

Part 201 Prohibition On Pre-enforcement Review Trumps Part 17 Lawsuit

The Michigan Court of Appeals has upheld the dismissal of a lawsuit brought under Part 17 of the Natural Resources and Environmental Protection Act (NREPA), formerly known as the Michigan Environmental Protection Act, or “MEPA,” that challenged a cleanup remedy selected under Part 201 of NREPA. The court held that Part 17’s judicial review provisions do not override Part 201’s prohibition on pre-enforcement litigation regarding cleanup remedies selected by the Michigan Department of Environmental Quality (MDEQ).

Genesco, Inc. operated a leather tannery in the City of Whitehall, on the shores of White Lake, in an area known as “Tannery Bay.” For over a century, Genesco and other tanneries operating in that area discharged their industrial wastewater into White Lake, contaminating its bottomlands with various hazardous substances, including arsenic, chromium, and mercury. After studying various alternatives for cleaning up the lake bottom, Genesco concluded that the best response would be to leave contaminated sediment in place and prohibit its disturbance through restrictive deed covenants. In 1999, Genesco submitted this proposed response action to the MDEQ for its approval pursuant to Part 201 of NREPA. The MDEQ, however, disagreed with Genesco’s conclusion and, instead, insisted that the contaminated sediment must be dredged from the lake bottom. Believing that the MDEQ’s plan would “destroy the White Lake ecosystem” by unnecessarily stirring up the sediments, Genesco sued the MDEQ under Part 17 of NREPA. Genesco sought a court order that would prohibit the MDEQ from implementing its dredging remedy.

The trial court dismissed Genesco’s suit because Part 201 of NREPA, which generally governs environmental cleanups, prohibits courts from reviewing challenges to a MDEQ cleanup plan before MDEQ initiates an enforcement action to require compliance with that plan or to

recover cleanup costs. On appeal, Genesco argued that Part 17 of NREPA, which authorizes a court to prohibit any activity that would pollute, impair or destroy the environment, “trumps Part 201’s pre-enforcement bar to judicial review.” The court of appeals, however, agreed with the trial court’s decision and upheld the dismissal.

The court of appeals first noted that Part 17 and Part 201 share a common goal of protecting the environment, but that they achieve this goal in different ways. “[T]he approach of Part 17 is to preserve the environment through the obtaining of declaratory and injunctive relief [i.e., court orders] in court, while Part 201 encourages the prompt cleanup of hazardous substances through administrative or private action and assignment of financial responsibility.” These approaches, the court noted, are very different.

Under Part 17, any person may seek a court order to prohibit conduct that “is likely to pollute, impair, or destroy the air, water, or other natural resources.” Part 17 provides private citizens with “a direct method for enforcing environmental regulations and challenging an administrative agency’s decision.” It also allows a court to substitute its judgment for the judgment of the MDEQ’s regarding the “validity, applicability, and reasonableness” of a “standard for pollution or for an antipollution device or procedure.” Part 201, however, “generally defer[s] to administrative agencies to determine the appropriate response to contaminated sites and limit[s] pre-enforcement judicial review.” Specifically, “Part 201 provides that a state court does *not* have jurisdiction to review challenges to a ‘response activity selected or approved by the department . . .’ except in certain enumerated situations, none of which [were applicable to Genesco’s challenge].”

Recognizing that the “plain language of Part 17 and 201, and the differing approaches to judicial review and participation, seemingly conflict,” the appeals court turned to the principles

of statutory construction to resolve this conflict. The court held that these principles “dictate that claims under Part 17 may not be brought where the underlying controversy is over a ‘response activity’ as defined in Part 201.” “Otherwise,” the court reasoned, “the MDEQ’s efforts to clean up toxic sites might often be delayed by pre-enforcement litigation and the intent of the Legislature expressed in [Part 201] would be frustrated.” Although the MDEQ must comply with Part 17, judicial review of MDEQ’s activity with respect to a Part 201 response action plan “is delayed until after the response activity is completed.”

Thus, the court held that Part 17 supplements, but does not supplant, Part 201 and upheld the trial court’s dismissal of Genesco’s lawsuit.

Genesco, Inc. v. MDEQ, No. 226214 (Mich. Ct. App. Feb. 19, 2002)

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