitioner’s Brief at 16-17).

<sup>107</sup> Restatement Torts, 3d, Apportionment of Liability, § 23 cmt b (stating that if the initial payment does not discharge the underlying liability, “the person against whom contribution is sought would be subject to double liability”).

<sup>108</sup> Brief for Respondent, n 70 *supra* at 15.

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> 42 USC 9607(a)(4)(B) (requiring private parties to satisfy requirements to achieve a “CERCLA-quality cleanup”).

<sup>112</sup> Brief for Respondent, n 70 *supra* at 16.

<sup>113</sup> *Cooper*, n 1 *supra* at 577.

<sup>114</sup> *Key Tronic*, n 20 *supra* at 818 (agreeing that 107 “unquestionably provides a cause of action for [potentially responsible parties (PRPs)] to seek recovery of cleanup cost. . . .” basing its decision on § 107(a)(4)(B), which allows any person who has incurred costs for cleaning up . . . to recover . . . from any other [PRP]).

<sup>115</sup> *Cooper*, n 1 *supra* at 587.

<sup>116</sup> *Robb*, n 8 *supra*.

<sup>117</sup> See *Elementis Chem, Inc v T H Agric and Nutrition, LLC*, 2005 US Dist LEXIS 1404 (SDNY January 31, 2005). (Holding that a PRP who was not subject to a Section 106 or Section 107 government action and who lacks any affirmative defense under Section 107(b) can not sue another PRP citing to *Bedford Affiliates v Sills* 156 F3d 416 (CA 2, 1998)).

<sup>118</sup> *Id.*

<sup>119</sup> Defendants include T H Agriculture and Nutrition, LLC and Phillips Electronics North America Corporation.

<sup>120</sup> *Elementis*, n 117 *supra* at \*3-5.

<sup>121</sup> 42 USC 9607(b) (providing in part that “[t]here shall be no liability . . . for a person otherwise liable who can establish . . . that the release. . . [was] caused solely by – (1) an act of God; (2) and act of war; (3) an act or omission of a third party . . .”).

<sup>122</sup> *Elementis*, n 117 *supra* at \*14-18.

<sup>123</sup> *Pharmacia Corp v Clayton Chem Acquisition*, 382 F Supp 2d 1079, 1091 (SD Ill, 2005).

<sup>124</sup> Restatement Contracts, 2d §§ 175-6 (Stating that “[i]f a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim . . . .” and noting that modern court decisions have recognized threats causing economic harm as improper under “developing notions of ‘economic duress.’”).

<sup>125</sup> See generally *Aviall*, n 1 *supra*.

<sup>126</sup> *Cooper*, n 1 *supra* at 577.

<sup>127</sup> *Artesian Water*, n 28 *supra* at 1269.

<sup>128</sup> 42 USC 9606(b)(1) (provides fines for non-compliance of “not more than \$25,000 for each day in which such violation occurs or such failure to comply continues . . . .”).

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<sup>129</sup> *Cooper*, n 1 *supra* at 577.

<sup>130</sup> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 USC 9613(f)(2)

<sup>131</sup> *Artesian Water*, n 28 *supra* at 1269.

<sup>132</sup> If the United States or a state has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

42 USC 9613(f)(3)

<sup>133</sup> *Cooper*, n 1 *supra*, at 577.

<sup>134</sup> 42 USC 9607.

<sup>135</sup> Client Advisory from Katten Muchin Zavis Rosenman, to clients (March, 2005) (on file with the author).

<sup>136</sup> *Cooper*, n 1 *supra* at 577.

<sup>137</sup> *Black's Law Dictionary, Eighth Edition* (2004) (Defining a brownfield site as "[a]n abandoned, idled, or underused industrial or commercial site that is difficult to expand or redevelop because of environmental contamination.").

<sup>138</sup> Katten, n 135 *supra*.

<sup>139</sup> *Id.*

<sup>140</sup> Powell, n 23 *supra* at 123-24.

<sup>141</sup> *See Administration of Brownfields Program Questioned at Hill Appropriations Hearing*, 27 Env't Rep (BNA) No 49, at 2511 (April 18, 1997).

<sup>142</sup> Powell, n 23 *supra* at 124.

<sup>143</sup> Katten, n 135 *supra*.

<sup>144</sup> *Id.*

<sup>145</sup> Frona M. Powell is an Associate Professor of Business Law at Indiana University at Bloomington School of Business. BA 1970, JD 1976, Indiana University.

<sup>146</sup> *Black's Law Dictionary, Eighth Edition* (2004) (Defining a greenfield site as "[I]and that has never been developed. . . . [s]uch land is presumably uncontaminated.").

<sup>147</sup> Powell, n 23 *supra* at 124.

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<sup>148</sup> Robb, n 5 *supra*.

<sup>149</sup> Katten, n 135 *supra* at 2.

<sup>150</sup> 42 USC 9606(b).

<sup>151</sup> Cooper, n 1 *supra* at 577.

<sup>152</sup> Katten, n 135 *supra* at 3. (noting that alternate means of recovering cleanup costs such as state statutes may be increasingly valuable post-Cooper).

<sup>153</sup> *Id.*

<sup>154</sup> Powell, n 23 *supra* at 124.

## COMMITTEE REPORTS

### PROGRAM COMMITTEE

#### Meeting Minutes – November 22, 2005

The meeting was held on November 22, 2005. Attendees were John Byl, Kurt Brauer, Matt Eugster and Jim O'Brien.

#### A. Programs.

##### 1. Winter 2006 Program.

John Byl outlined Joe Quandt's Proposed agenda for the Winter 2006 Program. The program will be held on February 17, 2005 at Crystal Mountain, Thompsonville, Michigan. Details regarding registration will follow. John Byl will forward a copy of Mr. Quandt's proposed agenda. Committee members were asked to consider appropriate speakers for the topics outlined in the agenda. The agenda was summarized as follows:

- a. Environmental Science for the Technically Challenged
- b. Advising the Client on Environmental Issues in Real Estate Transactions  
3. Environmental Issues in Business Planning
  - i. Problems Areas When Running a Business
  - ii. Limiting Liability in Corporate Management
  - iii. Selecting the Appropriate Corporate Form
  - iv. Avoiding Successor, Officer and Director Liability
  - v. Generational Succession for Closely Held Businesses
- c. Environmental Issues in Estate Planning
  - i. Identifying Assets with Environmental Problems
  - ii. Asset Transition and Isolating Environmentally Compromised Assets
  - iii. Ethical Considerations in Advising Clients
- d. Brownfield and Development Issues

**2. Summer 2006 Program.** The Summer 2006 Program will be discussed at the next meeting. Committee members were asked to present ideas for the program at the next meeting. The Summer 2006 Program will be held on June 16, 2005.

#### B. Next Meeting.

The next meeting will be held on Tuesday, December 13, 2005 at 5:30 PM.

## Meeting Minutes – December 13, 2005

The program committee members in attendance: John Byl Susan Topp, Jim O'Brien, Kurt Brauer, Matt Eugster, Karyn Thwaites, Cindy Svenson and Bill Schikora.

- A. The winter program** (environmental boot camp) is confirmed for Friday, February 17, 2005 at Crystal Mountain Resort. A number of topics will be discussed, including all appropriate inquiry, ASTM Standard 1527 (as revised); technical issues and environmental due diligence, business planning, estate planning and brownfield redevelopment. Joe Quandt had suggested that Andy Smits, Grant Trigger, Chuck Barbieri, Kurt Brauer, Chris Dunsky, John Byl and others could speak on various topics. Susan Topp agreed to speak on gas, oil and mineral right issues. John Byl agreed to speak on brownfield redevelopment issues. Kurt Brauer will follow-up with Joe Quant to *confirm the* agenda and assist in selecting speakers.
- B. The Higgins Lake** program will take place June 16, 2006. In addition, the Environmental Law Section Council will take place June 17, 2006 at Higgins Lake. A list of speakers and proposed topics will be solicited.
- C. The Environmental Law Section Council Meeting** on February 4, 2006 will also include a short speaker program. The program will run from 12:00 Noon to 3:00 p.m. Chris Bzdok has been in contact with potential speakers. Tim Stocker at Dickinson was identified as a potential speaker, as were Andy Buchsbaum. In addition, John Byl will follow-up with Reed Hooper at the Pacific Legal Foundation representing Rapanos.
- D. The Next Meeting** of the Environmental Law Section Program Committee will take January 9, 2006 at 5:30 p.m.

## Meeting Minutes – January 9, 2006

Attendees included John Byl, Matt Eugster, Jim O'Brien, Joe Quandt, Karyn Thwaites, and Bill Schikora.

- A. February 17 Program.**

We have the topics, speaker and location in place for the February 17 program. The website registration was still unavailable as of the evening of January 9. Joe Quandt will be monitoring registrations with the State Bar.
- B. February 4 Program.**

There will be a program at the Ave Maria Law School on February 4 from 1:00 to 3:00 P.M. The Council meeting will take place in the morning at 10:00. The program in the afternoon will be a discussion of the *Rapanos* and *Carabell* cases (wetlands jurisdiction). The confirmed speakers include: Julie Keil

(counsel for Rapanos), Paul Bernard (attorney from Dickinson representing Carabell), Chris Shafer of Cooley (who will give the government perspective), and Noah Hall of Wayne State Law School. A notice was sent on the listserv on January 11 regarding this program. Craig Hupp (Wayne), Peter Holmes (University of Michigan, Cooley and Ave Maria), Anna Maiuri (University of Detroit), and Chris Bzdok (MSU), with assistance from Jim O'Brien, will provide notice to Environmental Law Societies and relevant professors at the various law schools.

**C. Higgins Lake.**

There was a short discussion regarding Higgins Lake. Some possible topics for Higgins include: water legislation, RAP approval process, model administrative consent order. We should continue to brainstorm possible topics for Higgins.

**D. Next Meeting.**

The next meeting will take place on February 8 @ 5:30 p.m.

## **Meeting Minutes – February 28, 2006**

The meeting was called to order at 5:30 pm. The Attendees were Cynthia Svenson, Susan Topp, Kurt Kissling, Joe Quandt, Michael Caldwell, Matt Eugster, John Byl, Jim O'Brien, and a very, very late Kurt Brauer from Dickinson Wright also attended, and potential CAFO speakers include Ken Vermeulen of Warner Norcross & Judd and/or Barry Selden of MDEQ (assuming they can get along).

**A. February 17, 2006 Program.**

Topp reported that the program was well attended despite the storm (55-60 attendees out of the 75 registrants). No reports from the State Bar have been received yet on the accounting side.

**B. Planning Programs for 2006.**

**1. Spring Program.**

The program is planned for May 10 or May 1 Ph at the State Bar Building from 1:00 to 4:30 pm. No lunch, beverages only, and the cost is \$25.00. The proposed topics are:

**a. The new water legislation.**

Proposed speakers: Tim Lungren, Varnum - Jim O'Brien will contact; Rich Bowman, Trout Unlimited - Kurt Brauer will contact.

**b. Glass v Goeckel case.**

Proposed speakers: Pam Burt, Atty for Plaintiff Glass (Post meeting insert by Topp: Chris Shafer, Professor at Cooley also spoke on this case and published an article in the Planning and Zoning News Sept

2005. We may want to consider him for this topic instead.) Topp to check on speaker availability for this topic.

**c. Concentrated Animal Feed Lots.**

Proposed speakers include Ken Vermeulen of Warner Norcross & Judd and/or Barry Selden of MDEQ.

Program moderators will be Jim O'Brian and Kurt Brauer. Jim and Kurt will lock in a date with the State Bar Building. Topp to inquire with real property section on participating in the program.

**2. Higgins Lake Program.**

The program will be from 1:00 pm to 3:30/4:00 pm. The suggested topics for the program on June 16 are as follows:

- a. RAP approval process.
- b. Model Administrative Consent Order.

**3. Fall Program.**

Suggested topics include wetlands issues: Rappanos and Carabell cases, and the new feasible and prudent analysis.

**4. Next Meeting.**

The next meeting will be held on Tuesday, March 21, 2006 at 5:30 p.m.

**Meeting Minutes – March 21, 2006**

The meeting was called to order at 5:30 pm. The Attendees were Michael Caldwell, Karen Thwait, Jim O'Brien, Kurt Brauer, Susan Topp, John Byl and Mat Eugster.

- A. Winter Program Results.** Still waiting for reports.
- B. Spring Program 2006.** The program will be May 1<sup>st</sup> from 1:00 to 4:30 PM at the State Bar Building in Lansing. The moderators will be Jim O'Brien and Kurt Brauer

Agenda.

Chris Shaefer: Glass v. Goeckel. I - 1:30 p.m.  
Barry Selden/Ken Vermeulen: CAFO 1:40 - 2:30 pm.  
Rich Bowman/Mike Johnson, Tim Lunden: The New Water Legislation  
2:45 – 4:30

- C. **ELS Co-Sponsoring U of M program.** Discussion and approval of ELS co sponsoring program with U of M Law School. Suggested that be our fall program
- D. **Higgins Program.** Suggested topics: RAP approval process; Suggested speakers Any Hogarth and Grant Trigger.
- E. **Annual Program.** Rapanos, and Carabell cases.
- F. **Fall Program.** Co-sponsor with University of Michigan
- G. **Next Meeting.** The next meeting will be held on Thursday, April 20,2006 at 5:30 pm

## MICHIGAN ENVIRONMENTAL CASENOTES

### **Glass v Goeckel**

473 Mich 667; 703 NW2d 58 (2005)

Plaintiff neighbor filed suit against defendant landowners, seeking to stop the landowners from interfering with her right as a member of the public to walk along the shoreline of Lake Huron. The defendants have private littoral title to land abutting the lake.

In determining how the public trust doctrine affects private littoral title, the court held that landowners' private title on the shores of the Great Lakes is subject to the public trust beneath the "ordinary high-water mark." The court, adopting Wisconsin law, created a new definition for the term as the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. The court reasoned that because the sovereign state does not have the power to diminish public rights in the Great Lakes when granting a private party littoral title, a party's acquired private property rights are held subject to the superior rights of the public trust. Therefore, the boundary of the public trust at the edges of the Great Lakes need not equate with the lakeward boundary of a landowner's littoral title. Instead, the public trust may overlap with the privately owned land.

The court also held that the Great Lakes Submerged Lands Act (GLSLA) does not show a legislative intent to take title to all land lakeward of the ordinary high water mark. Instead, the GLSLA establishes the scope of the regulatory authority the Legislature exercises pursuant to the public trust doctrine and provides private littoral landowners with a mechanism to certify private property boundaries.

Finally, the court held that the limited rights encompassed within the public trust do include the right to walk along the shore of Lake Huron below the ordinary high water mark, reasoning that walking along the lakeshore was inherent in the exercise of traditionally protected public rights like fishing, hunting and navigation for commerce or pleasure.

Author: Amanda Noonan Heyman, University of Michigan Law School

**Hickson Corp v Norfolk S Ry Co**  
124 F App'x 336 (CA 6 2005)

In June 1994, Hickson Corporation contracted with Norfolk Southern Railway to transport arsenic acid by tank car from Georgia to Indiana. While stopped in a Tennessee railyard during the journey, a leak was discovered. Before the leak could be contained, one quarter of the car's arsenic acid had been spilled. As a result, Norfolk made significant expenditures to clean up the surrounding area.

After the incident, Hickson brought an action against Norfolk for property damage. Norfolk counterclaimed, alleging breach of contract and negligence. At trial, the district court awarded Norfolk both contract and negligence damages on its counterclaim. However, the Sixth Circuit held that awarding both contract and negligence damages represented double recovery for a single injury, and remanded for retrial on damages. At retrial, Norfolk was awarded over \$3 million in contract damages, as well as prejudgment interest. This award was less than half that given by the first jury.

Both Hickson and Norfolk appealed this second judgment. Hickson appealed the court's award of prejudgment interest, while Norfolk appealed the court's denial of its motion for new trial. Norfolk based its motion in part upon an instruction to the retrial jury that Norfolk's response to the leak had been found negligent at the first trial. Norfolk additionally contended that the district court inappropriately allowed into evidence a report by the National Transportation Safety Board, information on Norfolk's prior felony conviction for improper disposal of paint, and four exhibits alleged to violate the hearsay rule.

In all matters the district court was affirmed. First, the award of prejudgment interest was deemed not to be an abuse of discretion in light of the reduction of Norfolk's award and its loss of funds for six years. Second, the court's instruction that Norfolk negligently responded to the spill was found not to be erroneous. The instruction was held to properly convey Norfolk's failure to mitigate, a matter applicable to its claim for contract damages. Third, none of the evidence issues were held to be grounds for a new trial. In each instance, Norfolk was determined either to have invited the evidence by presenting a spotless environmental record entitled to rebuttal, or the introduction of evidence was found to be harmless error.

Thomas Dillon, University of Michigan Law School

## ENVIRONMENTAL LAW SECTION COUNCIL MEETINGS

### MEETING MINUTES - November 5, 2005

#### Present:

In Person: Chuck Barbieri, Chris Bzdok, John Byl, Dennis Donohue, Chris Dunskey, Peter Holmes, Scott Hubbard, Craig Hupp, Lee Johnson, Anna Maiuri, Dustin Ordway, and Grant Trigger.

By Phone: Charlie Denton, Ken Gold, Steve Huff, and Joe Quandt.

#### Special Agenda Item

1. **Subject Matter Committees.** We held a discussion regarding each of the subject matter committees. A summary of that discussion follows:
  - A. **Environmental Litigation Committee** - Steve Huff will continue as chair of the committee. A suggestion was made that the committee try to involve attorneys from the Attorney General's office, such as Sara Gosman and Polly Synk.

A suggestion was also made to include administrative hearings within this committee. The committee will probably be renamed to something like the environmental litigation and administrative practice committee.
  - B. **Ethics Committee** - There was a brief discussion regarding the ethics committee, and a decision was made during the afternoon council meeting to eliminate that committee.
  - C. **Water Committee** - Ken Gold noted that most of the activities have involved assisting with section programs, such as the annual meeting in September, where all the topics were water topics organized by the water committee. Ken noted that it is difficult to identify who is on the committee. Ken will rotate off as Chair and Dennis Donohue will assume the position of Chair of that committee. They will make a recommendation to Peter Holmes on who should become Vice Chair of that committee.
  - D. **Natural Resources Committee** - Joe Quandt will continue as Chair of that committee and Matt Zimmerman as Vice Chair. That committee will provide support for section programs and may conduct separate brown bag programs.
  - E. **Air Committee** - Lee Johnson will become Chair of that committee. Lee noted that it would be useful to get a new list of committee members.

- F. **Hazardous Substances and Brownfields Committee** - Chris Dunsky is currently the Chair and Craig Hupp is the Vice Chair. Chris will rotate off as Chair and Craig will become the Chair. This committee has held programs from time to time, and has provided members with information concerning legislation, such as the model restrictive covenant legislation. The group digressed into a discussion of the inability to obtain closures under Part 201 in wellhead protection areas. This topic may be appropriate for consideration at Higgins next June.

2. **Standing Committees.** We also briefly discussed the standing committees.

- A. **Technology Committee.** John Tatum suggested eliminating this committee, but the group preliminarily decided to continue with this committee, with John Tatum as the Chair.
- B. **Membership Committee.** Dustin Ordway will continue as Chair, and Chris Bzdok will continue as Vice Chair.
- C. **Program Committee.** Peter will confirm whether Susan Topp will continue as Chair of the program committee. Kurt Brauer will continue as Vice Chair of the committee.
- D. **Environmental Law Journal and Deskbook Committees.** These committees will continue to function as they currently do with the existing Chairs.

Other Decisions Regarding Committees. We made a number of other decisions regarding all the committees.

- E. **Committee Membership.** Dustin Ordway will circulate an e-mail to the environmental section listserv, identifying the Chairs of each of the committees, and inviting section members to contact the Chairs of any committees they wish to join. The e-mail addresses of the committee Chairs will be included in the e-mail from Dustin. Dustin will include a link to the website along with a reminder that a description of the committees is included in our website. The Chairs of each of the committees will then create group e-mail lists based on the members who sign up for their committees. Note that it will be important for section members to respond, even if they believe they already are members of a particular committee.
- F. **Comments on Legislation.** We also discussed whether it is appropriate for committees, particularly subject matter committees, to comment on pending legislation. This may be a topic of future discussion. In general, the Council has decided that the Environmental Law Section will not take a position on controversial legislation, as there often are multiple viewpoints represented within the ELS. Other sections often do comment on legislation.
- G. **Subject Matter Committee Reports.** After some discussion, the group decided that subject matter committees should report at every Council

meeting, other than the annual meeting. We expect that this should result in three reports per year, one in November, one in February, and one at Higgins Lake in June.

### Regular Agenda

1. **Minutes:** The minutes of the September 22 and June 18 meetings were approved with one change. The September minutes were revised to reflect that Dustin Ordway was present at that meeting.
2. **Secretary-Treasurer's Report:** The Secretary-Treasurer's Report was approved. It was noted that the Section has a healthy balance in its account, and there was a discussion regarding whether the Section should consider a number of options:
  - A. A prize for second place for the essay contest.
  - B. Lower fees for programs.
  - C. Waiving charges for law students and professors for programs.

The Council decided that program fees would generally be waived for law students and professors. The Council also decided that we would try to obtain an e-mail list of environmental law societies and law school professors for invitations to section programs. The following individuals were to provide contact information for this purpose: Craig Hupp - Wayne Law School; Chris Bzdok - MSU; Peter Holmes - University of Michigan, Cooley and Ave Maria; and Anna Maiuri - University of Detroit. Those individuals agreed they would forward information regarding the November 10 program to these environmental law societies (or their officers) and professors, and would forward that contact information to John Byl so that it can be included for future programs.

3. **Standing Committee Reports:**
  - A. **Membership.** Dustin and Chris reported that they are actively recruiting and updating the membership list. They are also identifying young attorneys in both the private and public sectors to encourage them to join the Section and actively participate.
  - B. **Program Committee.** There is a program scheduled for November 10. Joe Quandt also reported on a potential agenda for a "boot camp" program on February 10 or 17 at some location in Northern Michigan. Joe's expressed preference was Boyne. Currently, Joe is thinking of a five part program that would include the real property section, business section, and ICLE as co-sponsors. The five parts of the program would include:

Environmental science for technically challenged;  
Advising clients in real property transactions;  
Business planning issues, including officer, director and shareholder liability, as well as generational succession planning;

Brownfield redevelopment issues; and  
Environmental issues in estate planning.

There was a suggestion that Joe consider adding permitting and administrative enforcement overviews.

- C. **Michigan Environmental Law Journal.** The next issue is nearly done. We also discussed the naming of the essay contest. A decision was made that the name of the essay contest would return to Environmental Law Section Essay Contest. The award would be named the Environmental Law Section Essay Award in Honor of [to be determined on an annual basis], in instances where the Council decides to name the award after an individual or group.
- D. **Technology.** No report.
- E. **Deskbook.** Peter reported on behalf of Jeff Haynes that Jeff has received about one-half of the outlines and is shooting for publication in late 2006.

4. **Subject Matter Committee Reports.** The Council voted to terminate the Ethics Committee. It was noted that ethics should be considered as appropriate in each of the subject matter committees. For other information regarding committee reports, note the Special Agenda Item described above.

5. **Ad Hoc Committee on Outreach.** Anna Maiuri and Peter Holmes provided a summary of activities. There have been significant efforts to get young attorneys more actively involved in this Section. A decision was made to incorporate this committee into the Membership Committee. All the members of the Ad Hoc Committee agreed to join the Membership Committee to continue these efforts.

Peter Holmes suggested that the Council develop a list of individuals from this Section who are willing to speak at law schools and universities in classes and to environmental law societies. The Membership Committee will be responsible for developing and administering such a list.

6. **Liaison Reports.**

- A. **Board of Commissioners.** Bob Gardella is the Section's liaison to the State Bar of Michigan Board of Commissioners. Bob noted that any issues of concern relating to the Michigan Bar should be conveyed to him. His contact information is 810-227-1700, ext. 113 (office) and 810-229-8484 (home).
- B. **Real Estate Section.** Peter conveyed Pat Paruch's report highlights include:

The Real Property Section entered into an agreement with ICLE to co-produce the Real Property Law Section Homeward Bound Series of real property law seminars.  
George Siedel of the University of Michigan is retiring.

The Real Property Law Section is holding its winter conference in March in Las Vegas.

C. **Administrative Law Section.** No report.

7. **Chairperson's Report.**

A. **Council Vacancies.** The Council voted to add Pat Paruch and Matt Eugster to fill two additional vacancies on the Council. Grant Trigger is following up to determine why the terms of seven Council members are scheduled to expire in 2007 and only five are scheduled to expire in 2008.

B. **Committees.** See the discussion under Special Agenda Item.

C. **NREPA.** There was a brief discussion regarding the attorneys fee provision that would require the State to pay the attorneys fees of the private party if the State is unsuccessful in a Part 201 matter.

D. **Meeting Schedule.** The following are the dates of future meetings:

**February 4.** The next meeting will be held on February 4 at Ave Maria Law School in Ann Arbor. This will probably follow the format of last year's February meeting. The Council will likely meet from 10:00 to 12:00, and a program will follow regarding some topic. Currently, they expect that there will be a discussion regarding the Clean Water Act cases for which certiorari was granted in the U.S. Supreme Court: *Rapanos* and *Carabell*. Chris Bzdok has contacted the attorney at Dickinson who is representing *Carabell*, and Chris will follow up with that attorney to confirm their availability for February 4. Someone will contact Andy Buchsbaum regarding his willingness to participate and to determine who the attorneys are for the federal government and for *Rapanos* (from the Pacifica Legal Foundation).

**June 16 and 17.** Higgins Lake is scheduled for June 16 and 17.

**September 14.** The Annual Meeting will be held on Thursday afternoon, September 14. There was also brief discussion regarding a possible reception or other event for the 25th anniversary of the Section. Peter will follow up with Charles Toy to see if he might make suggestions for such an event.

8. **Meeting Adjourned.**

## MEETING MINUTES – February 4, 2006

Present:

In Person: Peter Holmes, John Byl, Dustin Ordway, Craig Hupp, John Tatum, Pat Paruch, Jeff Haynes, Kurt Brauer, Scott Hubbard, Susan Topp, Matt Eugster, Richard Barran, Chris Dunskey, Chris Huff, Charles Toy, Ernest Chiado, Michael Caldwell, Ken Gold and Steve Kohl

By Phone: S. Lee Johnson, Dennis Donahue, Chuck Barbieri, Charlie Denton, Peter Lozo and Anna Maiuri

1. **Minutes:** The minutes of the November 5<sup>th</sup> meeting were approved.

2. **Secretary-Treasurer's Report:**

Topp presented the Secretary-Treasurer's Report. She reported that there is a balance in the Section's account of \$51,629.89 as of December 31, 2005. A recommendation was made that a second place prize be considered for the essay contest in light of the budget.

3. **Standing Committee Reports:**

A. **Membership.**

Report by Dustin Ordway. There was a discussion of adding committee members to the end of the Section directory. Another invitation to Section members to join a committee will be sent out. Ordway will ask each committee chair to provide a list of current committee members. There was also discussion that the Section's survey should be distilled down to essential information only, and the survey will be distributed electronically.

B. **Program Committee.**

Susan Topp reported that the next program, the Environmental Law Boot Camp, will be held at Crystal Mountain on February 17, 2006, and the program by all indications will be well attended. There was also discussion as to whether or not the Section should be charging speakers for the seminar registration fee. It was decided that no seminar registration fee would be charged to any speaker/presenter. There was also discussion concerning paying for lodging for the speakers. It was decided that the Section would not pay for the lodging for attorneys, but would possibly pay lodging for speakers from other outside groups on a case by case basis. A brief discussion concerning the June 16<sup>th</sup> and 17<sup>th</sup> 2006 Higgins Lake program was held. It was suggested that the program may include air issues as a topic. It was recommended that the subject matter committee chairs be contacted and solicited for suggestions for program topics.

C. **Michigan Environmental Law Journal.**

Report by Peter Holmes who was standing in for Bob Schroder. The deadlines for articles are March 31, July 28, and October 27, 2006. The

committee is seeking articles and other subject matter committee chairs will be contacted for suggestions. The Honigman firm has discontinued the Environmental Law Newsletter. That newsletter was used to prepare the "State of the Law" summary each year. The committee needs a volunteer to assist with the compilation of the "State of the Law" summary. It was suggested that the committee use the E-journal as a basis for the "State of the Law". It was also suggested that circuit court decisions should be published. John Tatum hopes to index the court decisions in the near future. It was decided that this year's essay contest will be named in the honor of David Tripp.

**D. Technology.**

Report by John Tatum. John Tatum suggested that the role of the technology committee has been assumed by the membership committee and therefore requested that the technology committee be discontinued. It was decided that the technology committee and John Tatum's work were very valuable to the Section, and John Tatum was requested to stay on. Tatum requested that in order to continue on with the committee, he would like the assistance of another attorney. Any volunteers should contact Tatum directly.

**E. Desk Book.**

Report by Jeff Haynes. Haynes stated that they are "making progress" on the Desk Book. There was a concern pertaining to contradictory materials being published in other ICLE books. They are targeting 2007 for the second edition of the Desk Book. There are five authors presently working on materials, and their outlines are due May 1, 2006. The outstanding outlines at this time are solid waste, Part 201, Brownfields, criminal and insurance. The new Desk Book will be one volume instead of two.

**4. Subject Matter Committee Reports:**

**A. Air.**

Report by S. Lee Johnson. The committee will be re-invigorated. Kurt Kissling is the new vice chair of the committee, and the committee has about one dozen members at present, with hopes of increasing the membership to 20.

**B. Environmental Litigation and Administrative Practice.**

Report by Craig Hupp, This committee currently has 16 members. They are planning on meeting on February 23, 2006 at Dr. Chiodo's office in Clinton Township for a program.

**C. Hazardous Substances and Brownfields.**

Report by Craig Hupp. Committee presently has 25 members and they hold three to four meetings a year on Saturday mornings. The next meeting dates are March 4, 2006 and May 6, 2006.

**D. Natural Resources.** No report.

E. **Water.**

Report Dennis Donohue. This committee presently has 13 members. They are reviewing water legislation issues and expect the bill to be signed within the next six months. This committee is considering a "Nuts and Bolts" program to be held in Lansing.

5. **Liaison Reports.**

A. **Board of Commissioners.**

Report by Charles Toy. They are there to help.

B. **Real Estate Section.**

Report by Pat Paruch. Craig Hupp's article on "All Appropriate Inquiry" will be in the next issue of Real Property Law. The Section will be holding a program on Mackinaw Island on July 12 - 15, 2006.

C. **Administrative Law Section.**

This section needs a liaison. Peter Holmes will contact the chair of the Administrative Law Section and request that a liaison be appointed.

6. **Chairperson's Report.** Report by Peter Holmes.

A. There was a request by the University of North Carolina that a survey be distributed amongst the ELS members. The section does not forward such info to its membership, and the decision was made not to send the survey out to the section.

B. There was a request that a representative to the MDEQ Part 201 discussion group be appointed. This is no longer necessary.

C. The discussion of bylaws on council members and committee chairs was postponed to the next meeting, which will include the following issues:

1. Liaison Issue. The council "shall" have two additional non-voting members as liaisons for the Real Property and Administrative Law Sections. Should we eliminate a restriction of non-voting? Do we need liaisons? Should we make "shall" discretionary? Pat Paruch will continue on as liaison to the Real Property Section.
2. The council member terms are out of rotation. Suggestion made to reduce the number of council members to 15 instead of 18, and then not to fill all subsequent vacancies until the rotation gets back in order.
3. With reference to committees, there is a two-year term for the chair and the vice-chair. Is a two-year term too short? Should it be three years? The terms cannot be consecutive.

D. Bar inquiry on compensation for section services was discussed. Section members cannot be paid for their performance of duties except for the editor and assistant editor of the Journal who have traditionally been paid a stipend. Some sections have been paying stipends to section chairs, but this has not been the practice of the Environmental Law Section.

7. **Vice-Chair's Report.** None.
8. **Old Business.** None.