ENVIRONMENTAL LAW

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I. INTRODUCTION

The decisions of the Michigan Supreme Court and the Michigan Court of Appeals during the *Survey* period, May 23, 2007 to July 30, 2008, did not dramatically change the course of environmental law in Michigan, nor did they contain any major surprises. The state Supreme Court's decision in *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.* is the most significant decision in the *Survey* period because it held that plaintiffs in Michigan Environmental Protection Act (MEPA)[1] cases must now satisfy federal standing requirements.[2] Although the *Nestlé* decision may make it more difficult for ordinary citizens to use MEPA to protect the environment in Michigan courts, it will have no effect on their ability to participate in the administrative process, which is usually a more productive and less expensive venue for citizen participation in environmental decision making. A recent Michigan Court of Appeals decision, *Sierra Club Mackinac Chapter v. Department of Environmental Quality*, is likely to

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1. MICH. COMP. LAWS ANN. § 324.1701(1) (West 2008).

2. 479 Mich. 280, 737 N.W.2d 447 (2007).

facilitate citizen participation in the administrative process of issuing wastewater permits to concentrated animal feeding operations.[3] *Sierra Club* and *Nestlé* illustrate that environmental practitioners can expect to spend more of their time in practice before agencies and less time before courts.

Other decisions of Michigan courts in the past year confirm that courts generally have little sympathy for defendants in environmental remediation enforcement cases.[4] The Michigan Court of Appeals held that a criminal provision in Michigan's scrap tire disposal law imposes strict liability in *People v. Schumacher*.[5] The court of appeals also upheld substantial penalties in a site remediation case in *Department of Environmental Quality v. Bulk Petroleum Corp.*[6]

II. STANDING UNDER MEPA

The Michigan Environmental Protection Act (MEPA) was one of the first environmental statutes to adopt an expansive citizen suit provision. The statute authorizes "any person" to maintain an action "for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."[7] MEPA included no requirement that a plaintiff show personal injury. As long as a citizen could initially demonstrate that the defendant had polluted, impaired, or destroyed a natural resource or was likely to do so, the citizen had standing.[8] Therefore, MEPA cases on standing[9] represented a significant departure from the traditional requirement that environmental plaintiffs meet constitutional standing requirements prior to filing suit.[10]

In 2007, the Michigan Supreme Court directly addressed MEPA's standing provision in *Michigan Citizens for Water Conservation v. Nestlé*

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3. 277 Mich. App. 531, 747 N.W.2d 321 (2008).

4. *See* discussion, *infra* Parts IV & V.

5. 276 Mich. App. 165, 740 N.W.2d 534 (2007).

6. 276 Mich. App. 654, 741 N.W.2d 857 (2007).

7. MICH. COMP. LAWS ANN. § 324.1701(1) (West 2008).

8. *See* MICH. COMP. LAWS ANN. § 324.1703(1) (West 2008); *see also* Heather Terry, Comment, *Still Standing But "Teed Up:" The Michigan Environmental Protection Act's Citizen Suit Provision After* Nat'l Wildlife Fed'n v. Cleveland Cliffs, 2005 MICH. ST. L. REV. 1297, 1304 (2005).

9. *See, e.g.*, Mich. State Highway Comm'n v. Vanderkloot, 392 Mich. 159, 184, 220 N.W.2d 416, 427-28 (1974) (upholding MEPA's broad standing provision by allowing plaintiffs to initiate actions without meeting the traditional standing requirements).

10. *See* Friends of the Earth v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Waters North America, Inc.[11] Prior to *Nestlé*, the Court had indicated its displeasure with MEPA's broad standing provision in *National Wildlife Federation v. Cleveland Cliffs Iron Company.*[12] In *National Wildlife*, the Court stopped short of declaring MEPA's standing provision unconstitutional.[13] The affidavits offered by the plaintiff organization alleged actual injury or imminent harm to three of the organization's members satisfied constitutional standing requirements, thus avoiding the need to address the constitutionality of the MEPA standing provision.[14]

In *Nestlé*, the Court was again confronted with MEPA's standing provision and this time struck it down.[15] *Nestlé* was a highly publicized case concerning streams, lakes, and wetlands located in Mecosta County, Michigan.[16] The affected water bodies included Osprey Lake, Thompson Lake, the Dead Stream, and various wetlands.[17]

Donald and Nancy Bollman granted the defendant, Nestlé Waters North America ("Nestlé"), the groundwater rights to a 139 acre parcel of land located on the northern shore of Osprey Lake.[18] Nestlé obtained all appropriate water permits from the Michigan Department of Environmental Quality and began operations.[19] Michigan Citizens for Water Conservation (MCWC), a non-profit corporation of approximately 1,300 members, filed suit seeking temporary and permanent injunctive relief to prevent Nestlé's construction of a bottling facility and challenging Nestlé's right to withdraw water from the location.[20] In asserting its claim at trial, the plaintiff relied on both common-law riparian groundwater law and MEPA.[21] Ultimately, the trial court determined that Nestlé 's pumping activities caused "ecological impacts"

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11. 479 Mich. 280, 737 N.W.2d 447 (2007).

12. 471 Mich. 608, 684 N.W.2d 800 (2004).

13. *Id.* at 652-53, 684 N.W.2d at 827 (Weaver, J., concurring in result only).

14. *Id.* at 632, 684 N.W.2d at 815. *National Wildlife* was discussed in greater depth by Browne Lewis, *Environmental Law, 2004 Ann. Survey of Mich. Law*, 52 WAYNE L. REV. 637, 655-60 (2006).

15. *Nestlé*, 479 Mich. at 302-03, 737 N.W.2d at 459.

16. *Id.* at 285, 737 N.W.2d at 450.

17. *Id.* at 286, 737 N.W.2d at 450. The wetlands in question were identified as Wetlands 112, 115, and 301 and are located west and north of Osprey Lake. *Id.* Additionally, Osprey Lake is a manmade lake, created by damming and flooding the Dead Stream. *Id.* Thompson Lake is a naturally formed lake just south of Osprey Lake. *Id.*

18. *Nestlé*, 479 Mich. at 286, 737 N.W.2d at 450. The Bollman's land surrounds Osprey Lake and several of the enumerated wetlands. *Id.*

19. *Id.* at 287, 737 N.W.2d at 450.

20. *Id.* at 288, 737 N.W.2d at 451. Two hundred and sixty-five MCWC members are riparian owners in the Tri-Lakes region. Two members own land on the Dead Stream and two others own land on Thompson Lake. *Id.*

21. *Id.*

and "hydrological effects" on a "zone of influence" which included the Dead Stream, Thompson Lake, Osprey Lake, and various associated wetlands, which violated both riparian law and MEPA.[22]

Both the plaintiff and defendant appealed the case to the court of appeals, which affirmed in part, reversed in part, and remanded to the trial court.[23] In its appeal of the MEPA claim, Nestlé argued that MCWC lacked standing to make a claim with respect to Osprey Lake and the various wetlands.[24] The majority opinion, however, held that the plaintiff organization had standing "with respect to all the natural sources at issue."[25] In its determination, the court of appeals applied MEPA's broad citizen suit provision. Thus, despite there being no evidence that any member of MCWC actually used or participated in activities on Osprey Lake or the wetlands, the court of appeals held that there was standing because any harm to one of the interrelated nature of the water bodies would cause harm to other water bodies or associated wetlands.[26] Both parties appealed the court of appeals decision for various reasons. However, the Michigan Supreme Court limited the case to the plaintiff's standing with respect to Osprey Lake and associated wetlands.[27]

In its analysis of standing, the state Supreme Court focused on whether the Legislature has authority to expand standing.[28] The main argument proffered by the majority made up of Justices Young, Taylor, Corrigan and Markman was the Michigan Legislature impermissibly expanded the "judicial power" to include circumstances involving non-injured parties by permitting "any person" to commence an action.[29] The Court emphasized the principle of separation of powers in both the State Constitution of Michigan and in the United States Constitution.[30] According to the Court, allowing the legislature to negate the principle of standing undermines the doctrine of separation of powers and the tripartite system of government.[31] Noting that "judicial power" is an undefined term in the Michigan Constitution, the Court referred to its

22. *Nestlé*, 479 Mich. at 288, 737 N.W.2d at 451.

23. *See* Mich. Citizens for Water Conservation v. Nestlé Waters N. Am. Inc., 269 Mich. App. 25, 709 N.W.2d 174 (2005).

24. *Id.* at 34, 709 N.W.2d at 184.

25. *Nestlé*, 479 Mich. 289, 737 N.W.2d at 452.

26. *Id.*

27. *Id.* at 291, 737 N.W.2d at 453.

28. *Id.* at 291-96, 737 N.W.2d at 453-55.

29. *Id.* at 302, 737 N.W.2d at 458.

30. *Id.* at 291-92, 737 N.W.2d at 453. The Court highlighted parallels between the United States Constitution's limitation of the "judicial power" to "[c]ases and [c]ontroversies" and the Michigan's constitution which charges the judiciary with the "task of exercising the 'judicial power.'" *Nestlé*, 479 Mich. at 292, 737 N.W.2d at 453.

31. *Id.* at 292, 737 N.W.2d at 453.

discussion in *National Wildlife* regarding the traditional definition of "judicial power."[32] The court determined that the most vital aspect of "judicial power" is the "requirement of a genuine case or controversy between the parties, one in which there is a real, not hypothetical, dispute."[33] Relying on United States Supreme Court Chief Justice Roberts for further support, the court stressed that the judiciary has no function where no case or controversy exists[34] and that courts that fail to exercise discipline and restraint in resolving conflicts would swallow up the tripartite government.[35]

The Michigan Supreme Court formally adopted the federal test for standing in MEPA cases.[36] The federal test for standing has three elements. First, there must be an allegation of "an injury in fact" which is an assault upon "a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[37] Second, there must be a causal connection between the injury and the action being challenged—that is, the injury must be "fairly traceable" to the complained conduct.[38] Last, the individual must show that the injury will be "redressed by a favorable decision"—that is, that a favorable decision will remedy the injury.[39] This standard was adopted by the United States Supreme Court in *Lujan v. Defenders of Wildlife*[40]

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32. *Id.* at 293, 737 N.W.2d at 453-54. The court stated:

> The "judicial power" has traditionally been defined by a combination of considerations: [T]he existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.

Id. (quoting Nat'l Wildlife Fed'n v. Cleveland Cliffs, 471 Mich. 608, 615, 684 N.W.2d 800, 806 (2004)).

33. *Id.* at 293, 737 N.W.2d at 454 (quoting *Nat'l Wildlife*, 471 Mich. at 615, 684 N.W.2d at 806).

34. *Id.* at 293-94, 737 N.W.2d at 454.

35. *Nestlé*, 479 Mich. at 294, 737 N.W.2d at 454; *see also* DaimlerChrysler v. Cuno, 547 U.S. 332 (2006) (Roberts, C.J.) (quoting 4 Papers of John Marshall 95 (C. Cullen ed., 1984)).

36. *See Nestlé*, 479 Mich. at 294-95, 737 N.W.2d at 455.

37. *Id.*

38. *Id.*

39. *Id.*

40. 504 U.S. at 560-61. *Lujan* held that the broad citizen suit provision of the Endangered Species Act authorizing "any person" to bring a claim against a person or agency alleged to be in violation of the act was limited by Article III of the United States Constitution. *Id.* Plaintiffs claiming violations of the Endangered Species Act must show

and later by the Michigan Supreme Court in *Lee v. Macomb County Board of Commissioners*.[41] The *Nestlé* Court now extended the *Lujan* standing criteria to environmental plaintiffs who file claims under MEPA, effectively eliminating MEPA's broad standing provision.[42] In order to successfully argue standing, Michigan environmental plaintiffs asserting violations of MEPA must now affirm that they in fact use the affected area and that they are persons whose "aesthetic and recreational values" will be detrimentally affected by the challenged activity.[43]

Turning to the case at hand, the Court applied the *Lujan* test to the facts of the *Nestlé* case.[44] The Court noted that the MCWC's organizational standing to bring a claim extended only to matters where members would have standing to bring a claim as individuals.[45] As to the Dead Stream and Thompson Lake, it held that the MCWC clearly had standing to bring a MEPA claim because four of its members (two for each body of water) had riparian rights to the bodies of water.[46] Therefore, with respect to these particular bodies of water, any activity by Nestlé would injure riparian rights causing a clear injury in fact.[47] However, the analysis was more complicated with respect to Osprey Lake and the various wetlands in question, because there was no indication that any members of the MCWC enjoyed a substantial interest—recreational, aesthetic, or economic—in these water bodies.[48] Because members of MCWC had no access or use of Osprey Lake or the associated wetlands, the plaintiff organization had no concrete and particularized injury with respect to the water bodies.[49] As a result the Court held that the plaintiff lacked standing with respect to Osprey Lake and the three wetlands.[50]

In reaching its decision, the Michigan Supreme Court formally rejected the court of appeals ruling that the interconnected nature of the water bodies was sufficient to create standing.[51] The Michigan Court of Appeals affirmed the trial court's findings that the hydrological link and

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a direct injury to their own interest in addition to a violation of the act itself. *Id.* at 562-63.

41. 464 Mich. 726, 739, 629 N.W.2d 900, 908 (2001).
42. *Nestlé*, 479 Mich. at 295-96, 737 N.W.2d at 455.
43. *Id.*; *see also Friends of the Earth*, 528 U.S. at 183.
44. *Nestlé*, 479 Mich. at 299-300, 737 N.W.2d at 457.
45. *Id.* at 296, 737 N.W.2d at 455.
46. *Id.*
47. *Id.*
48. *Id.* at 297, 737 N.W.2d at 456.
49. *Id.*
50. *Nestlé*, 479 Mich. at 310, 737 N.W.2d at 463.
51. *Id.*

interrelated nature of the bodies of water was sufficient to grant standing to the plaintiff with respect to *all* of the water bodies including Osprey Lake and the surrounding wetlands, despite there being no actual evidence that plaintiff or its members used or were present in those areas.[52] In the Michigan Supreme Court's view, the lower courts' "interconnectedness" theory permits an evasion of the plaintiff's burden to establish a concrete, particularized injury in fact.[53] The state Supreme Court cited *Lujan* in its rejection of the "ecosystem nexus" approach to standing.[54] In a resounding disapproval of the lower courts' approach, the court pointed out that were the "ecosystem nexus" approach to standing valid, "it would justify the standing of anyone but a Martian to contest water withdrawals in Michigan."[55]

The Court also responded to MCWC's argument that impairment of its members' aesthetic and recreational interests alone would satisfy constitutional standing.[56] MCWC relied on *Cantrell v. City of Long Beach*[57] where the Ninth Circuit extended standing to birdwatchers whose recreational and aesthetic interest of bird watching was affected by defendants' acts. The *Cantrell* court asserted that the plaintiff birdwatchers' right to view birds located on private property from publicly accessible locations was sufficient to confer standing.[58] Without endorsing the Ninth Circuit's expansion of standing to "recreational and aesthetic interests," the court pointed out that MCWC failed to allege such an impairment of its members' interests in Osprey Lake and the associated wetlands.[59]

The plaintiff argued that the Michigan Constitution permitted the legislature's enactment of MEPA's broad standing provision.[60] Article 4, section 52 of the Michigan Constitution, which MCWC based its argument on, establishes a public interest in the protection of Michigan's natural resources and directs the Legislature to enact appropriate legislation to protect these natural resources.[61] The majority dismissed this argument noting that neither the public interest provision in the Michigan Constitution nor the MEPA standing provision permit the

52. *Id.* at 297-98, 737 N.W.2d at 456.
53. *Id.* at 298, 737 N.W.2d 456-57.
54. *Id.* at 299, 737 N.W.2d at 457; *see also Lujan*, 504 U.S. at 565-66.
55. *Nestlé*, 479 Mich. at 300, 737 N.W.2d at 457.
56. *Id.* at 301, 737 N.W.2d at 458.
57. 241 F.3d 674 (9th Cir. 2001).
58. *See id.* at 680-81.
59. *Nestlé*, 479 Mich. at 300-301, 737 N.W.2d at 458.
60. *Id.* at 301-302, 737 N.W.2d at 458.
61. MICH. CONST. art IV, § 52.

erosion of the traditional notions of standing.[62] Accordingly, the Michigan Supreme Court characterized its holding as a "refining" as opposed to dismissal of the plaintiff's MEPA claim.[63]

Three justices dissented in this case. Justice Weaver, with Justice Cavanaugh concurring, was highly critical of the majority decision and accused the majority of eroding Michigan's traditional rules of standing in a string of cases.[64] Justice Weaver charged the majority of four with forcibly inserting Article III *Lujan* standing into Michigan case law and then ultimately converting standing into a constitutional question.[65] According to Justice Weaver, the majority adopted the *Lujan* standing test under the assumption that "judicial power" granted to the state courts in the Michigan Constitution was identical to the same "judicial power" granted under Article III in the United States Constitution.[66] She pointed out that the State Constitution of Michigan has no corollary to Article III of the United States Constitution.[67] The end result, in Justice Weaver's view, was that the majority not only undermined the Michigan Constitution but also took away the legislature's ability to restore "the private citizen['s] sizeable share of the initiative for environmental law enforcement."[68]

In contrast with Justice Weaver, Justice Kelly refused to ignore binding precedent offered under both *Lee* and *National Wildlife* in her dissent.[69] However, Justice Kelly found it unnecessary to revisit *Lee* and *National Wildlife* because she felt that MCWC had met the three pronged standing test.[70] In Justice Kelly's view, once a plaintiff has standing to challenge an activity, "it can raise other inadequacies on the basis of the public interest."[71] The trial court had found that Dead Stream, Thompson

62. *Nestlé*, 479 Mich. at 302, 737 N.W.2d at 458-59.

63. *Id.* at 297, 737 N.W.2d at 456 (Weaver, J., dissenting).

64. *Id.* at 311, 737 N.W.2d at 463.

65. *Id.* Justice Weaver pointed out that in *Lee*, which marked the first appearance of Article III standing in Michigan case law, the parties did not even raise or brief anything pertaining to *Lujan* or Article III standing. *Id.*

66. *Id.* at 313, 737 N.W.2d at 465.

67. *Nestlé*, 479 Mich. at 314, 737 N.W.2d at 465 (Weaver, J., dissenting).

68. *Id.* at 316, 737 N.W.2d at 466 (citations omitted).

69. *Id.* at 324, 737 N.W.2d at 470 (Kelly, J., dissenting).

70. *Id.*

71. *Id.* at 330, 737 N.W.2d at 474 (Kelly, J., dissenting). Justice Kelly also discussed several cases which illustrated this point. *Id.* at 328-30, 737 N.W.2d at 472-75 (discussing Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F. Supp. 496 (S.D. Ohio 1982) (finding that plaintiff's standing to assert his environmental injury granted him standing to assert the general public interest); Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978) (deciding that plaintiff's standing to assert a claim on at least one ground was sufficient to allow them to raise other environmental inadequacies).

Lake, Osprey Lake and the associated wetlands shared a common aquifer where withdrawals by Nestlé would result in varied reduction of water levels of all four bodies of water.[72] Once the MCWC had established standing to assert its own interests with respect to the Dead Stream and Thompson Lake, it could also assert the interests of the general public on Osprey Lake and the associated wetlands.[73]

In the 2006 *Survey* period, author Browne Lewis concluded that *National Wildlife* would not have a significant impact on environmental law in Michigan.[74] However, *Nestlé* is the realization of the *National Wildlife* decision: environmental plaintiffs must now conform to traditional federal standing requirements.[75] While it seems unlikely that the *Nestlé* standing requirements will severely limit environmental plaintiffs' access to the courts because most plaintiffs have a direct connection to the activity complained of, the full effect of the decision remains to be seen.[76]

III. CLEAN WATER ACT

Sierra Club Mackinac Chapter v. Department of Environmental Quality increased public participation in the issuance of permits under the National Pollutant Discharge Elimination System (NPDES) to owners of concentrated animal feeding operations (CAFOs).[77] The Sierra

72. *Nestlé*, 479 Mich. at 325, 737 N.W.2d at 471. Specifically, the trial court found that for every gallon of water pumped out by Nestlé, the surface water levels of the Dead Stream would fall by two inches, the level of at least one of the associated wetlands would fall by one and a half feet while others would fall by two to four inches, and both Osprey Lake and Thompson Lake would fall by as much as six inches. *Id.*

73. *Id.* at 330, 737 N.W.2d at 474.

74. Lewis, *supra* note 14, at 660.

75. *Nestlé*, 479 Mich. at 298, 737 N.W.2d at 457.

76. At least one court has already applied the new standing requirements to an environmental plaintiff. In *Coldsprings Twp. v. Kalkaska County Zoning Bd. of Appeals*, the Michigan Court of Appeals affirmed the dismissal of the plaintiff township's claim because of a failure to show it suffered a concrete, particularized injury. 279 Mich. App. 25, 755 N.W.2d 553 (2008). While *Nestlé* was cited, the petitioner's claim was denied because the municipality impermissibly attempted to represent residents under the doctrine of *parens patriae*; the township's power is derivative and not sovereign in nature rendering *parens patriae* inapplicable. *Id.* at 29-30, 755 N.W.2d at 555-56. The court of appeals clarified that, under *Nestlé*, the township must demonstrate that it suffered a concrete, particularized, injury caused by the county's decision. *Id.* at 30, 755 N.W.2d at 556.

77. 277 Mich. App. 531, 747 N.W.2d 321. Large CAFOs house hundreds or even thousands of livestock. *Id.* at 535, 747 N.W.2d at 324. Many feedlots generate significant amounts of manure (liquid and solid waste) and then dispose of it by applying the manure as fertilizer on agricultural fields. *Id.*

Club appealed the Michigan Department of Environmental Quality's (DEQ) declaratory ruling rejecting the group's Clean Water Act[78] challenges to a general permit for Michigan CAFO owners.[79]

The Clean Water Act prohibits the "discharge of any pollutant" into waters of the United States from "point sources" without a NPDES permit.[80] Parties who have obtained an NPDES permit may discharge effluent into the navigable waters of the United States.[81] CAFO owners are required to obtain either an individual NPDES permit or obtain coverage under an NPDES general permit.[82]

In *Sierra Club*, DEQ issued a general CAFO permit in mid-2004 after subjecting a proposed general NPDES permit to public notice and comment.[83] Among the various requirements of a general permit for a large CAFO, CAFO owners must develop and implement a nutrient management plan, which is a plan to manage the nutrients released into water from manure, litter, and wastewater.[84] However, this plan, which is called the comprehensive nutrient management plan (CNMP) and "describes the production practices, equipment, and structure(s) that the owner/operator of an agricultural operation now uses and/or will implement to sustain livestock and/or crop production in a manner that is both environmentally and economically sound," is not a part of the permit application or the permit itself and thus is not subject to public notice and comment.[85] Only a general summary of the CNMP is required for an application under the general permit.[86] Furthermore, rather than applying numerical standards, the general permit merely requires annual reviews of and updates to each CAFO's CNMP, so there is little opportunity for public notice and comment on CNMPs.[87]

Sierra Club requested a declaratory ruling from DEQ regarding (1) whether the general permit allowed CAFOs to submit a CNMP that would not be reviewed or approved by DEQ, (2) whether the general permit's failure to provide public notice and comment on the CNMP

78. 33 U.S.C. § 1251 (2006).

79. *Sierra Club*, 277 Mich. App. at 532-33, 747 N.W.2d at 323.

80. 33 U.S.C. § 1311 (2006).

81. 33 U.S.C. § 1362(11) (2006).

82. *Sierra Club*, 277 Mich. App. at 536, 747 N.W.2d at 325; *see also* 40 C.F.R. 122.23(d)(1) (2008). The DEQ operates a federally approved NPDES permit system, thus all state administrative rules parallel the Clean Water Act and all associated regulations. *See* MICH. ADMIN. CODE r. 323.2102 (2008); MICH. ADMIN. CODE r. 323.2103 (2008); MICH. ADMIN. CODE r. 323.2104 (2008); MICH. ADMIN. CODE r. 3232.2196 (2008).

83. *Sierra Club*, 277 Mich. App. at 538-39, 747 N.W.2d at 326.

84. *Id.* at 536, 747 N.W.2d at 325.

85. *Id.* at 539, 747 N.W.2d at 326 (citations omitted).

86. *Id.*

87. *Id.* at 539-40, 747 N.W.2d at 327.

violated the Clean Water Act, and (3) whether the general permit violated Section 402 of the Clean Water Act by authorizing the discharge of pollutants without meeting the water quality requirements of the Clean Water Act.[88] DEQ rejected these claims in a declaratory ruling, asserting that requests for authorization under the general permit did not require separate notice and comment, because the general permit was already subject to public notice and comment.[89] Furthermore, DEQ asserted that CNMP was neither a part of the permit application nor the permit itself, but it conceded that the CNMP was a valuable resource which aided DEQ in its determinations of whether a CAFO operator was capable of complying with the conditions of the general permit.[90] Sierra Club appealed the declaratory ruling to the circuit court arguing that a CAFO's nutrient management plan is an effluent limitation which should be included in a NPDES permit application.[91] The circuit court affirmed DEQ's declaratory ruling, holding that the issuance of the general permit was not arbitrary, capricious or an abuse of discretion.[92] Sierra Club subsequently appealed the circuit court's ruling.[93]

After affirming jurisdiction, the Michigan Court of Appeals turned to the declaratory ruling itself.[94] The court relied in part on a Second Circuit decision in *Waterkeeper Alliance Inc. v. United States Environmental Protection Agency*, which held that a similar federal CAFO rule was legally deficient because of its failure to allow for the meaningful review of nutrient management plans and require the inclusion of the nutrient plans in NPDES permits.[95] The court of appeals noted that the DEQ's general permit impermissibly delegated the authority to determine and adopt rates for the disposal of liquid waste to

88. *Id.* at 540-41, 747 N.W.2d at 327.

89. *Sierra Club*, 277 Mich. App. at 541-42, 747 N.W.2d at 327-28.

90. *Id.* at 542, 747 N.W.2d at 328. DEQ did make some alterations to the general permit. *Id.*

91. *Id.* at 543, 747 N.W.2d at 328.

92. *Id.*

93. *Id.* at 543, 747 N.W.2d at 328-29.

94. *Sierra Club*, 277 Mich. App. at 545, 747 N.W.2d at 330-31. One judge dissented, arguing that the dispositive issue in the case was whether DEQ complied with all of the federal statutory and regulatory requirements of the NPDES program. *Id.* at 555, 747 N.W.2d at 335 (Zahra, J., dissenting). The dissenting judge refused to consider Sierra Club's arguments whether DEQ was in compliance with the Clean Water Act because the proper forum for such a case is the United States Court of Appeals. *Id.*

95. 399 F.3d 486, 498 (2nd Cir. 2005); *see also Sierra Club*, 277 Mich. App. at 549-50, 747 N.W.2d at 332.

CAFOs.[96] CNMPs contained "effluent limitations" which must be incorporated into applications under general permit.[97]

Turning to the Sierra Club's argument that the general permit's failure to incorporate the CNMP into permit applications was a violation of the Clean Water Act's public participation provision, the court of appeals emphasized the provision that there be an "'opportunity for public' hearing *before* a NPDES permit issues."[98] The court further pointed out "that a copy of each permit application and each permit issued under this section [1342] shall be available to the public."[99] Because Section 1251(e) of the Clean Water Act "requires public participation in development, revision, and enforcement of effluent limitations,"[100] and comprehensive nutrient management plans are "effluent limitations,"[101] the court concluded that public participation is required in the development, revision and enforcement of the plans.[102] The court was unconvinced by DEQ's argument that CNMPs were accessible to the public via Michigan's Freedom of Information Act, ruling such a method to be meaningless.[103]

While *Sierra Club* has not technically increased the burden on CAFO operators seeking authorization for effluent releases under a NPDES general permit, it may have a significant effect on the ability of CAFO operators to successfully achieve such authorization. Forcing CAFO operators to submit a CNMP along with their applications for authorization under a general permit has increased opportunities for public participation in the issuance of NPDES permits. Incorporating the CNMP into the application may also give the public more information to use in challenging CAFO applications.

IV. PART 201

In *Department of Environmental Quality v. Waterous Co.*, the Michigan Court of Appeals addressed a wide range of issues regarding

96. *Sierra Club*, 277 Mich. App. at 551, 747 N.W.2d at 333. The general permit allowed the DEQ to determine the adequacy of a CNMP but such a review was not required prior to the discharge of pollutants. *Id.*

97. *Id.* at 552, 747 N.W.2d at 334.

98. *Id.* at 553, 747 N.W.2d at 334; *see also* 33 U.S.C. § 1251(e) (2006); 33 U.S.C. § 1342(a)(1), (b)(3) (2006).

99. *Sierra Club*, 277 Mich. App. at 553-54, 747 N.W.2d at 334; *see also* 33 U.S.C. § 1342(j) (2006).

100. 33 U.S.C. § 1251(e) (2006).

101. *Id.*

102. *Sierra Club*, 277 Mich. App. at 554, 747 N.W.2d at 334.

103. *Id.*

remediation of hazardous substances, including whether a liable party may be compelled to remediate a contaminated former industrial site to residential standards, and what effect may be given to unpromulgated sediment guidelines.[104]

The case involved property located in Traverse City that the Traverse City Iron Works (TCIW) had used as a foundry from the early 1900s until 1974.[105] TCIW disposed of approximately 80,000 cubic yards of foundry sand and slag on the banks and the bottom of the Boardman River.[106] In 1978, TCIW merged with the Waterous Company (Waterous).[107] Title to the property was conveyed to Waterous in 1980.[108] In 1982, Waterous sold the property to a developer who resold it in 1997 to a second developer.[109] The second developer used a site reclamation grant from DEQ to construct a retaining wall along the bank of the Boardman River and to add backfill behind the wall to facilitate the property's redevelopment for commercial and residential use.[110]

In 2003, DEQ sued Waterous under Parts 31 and 201 of NREPA and under the common law of public nuisance to recover past response activity costs, for a declaratory judgment for future costs, and for injunctive relief.[111] Waterous responded with a host of denials, defenses and pre-trial motions, arguing that other parties had caused the contamination in the River, that Waterous was not liable for any contamination caused by TCIW, that some of DEQ's costs were costs of residential redevelopment and were not necessary to remediate the site consistent with its historic industrial use, and that DEQ could not recover costs to comply with the developer's "due care" obligations under Part 201.[112] Waterous also argued that the statute of limitations barred DEQ's public nuisance claim for injunctive relief.[113]

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104. 279 Mich. App. 346, No. 272968, 2008 Mich. App. LEXIS 1307 (Mich. App. Ct. April 15, 2008).

105. *Id.* at 349, 2008 Mich. App. LEXIS 1307, at *1.

106. *Id.*, 2008 Mich. App. LEXIS 1307, at *1-2.

107. *Id.* at 350, 2008 Mich. App. LEXIS 1307, at *2.

108. *Id.*

109. *Id.*

110. *Waterous*, 279 Mich. App. at 350, 2008 Mich. App. LEXIS 1307, at *2-3.

111. *Id.* at 356, 2008 Mich. App. LEXIS 1307, at *11-12. DEQ also sued to recover natural resource damages, but dismissed that claim without prejudice before trial. *Id.* at 369, 2008 Mich. App. LEXIS 1307, at *30.

112. *Id.* at 351-53, 2008 Mich. App. LEXIS 1307, at *3-7. Part 201 of the NREPA requires a person who owns or operates property that it knows is contaminated above residential criteria to take certain steps with respect to hazardous substances on such property. MICH. COMP. LAWS ANN. § 324.20107a (West 2008). The actions that a non-liable owner or operator must perform are commonly referred to as "due care obligations." *Id.* The developers of the TCIW property involved in this case, and

Before trial, the parties resolved DEQ's claim for past response activity costs by stipulation requiring Waterous to pay $1.25 million of the approximately $1.6 million DEQ had claimed.[114] Persuading DEQ to waive $350,000 of its past costs would prove to be Waterous's only victory in the case.[115]

The trial focused on whether Waterous was liable under Part 201 for DEQ's future response activity costs and whether DEQ was entitled to a mandatory injunction requiring Waterous to investigate and remediate the site and abate a public nuisance.[116] After a two-week trial, the court found that TCIW had released or discharged sand, slag, and other foundry waste at the site, that those materials contained Part 201 hazardous substances, and that the site was a Part 201 "facility."[117] The court held that Waterous was liable under Part 201 because it was the successor-by-merger to TCIW.[118] The court entered a declaratory judgment holding Waterous liable for DEQ's future response activity costs and granted a broad permanent injunction requiring Waterous to perform a remedial investigation of soil, groundwater, and sediment at the site; conduct a feasibility study of remedial action options; prepare and implement a remedial action plan (RAP) after DEQ approval; and implement any other response activity needed to protect public health and the environment.[119] The court also held that "conditions at the Site constituted a public nuisance."[120]

One of the more interesting issues on appeal was whether Waterous was liable for response activity costs beyond those necessary to comply with industrial cleanup criteria. Waterous relied on several cases under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[121] involving claims by private parties for response costs to support its argument that costs beyond those required to comply with industrial cleanup criteria were not "necessary" and were therefore not recoverable.[122] The court of appeals rejected this argument

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subsequent owners and operators, probably incurred and will continue to incur certain expenses in meeting their due care obligations. Some of those expenses may have been paid with funds from DEQ's site reclamation grant.

113. *Waterous*, 279 Mich. App. at 383, 2008 Mich. App. LEXIS 1307, at *49.

114. *Id.* at 356-57, 2008 Mich. App. LEXIS 1307, at *11-12.

115. *See id.* at 350-51, 2008 Mich. App. LEXIS 1307, at *2.

116. *Id.* at 352-54, 2008 Mich. App. LEXIS 1307, at *6-7.

117. *Id.* at 357-58, 2008 Mich. App. LEXIS 1307, at *12-14.

118. *Id.* at 358-59, 2008 Mich. App. LEXIS 1307, at *14-15.

119. *Waterous*, 279 Mich. App. at 360-62, 2008 Mich. App. LEXIS 1307, at *16-18.

120. *Id.* at 358, 2008 Mich. App. LEXIS 1307, at *14.

121. 42 U.S.C. §§ 9601-9675 (2006).

122. Waterous relied on *City of Detroit v. Simon*, 247 F.3d 619 (6th Cir. 2001) and *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006), both of which

because Part 201[123] specifies "current zoning" and "current property use" as the basis for a RAP.[124] The court held that "the proper cleanup criteria should be consistent with the current zoning and use of the property at the time of remedial action."[125] The lesson from this holding is that an owner of contaminated property who is liable under Part 201 should either remediate the property or record an enforceable restrictive covenant limiting future use of the property before transferring it.

Waterous also argued on appeal that the trial court impermissibly held Waterous liable for remedial obligations of other entities, including the due care obligations of the developer and the current property owner.[126] Because DEQ and Waterous agreed before trial to settle DEQ's claim for past response activity costs, which presumably included the site reclamation grant, and because the developer and the current owner were not parties to the litigation, it is unclear whether DEQ future response activity costs will include any costs of complying with due care obligations.[127] Therefore, this issue was probably moot. Nonetheless, the court of appeals affirmed the trial court's ruling on this issue, holding that Part 201 imposes primary responsibility upon "those persons who are responsible for the environmental contamination," and that if an non-liable current owner exacerbates existing contamination by violating its due care obligations, the only remedy the liable party has is to seek contribution under Section 324.20129 of the Michigan Compiled Laws.[128] This portion of the court of appeals decision could be interpreted as meaning that a non-liable property owner is entitled to recover the cost of complying with its due care obligations from a liable

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involved claims by municipalities under Section 107(a)(4)(B) to recover "necessary costs of response" the municipalities had incurred in remediating contaminated properties to levels cleaner than required to allow the properties to be used for industrial purposes. *Waterous*, 279 Mich. App. at 365-66, 2008 Mich. App. LEXIS 1307, at *24-25. This argument by Waterous was weak for various reasons, including the fact that in both CERCLA and Part 201, the requirement that response costs be considered "necessary" to be recoverable applies only to claims asserted by plaintiffs other than the United States, a state, or an Indian tribe. *See* 42 U.S.C. § 9607(a)(4)(B) (2006); MICH. COMP. LAWS ANN. § 324.20126a(1)(b) (West 2008). Part 201 authorizes the state to recover "all costs of response activity lawfully incurred by the state," whether or not such costs are "necessary." MICH. COMP. LAWS ANN. § 324.20126a(1)(a) (West 2008). Thus, Waterous' argument based on decisions in private party cost recovery actions under CERCLA is not persuasive in the context of a cost recovery action by the State of Michigan under Part 201.

123. MICH. COMP. LAWS ANN. § 324.20120a(6) (West 2008).

124. *Waterous*, 279 Mich. App. at 365-67, 2008 Mich. App. LEXIS 1307, at *26-27.

125. *Id.* at 367, 2008 Mich. App. LEXIS 1307, at *26.

126. *Id.* at 352-54, 2008 Mich. App. LEXIS 1307, at *6-7.

127. *Id.* at 387, 2008 Mich. App. LEXIS 1307, at *55.

128. *Id.* at 372-75, 2008 Mich. App. LEXIS 1307, at *35-38.

party. Such an interpretation would encourage some non-liable owners to seek to recover the costs of their due care obligations from persons who are liable under Part 201, something that non-liable owners have traditionally not done.

The court of appeals also discussed whether an expert witness may rely on unpromulgated guidelines as the basis for an opinion that contaminated sediments should be investigated and/or remediated.[129] A DEQ expert witness relied on unpromulgated sediment quality screening guidelines and a draft DEQ memorandum to support his opinion testimony that the court should order Waterous to investigate and remediate contaminated sediments.[130] Waterous contended on appeal that the trial court should not have admitted the expert's testimony because the sediment guidelines he relied upon were unpromulgated and inherently unreliable.[131] The court of appeals concluded that the trial court had not abused its discretion under Michigan Rule of Evidence 702 by admitting the expert testimony.[132] It appears that the expert used the sediment guidelines only for the limited purpose of supporting the expert's opinion that a detailed remedial investigation was necessary performed, rather than to support selection of any particular cleanup plan.[133]

The court of appeals also addressed how the statute of limitations applies to public nuisance claims seeking injunctive relief.[134] Waterous argued that the six-year statute of limitations[135] barred the state's claim for injunctive relief based on public nuisance law.[136] Waterous argued that the "continuing wrong doctrine" applies only when a defendant's wrongful acts, not the effects thereof, are continuing, and that the alleged wrongful acts in this case ceased when TCIW stopped disposing of foundry waste in 1978.[137] That argument should have succeeded if DEQ had asserted a claim for money damages based on negligence. However, as the court of appeals noted, the continuing wrong doctrine applies

129. *Id.* at 280-83, 2008 Mich. App. LEXIS 1307, at *45-49.

130. *Waterous*, 279 Mich. App. at 381, 2008 Mich. App. LEXIS 1307, at *47.

131. *Id.*

132. *Id.* at 382-83, 2008 Mich. App. LEXIS 1307, at *48.

133. *Id.*, 2008 Mich. App. LEXIS 1307, at *48-49.

134. *Id.* at 383-86, 2008 Mich. App. LEXIS 1307, at *49-54. It is not clear why DEQ pursued a public nuisance claim at all, considering the availability of injunctive relief under both Part 201 and Part 31. DEQ may have pursued its public nuisance claim because there are no promulgated sediment criteria under Part 201.

135. MICH. COMP. LAWS ANN. § 600.5813 (West 2008).

136. *Waterous*, 279 Mich. App. at 383, 2008 Mich. App. LEXIS 1307, at *50.

137. *Id.* at 384, 2008 Mich. App. LEXIS 1307, at *51.

differently in the context of trespass and nuisance cases.[138] The court explained, citing *Traver Lakes Community Maintenance Ass'n v. Douglas Co.*[139] that "where a nuisance is temporary . . . damages to property affected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated."[140] The court of appeals reasoned that "Part 201 was designed to address temporary nuisances, like the claims herein," and concluded that DEQ is entitled to recover damages until the nuisance is abated without its claim being time barred.[141] The court's discussion of the statute of limitations can be criticized because it improperly assumes that the presence of 80,000 tons of foundry sand is a "temporary" condition that it is "abatable by reasonable curative or remedial action."[142] The court should have remanded for a determination of this factual issue as it did in *Traver Lakes*.

The court of appeals decision is also significant because it upheld a very broad grant of injunctive relief. The trial court ordered Waterous not only to pay DEQ's future response activity costs, but also to perform a complete remedial investigation and to develop and implement a remedial action plan to be approved by DEQ.[143] Waterous argued on appeal that it should have been required to investigate and remediate only the four hazardous substances that the trial court found to have a potential to affect aquatic life, and that were alleged in DEQ's complaint, rather than all possible hazardous substances.[144] The court of appeals agreed with DEQ that the complaint's allegations regarding a few hazardous substances were intended only to show that the site was a Part 201 "facility," and that DEQ's pre-complaint investigation was not intended to identify all hazardous substances that might be present at the site.[145] The court of appeals properly rejected Waterous's argument on this point.

In conclusion, both the trial court and the court of appeals resolved numerous issues, including some that may have been of first impression. Although the court of appeals decided most or all issues correctly, its discussions of several issues, including the recoverability of costs incurred to comply with due care obligations and the proper use of

138. *Id.* at 386, 2008 Mich. App. LEXIS 1307, at *53-54.
139. 224 Mich. App. 335, 341, 568 N.W.2d 847 (1997).
140. *Waterous*, 279 Mich. App. at 385, 2008 Mich. App. LEXIS 1307, at *53 (citing *Traver Lakes*, 224 Mich. App. at 347-48, 568 N.W.2d at 853).
141. *Id.* at 386, 2008 Mich. App. LEXIS 1307, at *53-54.
142. *Id.* at 385, 2008 Mich. App. LEXIS 1307, at *53.
143. *Id.* at 371-72, 2008 Mich. App. LEXIS 1307, at *32-33.
144. *Id.* at 371-72, 2008 Mich. App. LEXIS 1307, at *32-35.
145. *Id.* at 371-72, 2008 Mich. App. LEXIS 1307, at *33.

unpromulgated sediment guidelines, are not very clear and may tempt some litigants to cite this decision for principles broader than its actual holdings.

V. PROTECTION OF RESOURCES

Two recent Michigan Court of Appeals cases highlighted a key point in the day-to-day practice of negotiations with state agencies.[146] In *Jacques v. Department of Environmental Quality*, the court of appeals decision reiterated the deference courts give to agency decision-making and the importance of the administrative process.[147] The plaintiff, Mr. Jacques, requested a special exception to build a driveway to a lakeside home he planned to construct in a critical dune area in Pentwater, Michigan.[148] The Michigan DEQ denied Mr. Jacques' application for a permit or special exception for the driveway and instead recommended a park-and-walk system, which involved installing a parking area adjacent to the road and a boardwalk and stair system to connect the parking area to the proposed home.[149]

Critical dune areas are defined in and protected by the Sand Dune Protection and Management Act (SDPMA).[150] Unless a variance is issued under a local zoning ordinance or DEQ permits a special exemption, any development, silvicultural, or recreational activity involving contour changes that result in increased erosion, decreased stability, or are more extensive than required are limited.[151]

Mr. Jacques appealed the denial to the circuit court, where DEQ's decision was reversed on the basis that the driveway and park-and-walk proposals were equally supported by the evidence and that decision lay with the property owner not DEQ.[152] DEQ appealed the circuit court reversal of its decision to the court of appeals.[153]

After dismissing Mr. Jacques' argument that DEQ did not have authority to regulate the driveway, the court reaffirmed its deference to

146. *See* Jacques v. Dep't Envtl. Quality, No. 268016, 2007 Mich. App. LEXIS 1997 (Mich. Ct. App. Aug. 23, 2007); Schultz v. Dep't Envtl. Quality, No. 271285, 2007 Mich. App. LEXIS 430 (Mich. Ct. App. Feb. 20, 2007).

147. *Jacques*, 2007 Mich. App. LEXIS 1997, at *1.

148. *Id.*

149. *Id.* at *1-2.

150. *See* MICH. COMP. LAWS ANN. §§ 324.35301-.35301 (West 2008).

151. MICH. COMP. LAWS ANN. §§ 324.35301(j), 324.35316(1)(d) (West 2008). Also restricted are uses which involve the removal of vegetation which can result in increased erosion or decreased stability and uses which are not deemed to be in the public interest. MICH. COMP. LAWS ANN. § 324.35301(f), (g) (West 2008).

152. *Jacques*, 2007 Mich. App. LEXIS 1997, at *2.

153. *Id.* at *1.

the agency's interpretation of the statute.[154] The Michigan Court of Appeals then turned to its investigation of whether the lower court had overstepped its bounds and "misapprehended or grossly misapplied" its review of DEQ's factual inquiry.[155] A court's review of an agency's factual finding is "limited to determining whether the decision was supported by competent material, and substantial evidence on the whole record, was arbitrary or capricious, or was clearly an abuse of discretion."[156] Here, the circuit court failed to give proper deference to DEQ's inquiry into the driveway proposal.[157] The circuit court substituted its own judgment for DEQ's by declaring the driveway and park-and-walk options substantially similar and neither was more detrimental to the sand dunes than the other.[158] The circuit court ignored DEQ's inquiry and the substantial evidence before it which indicated that park-and-walk plan impacted less square footage on the sand dunes than the attached driveway option.[159]

Mr. Jacques also argued that the agency referee gave insufficient weight to his safety concerns about the park-and-walk option.[160] The court of appeals supported DEQ's determination that there was little difference in the safety of each proposal.[161] DEQ's decision was supported by the substantial evidence made available during the hearing.[162] Ultimately, the Michigan Court of Appeals determined that the circuit court failed to give proper deference to DEQ's decision; it grossly misapplied its review of the agency's factual findings.[163]

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154. *Id.* at *2-5. Mr. Jacques argued that the agency lacked the statutory authority necessary to regulate the proposed driveway's impact on critical dunes and that any impacts should be considered on a statewide level rather than on a local one. *Id.* at *2.

155. *Id.* at *6.

156. *Id.* at *5 (quoting Romulus v. Dep't Envtl. Quality, 260 Mich. App. 54, 678 N.W.2d 444 (2003)).

157. *Jacques*, 2007 Mich. App. LEXIS 1997, at *7.

158. *Id.*

159. *Id.* at *7-9. The driveway option would have impacted 1,620 square feet of dune area with more than 1,100 square feet located on slopes with an incline greater than thirty-three percent. *Id.* at *9. Meanwhile, the park-and-walk option would have impacted nine hundred forty square feet with only six hundred square feet of impact on slopes with inclines of greater than thirty-three percent. *Id.*

160. *Id.* at *10-12. These concerns included the steep grade of the park-and-walk option's staircase and the possibility of a user falling. *Jacques*, 2007 Mich. App. LEXIS 1997, at *10-12. Furthermore, the petitioner argued that the respondent agency failed to consider his personal circumstances (his wife's osteoporosis) in making its determination. *Id.* at *13. However, the court of appeals supported the agency's interpretation of SDPMA as not permitting the consideration of personal circumstances. *Id.* at *13-14.

161. *Id.* at *10-12.

162. *Id.*

163. *Id.* at *9.

The *Jacques* case illustrates that Michigan courts continue their deference to agencies in both statutory interpretations and factual determinations supported by substantial evidence. This case is an important reminder to practitioners that an agency decision will be reversed only when the agency has acted arbitrarily, capriciously, or clearly abused its discretion.

The Michigan Court of Appeals demonstrated a similar deference in *Schultz v. Department of Environmental Quality.*[164] In 1991, Mr. Schultz applied to DEQ to build a home on pilings with an attached garage and access drive on an all-wetland lot.[165] DEQ denied the original proposal, but a modified permit was granted in 1996, provided Mr. Schultz granted the agency a conservation easement over the remaining undeveloped wetlands.[166] Mr. Schultz agreed to the modified proposal in early 1997 and submitted several proposed conservation easements over the next two years, all of which DEQ rejected.[167] DEQ closed the application file in September 1999.[168] In August 2001, Mr. Schultz moved to compel DEQ to comply with the 1996 final determination and order leading Mr. Schultz to appeal to circuit court.[169] In November 2002, the parties reached an agreement that Mr. Schultz would file an appropriate conservation easement within 30 days.[170] If DEQ chose to reject the proposed conservation easement, it must provide reasons for its denial.[171] Over the next two years, several proposals were submitted by Mr. Schultz and subsequently rejected by DEQ because Mr. Schultz continued to exempt areas of his property from the conservation easement.[172] Mr. Schultz appealed to the court of claims alleging an unconstitutional taking of his property.[173] DEQ filed a motion for summary disposition, which was granted by the court of claims because Mr. Schultz's claim was barred by the three-year statute of limitations instituted for inverse condemnation claims.[174]

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164. *Schultz*, 2007 Mich. App. LEXIS 430.
165. *Id.* at *1.
166. *Id.*
167. *Id.* at *2. The plaintiffs proposals were rejected because the proposed easements allowed for supplementary structures to be added to the property at a later time. *Id.*
168. *Id.*
169. *Schultz*, 2007 Mich. App. LEXIS 430, at *2.
170. *Id.* at *2-3.
171. *Id.*
172. *Id.*
173. *Id.* at *3.
174. *Id.*

Mr. Schultz then appealed the trial court's grant of summary disposition.[175] The court of appeals determined that the three-year statute of limitations applied to an inverse condemnation case and that the continuing wrong doctrine which would have tolled the statute of limitations did not apply.[176] Most important, the court of appeals held that the statute of limitations begins to run when the consequences of the condemnation have "stabilized."[177] In the court's view, the situation was stabilized when DEQ closed Mr. Schultz's permit file in 1999.[178] Of key importance was the fact that, in his August 2001 appeal, Mr. Schultz filed a motion to compel compliance rather than requesting a review of DEQ's decision to close the permit file.[179] The administrative law judge who heard the case prior to the appeal made the same determination and indicated that Mr. Schultz's only remaining option was to file a new permit application.[180] In the appellate court's view, the administrative law judge's order marked the last possible date of accrual.[181]

The *Schultz* case should act as a reminder to practitioners that it is difficult to overturn administrative decisions and that clients should make their best efforts to reach a settlement with an agency before a final decision is reached. Most important, once a final determination is made the statute of limitations begins to run. Ultimately, both *Jacques* and *Shultz* act as important reminders that overturning an agency's final determination is very difficult, thus practitioners must remain vigilant in addressing disputes in the administrative context.

V. ENFORCEMENT ACTIONS

In *Department of Environmental Quality v. Bulk Petroleum Corp.*, the Michigan Court of Appeals upheld a fine of $3,364,400, which was imposed on the owners of a gas station for their failure to comply with a Unilateral Administrative Order (UAO) and their failure to timely and properly submit a Final Assessment Report (FAR) required by the Michigan Natural Resources and Environmental Protection Act (NREPA).[182] The defendants in the case purchased the land at issue in

175. *Schultz*, 2007 Mich. App. LEXIS 430, at *3.
176. *Id.* at *5-9.
177. *Id.* at *10.
178. *Id.* at *10-11.
179. *Id.* at *13.
180. *Id.* at *15.
181. *Schultz*, 2007 Mich. App. LEXIS 430, at *15.
182. 276 Mich. App. 654, 741 N.W.2d 857 (2007); *see also* MICH. COMP. LAWS ANN. ch. 124 (West 2008).

1986.[183] Five underground storage tanks on the property leaked petroleum from about 1986 to 1999.[184] In 1993, the Department of Natural Resources, the predecessor to the DEQ, issued a UAO to require environmental remediation of the site. The defendants failed to comply with the UAO and also failed to submit a FAR, as required by Part 213 of NREPA.[185] Because of the failure to submit a FAR, DEQ assessed a fine of $29,400 on August 10, 2000, which defendants did not pay.[186] Defendants began excavating contaminated soil on the property in October of 2000.[187] On December 17, 2001, the Attorney General, on behalf of DEQ, filed a complaint against the defendants seeking penalties of $3,364,400 and an order mandating compliance with the UAO.[188]

On August 5, 2003, the trial court imposed a $1,090,000 penalty on the defendants for their failure to submit a statutorily sufficient FAR.[189] Defendants submitted a complete FAR on October 30, 2005 and paid the $1,090,000 penalty on December 9, 2003.[190] In January 2005, defendants moved to reduce the penalty and plaintiff moved for additional penalties in the amount of the difference between the amount paid and the $3,364,400 originally requested.[191] The trial court denied defendant's motion and granted plaintiff's motion, taking into account the seriousness of the violations and noncompliance.[192]

The defendants appealed both penalties. With respect to the first penalty of $1,090,000, the defendants argued that the trial court did not have the statutory authority to impose the penalty.[193] Part 213 of NREPA provides that a complete FAR must be submitted by a consultant within 365 days of discovery of the release.[194] If a sufficient FAR is not submitted in the required time, Part 213 provides for the following penalty schedule:

> (a) Not more than $100.00 per day for the first 7 days that the report is late.

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183. *Bulk Petroleum*, 276 Mich. App. at 655, 741 N.W.2d at 860.
184. *Id.* at 656, 741 N.W.2d at 860.
185. *Id.*; *see also* MICH. COMP. LAWS ANN. §§ 324.21301a-.21330 (West 2008).
186. *Bulk Petroleum*, 276 Mich. App. at 656, 741 N.W.2d at 860.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 657, 741 N.W.2d at 860-861.
192. *Bulk Petroleum*, 276 Mich. App. at 657, 741 N.W.2d at 861.
193. *Id.* at 659, 741 N.W.2d at 861.
194. MICH. COMP. LAWS ANN. § 324.21311a(1) (West 2008).

> (b) Not more than $500.00 per day for days 8 through 14 that the report is late.
>
> (c) Not more than $1,000.00 per day for each day beyond day 14 that the report is late.[195]

Based on this penalty schedule, the defendants argued that the $1,090,000 penalty for the delinquent FAR was not within the trial court's power to impose.[196] The court of appeals held, however, that based on another provision in Part 213, the penalty was appropriate, even though this provision did not relate specifically to FARs and the trial court did not offer it as a basis.[197] The provision cited by the court of appeals allows the Attorney General, in a case brought on behalf of DEQ, to seek various remedies for noncompliance.[198] One such remedy relates specifically to underground storage tanks:

> A civil fine of not more than $10,000.00 for each underground storage tank system for each day of noncompliance with a requirement of this part or a rule promulgated under this part. A fine imposed under this subdivision shall be based upon the seriousness of the violation and any good faith efforts by the violator to comply with the part or rule.[199]

The court of appeals held that although defendants were correct that DEQ has only the authority to impose penalties under NREPA Section 324.21313a for an untimely FAR, the trial court, on the other hand, had authority under Section 324.21323(1)(d) to impose the greater penalty of $1,090,000.[200]

The court of appeals similarly dismissed the defendants' two other arguments against the $1,090,000 penalty. First, the defendants argued that the plaintiff did not meet the evidentiary burden because no evidence was offered at the hearing.[201] The court of appeals agreed with the plaintiff that the statute did not set forth a burden of proof for the imposition of a fine and required only that an instance of noncompliance had occurred.[202] Because the defendants had stipulated to the violations

195. MICH. COMP. LAWS ANN. § 324.21313a (West 2008).
196. *Bulk Petroleum*, 276 Mich. App. at 659, 741 N.W.2d at 861.
197. *Id.*
198. MICH. COMP. LAWS ANN. § 324.21323(1) (West 2008).
199. MICH. COMP. LAWS ANN. § 324.21323(1)(d) (West 2008).
200. *Bulk Petroleum*, 276 Mich. App. at 659-60, 741 N.W.2d at 861-62.
201. *Id.* at 660, 741 N.W.2d at 862.
202. *Id.* at 660-61, 741 N.W.2d at 862.

underlying the penalty in their motion for summary judgment, no further evidence was necessary.[203] The second argument was that the trial court failed to properly consider the statutory criteria when it imposed the first penalty.[204] Section 324.21323(1)(d) requires that fines imposed for noncompliance involving underground storage tanks be "based upon the seriousness of the violation and any good faith efforts by the violator to comply with the part or rule."[205] The court held that the evidence considered by the trial court regarding defendants' repeated noncompliance and their failure to submit a timely and complete FAR was sufficient to justify the penalty.[206]

Against the second penalty of $1,418,900, the defendants first argued that Section 324.21323(1)(d) required a court to specifically enumerate the evidence it used in determining the penalty.[207] The court of appeals held that the trial court did not have such a duty under the statute, and that the trial court's statement that it had "tak[en] into account the seriousness of the violations, the defendants' noncompliance up to October 30, 2003, and the defendants' compliance since that time" was sufficient.[208] The defendants again argued that the plaintiff had not met its evidentiary burden, and the trial court again held that the statute did not set out an evidentiary burden, per se, and that the fact of noncompliance had been stipulated.[209]

Defendants also argued that some of the penalties were barred by the two-year statute of limitations period set out in Section 5809(2) Revised Judicature Act (RJA).[210] DEQ countered that the defendants had waived any statute of limitations defense because the issue was not raised at trial.[211] The court of appeals agreed that because it is an affirmative defense a statute of limitations defense must be raised at trial to be properly preserved for appeal.[212] Alternatively, DEQ argued that even if the defense was not waived, the proper statute of limitations period was

203. *Id.* at 660-61, 741 N.W.2d at 862-63.
204. *Id.* at 661, 741 N.W.2d at 863.
205. MICH. COMP. LAWS ANN. § 324.21323(1)(d) (West 2008).
206. *Bulk Petroleum*, 276 Mich. App. at 662, 741 N.W.2d at 863.
207. *Id.* at 662-63, 741 N.W.2d at 863.
208. *Id.*
209. *Id.* at 663, 741 N.W.2d at 863.
210. *Id.* at 663-64, 741 N.W.2d at 864. "The period of limitations is 2 years for an action for the recovery of a penalty or forfeiture based on a penal statute brought in the name of the people of this state." MICH. COMP. LAWS ANN. § 600.5809(2) (West 2008).
211. *Bulk Petroleum*, 276 Mich. App. at 664, 741 N.W.2d at 864.
212. *Id.* (citing MICH. CT. R. 2.111(F)(2) and (3)).

six years, under a different provision in the RJA.[213] Because it held that the defendants had waived the statute of limitations defense, the court did not reach the issue of which period to apply.

In *People v. Schumacher*, the Michigan Court of Appeals affirmed a trial court's criminal conviction of defendant Kenneth D. Schumacher for unlawful disposal of scrap tires.[214] Mr. Schumacher was sentenced to 270 days in jail and a $10,000 fine under Part 169 of NREPA.[215] Part 169 relates to Michigan's regulation of scrap tires and provides that scrap tires may be disposed of only at certain facilities.[216] The criminal enforcement provision of the statute states in relevant part:

> Violation as misdemeanor; penalties; separate violations; authority of officer; penalties inapplicable; conditions.
>
> (1) A person who violates this part when fewer than 50 scrap tires are involved is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not less than $200.00 or more than $500.00, or both, for each violation.
>
> (2) A person who violates this part when 50 or more scrap tires are involved is guilty of a misdemeanor punishable by imprisonment for not more than 180 days or a fine of not less than $500.00 or more than $10,000.00, or both, for each violation.
>
> (3) A person convicted of a second or subsequent violation of this part is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not less than $1,000.00 or more than $25,000.00, or both, for each violation.[217]

Mr. Schumacher argued on appeal that there was insufficient evidence at trial to uphold his conviction because there was insufficient evidence to prove that he *knowingly* violated the statute.[218] The Michigan Court of Appeals, however, held that the statute imposed strict liability and

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213. *Id.* at 664, 741 N.W.2d at 864. "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MICH. COMP. LAWS ANN. § 600.5813 (West 2008).

214. People v. Schumacher, 276 Mich. App. 165, 740 N.W.2d 534 (2007).

215. *Id.* at 166, 740 N.W.2d at 538.

216. MICH. COMP. LAWS ANN. §§ 324.16901-.16911 (West 2008).

217. MICH. COMP. LAWS ANN. §§ 324.16909(1)-(3) (West 2008) (emphasis added).

218. *Schumacher*, 276 Mich. App. at 167, 740 N.W.2d at 539.

therefore no such evidence was necessary.[219] The court acknowledged that the general rule is that each crime has a mens rea element.[220] But it held that a crime under Part 169 constitutes a "public welfare offense," which, unlike a common law crime, is intended to prevent acts that could injure society and not to deter direct injuries.[221] Therefore, it was necessary to prove only Mr. Schumacher knowingly and voluntarily delivered the tires and that the delivery was violative of the statute.[222]

Additionally, Mr. Schumacher argued that the site where he disposed of the scrap tires was in fact a lawful place to do so.[223] Part 169 provides, in relevant part:

> A person shall deliver a scrap tire only to a collection site registered under section 16904, *a disposal area licensed under part 115*, an end-user, a scrap tire processor, a tire retailer, or a scrap tire recycler, that is in compliance with this part.[224]

Mr. Schumacher argued that Robinson Farms, the site where he disposed of the tires, constituted a disposal area licensed under Part 115 of NREPA.[225] Part 115, which relates to solid waste management, has an exception that allows certain facilities to operate lawfully without a license.[226] Mr. Schumacher argued that the fact that Robinson Farms qualified under the exception under Part 115 amounted to the site being *licensed* under Part 115, which in turn complied with the mandate of Part 169.[227] The court disagreed with this argument, holding that "the evidence at trial established that Robinson Farms was not licensed under Part 115 of NREPA, and no evidence that Robinson Farms could do certain things lawfully without a license changes that fact."[228]

Mr. Schumacher also made a number of constitutional claims, including denial of due process, violation of his Fifth Amendment right not to be compelled to testify against himself, and denial of a fair trial.[229]

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219. *See id.* at 175, 740 N.W.2d at 543.

220. *Id.* at 168, 740 N.W.2d at 539 (quoting People v. Tombs, 472 Mich. 446, 466, 697 N.W.2d 494 (2005)).

221. *Id.* (quoting Morisette v. United States, 342 U.S. 246 (1952)).

222. *Id.* at 174-75, 740 N.W.2d at 542-43.

223. *Id.* at 175, 740 N.W.2d at 543.

224. MICH. COMP. LAWS ANN. § 324.16902 (West 2001) (emphasis added), *repealed* July 3, 2002.

225. *Schumacher*, 276 Mich. App. at 175, 740 N.W.2d at 543.

226. MICH. COMP. LAWS ANN. § 324.11529(1) (West 2008).

227. *Schumacher*, 276 Mich. App. at 175-76, 740 N.W.2d 543.

228. *Id.* at 176, 740 N.W.2d at 543.

229. *Id.* at 176-78, 740 N.W.2d at 543-44.

The court dismissed each of Mr. Schumacher's remaining arguments without significant discussion.[230]

The *Bulk Petroleum* and *Schumacher* cases demonstrate that the executive branch in Michigan remains willing to enforce criminal environmental laws and that the courts will impose substantial penalties for such crimes. The outcome of *Bulk Petroleum* illustrates the importance of working diligently with DEQ because future efforts may not cure past errors, as was the case with the insufficient FAR that, while defendants eventually did submit a complete version, resulted a penalty of over one million dollars. The holding in *Schumacher* which interpreted the criminal provision in Part 169 as a strict liability offense may serve as a reminder that individuals and entities whose activities fall within the scope of environmental laws must educate themselves about the mandates of such laws because a lack of knowledge will not shield a defendant from criminal liability.

VI. CONCLUSION

While the 2007-2008 *Survey* period did not contain any landmark environmental decisions, the cases discussed in this article reinforce the importance the Michigan courts place on standing, the administrative process, and environmental liability. The purpose of this article was to highlight general trends in environmental law and considerations which practitioners must make when counseling clients on strategies for success.

230. *Id.*