

ENVIRONMENTAL LAW FOCUS

S. Lee Johnson, Editor

SUPERFUND ATTORNEYS STRUGGLE TO COPE WITH THE EFFECTS OF *COOPER v. AVIALL*

The Supreme Court's December 2004 decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004), has caused Superfund attorneys to reevaluate everything they thought they knew about contribution actions. District court decisions have disagreed on how the *Aviall* decision affects contribution actions. It will take several years of litigation, and possibly some legislation, to restore order to this area of Superfund practice.

The CERCLA Sections Involved

As enacted in 1980, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 *et seq.* ("CERCLA"), did not expressly provide a right of contribution by one liable party against another. In the early 1980's, some courts allowed a liable party who had paid more than its fair share of response costs to maintain a contribution action against other liable parties, either under an implied right of contribution or under CERCLA §107(a)(4)(B).

However, several Supreme Court decisions in 1981 cast doubt on the availability of implied contribution actions. Congress amended CERCLA in 1986 by adding two sections that expressly authorize contribution actions:

- Section 113(f)(1) authorizes any person to "seek contribution from any other person who is liable . . . during or following any civil action under" §106 or 107 of CERCLA. 42 U.S.C. §9613(f)(1).
- Section 113(f)(3) provides that "a person who has resolved its liability to the United States or a State . . . in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement . . ." 42 U.S.C. §9613(f)(3).

The Aviall Case

In August, 2001, a three-judge panel of the United States Court of Appeals for the Fifth Circuit ruled that a liable party may maintain a contribution action under §113(f)(1) only "during or following a civil action" under §106 or 107. *Aviall Services, Inc. v. Cooper Industries, Inc.*, 263 F.3d 134 (5th Cir. 2001). The Fifth Circuit *en banc* overruled the panel decision. 312 F.3d 677 (2002).

The Supreme Court reversed, and held that *Aviall Services, Inc.* ("Aviall"), the contribution-plaintiff was not entitled to seek contribution under §113(f)(1) because Aviall had not been the subject of a civil action under §106 or 107. The Court held that §113(f)(1) authorizes a party to seek contribution for response costs from other liable parties only

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“during or following” a civil action under §106 or §107 of CERCLA. The Court held that Aviall was not entitled to sue for contribution under §113(f)(1) because it had cleaned up its property voluntarily, without having been sued under §106 or §107 and without having entered into a judicial or administrative settlement with the U.S. Environmental Protection Agency (“U.S. EPA”) or the State. The Court addressed the issue strictly as a matter of statutory interpretation, and declined to consider policy arguments based on the remedial purpose of CERCLA.

The Court declined to consider Aviall’s argument that if it could not sue under §113(f)(1), it should be allowed to sue under §107(a)(4)(B), which authorizes the recovery of “any other necessary costs of response incurred by any . . . person” other than the United States, a State, or an Indian tribe. The Court left open the issue of whether Aviall might be entitled to recover some or all of its costs under §107(a)(4)(B), and sent the case back to the lower courts to decide that issue.

Court Decisions Interpreting Aviall

Recent district courts that have considered whether PRPs may sue other PRPs under §107 have reached conflicting results. Some district courts have allowed PRPs to do so. See, e.g., *Vine Street, LLC v. Keeling*, 2005 WL 675786 (E.D. Texas, March 24, 2005); *Metropolitan Water Rec. Dist. v. Lake River Holding Corp.*, No. 03-C-0754 (N.D. Ill. March 8, 2005). Two district court have held that they may not. See, e.g., *AMW Materials Testing, Inc. v. Town of Babylon*, 2004 U.S. Dist. LEXIS 25511 (E.D. NY 2004); *Elementis Chemicals v. T. H. Agriculture*, 2005 WL 236488 (S.D.N.Y. January 31, 2005). One district court allowed a PRP to amend its complaint to add a §107 claim, but did not decide whether the claim would be valid. *General Motors Corp. v. United States*, 2005 WL 548266 (D. N.J., March 2, 2005).

Adding to the confusion is the fact that the Department of Justice has filed at least one legal brief arguing that private parties are not entitled to seek contribution under §107, while at the same time DOJ has filed at least one complaint on behalf of a liable federal agency seeking contribution under §107. *General Motors v. United States*, *supra*; *United States v. Coffee County*, No. 4:05-CV-0005 (E. D. TN. filed Jan. 20, 2005).

Perhaps the most surprising decision is *Pharmacia Corp. v. Clayton Chemical*, 2005 U.S. Dist. LEXIS 5286 (S.D. Ill. March 8, 2005), holding that a Administrative Order On Consent (“AOC”) under which a group of PRPs agreed to perform a remedial investigation for EPA, did not constitute “an administrative . . . settlement” for purposes of CERCLA §113(f)(3), so that the PRPs were not entitled to maintain a contribution action under CERCLA. EPA is reported to be considering adding new language to its AOCs so they qualify as “settlements.”

Will Aviall Affect Contribution Actions Under State Statutes?

The *Aviall* decision has caused concern that liable PRPs may not be able to seek contribution under state statutes that are analogous to CERCLA, including Michigan’s Part 201 of the Natural Resources and Environmental Protection Act. The section of Part 201 that authorizes liable parties to seek contribution from other liable parties is similar, but not identical, to the §113(f) of CERCLA. Because the Michigan appellate courts have sometimes interpreted Part 201 as having the same meaning as similar provisions of CERCLA, the rationale of the *Aviall* decision may adversely affect the rights of PRPs to seek contribution under Part 201, as well as under CERCLA.

Legislative Fix Not Likely

Congress could cure these problems simply by adding the word “before” to CERCLA §113(f)(1). However, neither Congress nor the Administration has expressed any serious interest in legislatively overturning the *Aviall* decision. Many people believe that the Administration would oppose any change because it would expose the Department of Defense and other federal agencies to contribution actions against which the *Aviall* decision may protect them.

Christopher J. Dunsky

SECOND CIRCUIT: POTENTIALLY LIABLE PARTIES CAN RECOVER VOLUNTARY RESPONSE COSTS UNDER CERCLA

On September 9, 2005, the United States Court of Appeals for the Second Circuit became the first federal appellate court to approve the use of Section 107 of the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) as a means for a party that may be liable to recover voluntary cleanup costs. In *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.* (“Consolidated Edison”), the court held that a party that has not been sued or made to participate in an administrative proceeding, but, if sued, would be liable under CERCLA Section 107(a), may recover necessary response costs incurred voluntarily.

In *Consolidated Edison*, prior to entering a voluntary cleanup agreement with the New York State Department of Environmental Conservation (“NYSDEC”), Consolidated Edison (“Con Ed”) sued Utilities, Inc. (“UGI”) seeking to recoup costs Con Ed had incurred and would incur in cleaning up sites at which Con Ed or its predecessors might have formerly owned or operated Manufactured Gas Plants. Con Ed alleged that UGI or its predecessors operated the plants, and that UGI was thus liable for remedial costs under CERCLA section 113(f)(1) and state law.

Before oral argument in the case, the Supreme Court issued its decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004) (“*Aviall*”). In *Aviall*, the Court held that a party may only pursue a contribution claim under CERCLA section 113(f)(1) during or following a civil action as specified in that section. Consequently, the Court held that section 113(f)(1) does not support a claim by a party that has not been the subject of judicial or administrative measures to compel cleanup.

Because no civil action had been filed against Con Ed, the Second Circuit found that, in light of *Aviall*, it did not have jurisdiction under section 113(f)(1). The court also found that, because Con Ed had settled only state law claims with NYSDEC, it did not have jurisdiction pursuant to CERCLA section 113(f)(3)(B), which creates contribution rights for parties who settle CERCLA liability. The court did find, however, that subject matter jurisdiction existed under CERCLA section 107(a).

In reaching this conclusion, the court considered other federal appellate court decisions that held that actions by parties that may be liable under section 107(a) were “necessarily actions for contribution, and [were] therefore governed by the mechanisms set forth in § 113(f).” The Second Circuit reasoned that in [*Aviall*], however, the Supreme Court expressly stated that the section 107(a) cost recovery remedy and the section 113(f)(1) contribution remedy, though ‘similar at a general level in that they both allow private parties to recoup costs from other private parties, [are] clearly distinct’ This holding impels us to conclude that it no longer makes sense to view section 113(f)(1) as the means by which the section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under section 107(a). Each of those sections, 107(a) and 113(f)(1), embodies a mechanism for cost recovery available to persons in different procedural circumstances. Given that section 107(a) is distinct and independent from section 113(f)(1), and that section 113(f)(1)’s remedies are not available to a person in the absence

of a civil action as specified in that section, determining whether a party in Con Ed's circumstances may sue under section 107(a) is easily resolved based on that section's plain language.

The court rejected the interpretation of section 107(a) that restricts it to use by innocent landowners. "Unlike some other courts, we find no basis for reading into [section 107(a)] a distinction between so-called 'innocent' parties and parties that, if sued, would be held liable under section 107(a). . . . Section 107(a) makes its cost recovery remedy available, in quite simple language, to any person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing."

Moreover, the court recognized that if section 107(a) were read to preclude parties that, if sued, would be held liable under section 107(a) from recovering necessary response costs, such parties, in light of *Aviall*, would "likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in absence of a suit This would undercut one of CERCLA's main goals, 'encourag[ing] private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.'"

Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc., 423 F.3d 90 (2nd Cir. 2005).

Christina C. Howard

MICHIGAN COURT OF APPEALS REJECTS CLAIM THAT DENIAL OF A PERMIT TO FILL A WETLAND CONSTITUTES A REGULATORY TAKING

The Michigan Court of Appeals held that the Michigan Department of Environmental Quality's ("MDEQ") denial of a permit to fill a wetland on private property does not constitute a regulatory taking and, therefore, is not compensable. JFK Investment Company, LLC ("Developer") owned four contiguous parcels of land, totaling approximately 82 acres, in Waterford Township, Oakland County ("Township"). Parcel 1, the largest parcel at 55 acres, contained 27 acres of wetlands. The other three parcels contained little or no wetlands. Developer began preparing Parcel 1 for construction of a 42 acre complex without applying for or receiving a permit from MDEQ to fill the wetlands. As a result, Township issued a cease-and-desist letter instructing Developer that, to continue construction, Developer would need to get a permit from MDEQ. Developer applied for a permit, which MDEQ denied on the grounds that Developer could avoid the wetland and that there was no demonstrated public need for the development. Developer then brought suit claiming that MDEQ's denial of the permit constituted a taking. While the suit was pending, Developer filed another application for a wetland permit using a different development plan. MDEQ denied that permit too. At some point, Developer built an office building and a restaurant on the non-wetland portions of Parcel 1.

A taking results from either a permanent, physical invasion by the government on private property or by a "regulation that goes too far" by affecting and limiting the use of private property to such a great extent that it is only fair to compensate the property owner for his or her loss of use. One type of regulatory taking is a categorical taking, which results "when the effect of a regulation goes so far as to deprive a property owner of all economically beneficial value" of his or her land. Because much of a court's analysis of whether a regulatory taking has occurred is driven by the extent of the loss in value of the property, a court has to determine what constitutes the "property" for purposes of its takings analysis, how much of the property was impacted by the regulation, and the value of the property both before and after the regulation. Thus, the court determination of what constitutes the relevant property for its takings analysis greatly affects the outcome of the analysis.

In this case, the trial court determined that only Parcel 1, rather than the entire property (all four contiguous parcels), was relevant to its analysis of whether MDEQ's denial of the permits constituted a taking and held that the permit denials rendered Parcel 1 valueless. Thus, the trial court found a categorical taking and ordered MDEQ to compensate Developer \$6 million for the loss in value. MDEQ appealed the trial court's decision to the Court of Appeals, which affirmed the trial court's decision. The Michigan Supreme Court reversed, however, finding that the trial court erred in considering only Parcel 1 when it valued Developer's property. Additionally, the Court held that the trial court should have considered the value of the two developed portions of Parcel 1 in its valuation of Developer's property. The Court explicitly held that the denial of the permits did not constitute a categorical taking. On remand, the Court ordered the trial court to apply the multi-factor test of *Penn Central Transportation Company v. New York*, 438 U.S. 104 (1978), to determine whether there had been a taking.

On remand, the trial court again found that Developer's property was rendered valueless by the permit denial despite the presence of the office building and the restaurant on Parcel 1. On appeal, the Court of Appeals found that the trial court ignored the instructions of the Michigan Supreme Court and had misapplied the Penn Central test to determine whether a taking had occurred. The Court of Appeals then reviewed the case for itself.

The Court of Appeals observed that, under Penn Central, in order to determine whether a land-use regulation constitutes a regulatory taking, the court must examine: (1) whether the challenged regulation is "comprehensive and universal so that the private property owner is relatively equally benefited and burdened ... as other similarly situated property owners" ("character of the government action"); (2) whether the owner purchased "with knowledge of the regulatory scheme so that it is fair to conclude that the cost to the owner factored in the effect of the regulations on the return on investment" ("distinct investment-backed expectations"); and (3) despite the regulation, whether the owner can "make valuable use of the land" ("economic impact of the regulation"). If the answer to all three prongs is yes, then a taking has not occurred and no compensation is due under Penn Central.

For the "character of the government action" prong of the Penn Central test, the Court of Appeals determined that while "wetland regulations place a burden on some property owners," this "burden ultimately benefits all property owners, including those who claim they are unfairly burdened." The Court of Appeals reached this conclusion by comparing wetlands regulations to zoning and historic districts, which have been upheld by the U.S. Supreme Court in past decisions. Just like zoning regulations, which protect property values over a broad area, wetland regulations are intended to broadly benefit property in Michigan. Wetlands benefit property by "protecting water quality, regulating local hydrology, preventing flooding, and preventing erosion." Furthermore, the Court of Appeals found that Developer is "not being singled out by the WPA [Wetland Protection Act]. The WPA provides the same regulatory framework that applies to all property owners in this state for the benefit of all landowners."

For the "distinct investment-backed expectations" prong, the Court of Appeals noted that Developer is an "experienced commercial land developer[] who clearly had or [was] on notice of the wetland regulations promulgated under the WPA," and therefore, Developer's "distinct, investment-backed expectations would reasonably have been tempered with the knowledge that [its] development of the property would be restricted due to the presence of wetlands." Furthermore, the Court of Appeals did not believe that, given the Developer's experience, Developer could overlook a 27 acre wetland on a 55 acre parcel. Developer should have factored the presence of the wetlands and the associated costs of wetlands into its decision to purchase and develop the property. Lastly, because of Developer's experience, the Court of Appeals found Developer's expectation that it would be able to build on all of Parcel 1 unreasonable.

For the "economic impact of the regulation" prong, a "reduction in the value of the regulated property is insufficient, standing alone, to establish a compensable regulatory taking." U.S. Supreme Court precedent has not found takings when property has been decreased in value by 75% or even by

92.5%. Here, the Court of Appeals noted that even under the trial court's "incorrect, inflated 'damage calculation,'" the property value declined only 67%. When the Court of Appeals accounted for the value of the office building and the restaurant, the denial of the permit only decreased the property's value by 24 – 33%. Furthermore, the Court of Appeals determined that Developer has "developed and retain[s] the ability to develop a significant amount of [its] property." Therefore, the diminution in value is insufficient to find a taking.

Consequently, the Court of Appeals reversed the judgment of the trial court and entered a judgment in favor of MDEQ that MDEQ had not taken Developer's property.

K & K Constr., Inc., v. MDEQ, 267 Mich. App. 523 (July 26, 2005).

Megan C. McCulloch

COURT APPROVES EXPANDED REMEDY FOR WEST KL AVENUE SUPERFUND SITE

On April 15, 2005, United States District Judge Enslin of the Western District of Michigan granted a motion by the United States Environmental Protection Agency ("EPA") to amend a 1992 consent decree for the West KL Avenue Superfund Site, located a few miles west of Kalamazoo, Michigan. As a result, the settling defendants will have to extend municipal water service to an area affected by a previously undiscovered plume of contaminated groundwater.

The West KL Avenue Site is one of the major Superfund sites in Michigan. It was added to the National Priorities List in 1982. In 1990, EPA issued a Record of Decision ("ROD") that selected a \$16,000,000 cleanup plan that included a landfill cap, a groundwater pump and treat system, and institutional controls to prevent the use of contaminated groundwater.

EPA and a group of settling defendants entered into a consent decree in 1992 by which the settling defendants agreed to implement the cleanup plan in the 1990 ROD. The consent decree also required the settling defendants to perform additional groundwater studies. As a result of those studies, EPA discovered that there was a previously unknown plume of contaminated groundwater that would not be treated by the groundwater pump and treat system that the PRPs had implemented pursuant to the consent decree.

In 2003, EPA issued an amended ROD to address the newly discovered groundwater plume. The amended ROD called for municipal water supplies to be extended to homes in the area of the newly discovered groundwater plume, and the imposition of institutional controls to prevent people from using groundwater wells in the affected area. The amended ROD also adopted revised standards for groundwater cleanup based on groundwater criteria adopted by the State of Michigan in 1994.

In deciding whether to approve the amendment to the consent decree, Judge Enslin considered whether the change to the consent decree was reasonable, fair, consistent with the statute, and adequate to protect the public interest. He held that the consent decree amendment was procedurally fair because it was negotiated between EPA and the settling defendants by arms-length bargaining. He found that the amended consent decree would be adequate to protect the public interest, relying on EPA's technical judgment and the fact that there was no adverse comment from property owners near the site during the 30 day public comment period.

Therefore, the court approved the amendment to the consent decree.

United States v. Upjohn Co. v. ABF Freight Systems, Inc., No. 1:92-CV-659 (W.D. Mich. April 15, 2005).

Christopher J. Dunsky

NO SUMMER VACATION: SIXTH CIRCUIT DECIDES TO RETAIN PRIOR RULING FROM MOOT CASE

The Sixth Circuit Court of Appeals has decided not to vacate a ruling concerning a court's power to issue injunctions under the All Writs Act, even though the underlying cause of action was voluntarily dismissed at request of the parties.

In conjunction with the dredging of contaminated sediment from Conner Creek as required under a 2000 consent judgment between the City of Detroit ("City") and the State of Michigan ("State"), the City had sought approval from the United States Army Corps of Engineers ("Corps") to dispose of the sediment at the Corps-operated Pointe Mouillee Confined Disposal Facility ("CDF"). The Corps refused to accept the sediment without first conducting environmental reviews accounting for the level of contamination in the sediment.

The City and State then sought an injunction in federal district court requiring the Corps to accept the sediment for disposal at the CDF, which was granted by the district court under the authority of the All Writs Act. The Corps appealed to the Sixth Circuit. On appeal, a panel of the Sixth Circuit vacated the injunction, holding that the district court lacked the authority to issue the injunction under the All Writs Act. The City and State petitioned for a rehearing before the entire group of Sixth Circuit judges (en banc), which was granted.

On May 15, 2003, the en banc Sixth Circuit held that the district court's decision may have been appropriate, specifically holding that: (a) the waiver of sovereign immunity under the Administrative Procedure Act ("APA") applies to cases that are brought under laws other than the APA, thus operating to waive the Corps' sovereign immunity for cases brought under the All Writs Act; and (b) the All Writs Act granted the district court power to issue the injunction. The Sixth Circuit remanded the case to the district court for determination of whether: (1) the motion should have been considered under the APA rather than the All Writs Act; and (2) the Corps' refusal to accept the sediment without further environmental study was "arbitrary and capricious."

On October 22, 2003, the district court reinstated the injunction, holding that it was appropriately considered under the All Writs Act rather than the APA, and that the Corps' determination was arbitrary and capricious. The Corps appealed that decision to the Sixth Circuit. Before oral argument on the appeal, however, the City notified the Corps that it no longer wished to dispose of the sediment at the CDF, and asked the Corps to dismiss its appeal. The Corps filed a motion seeking dismissal of the appeal, but also requested that the Sixth Circuit vacate all prior decisions in the case as being moot, arguing that the decisions "reached issues that are of broad importance to the United States beyond this litigation," and, therefore, retaining the decisions would be prejudicial to the Corps. The City agreed that the district court's October 22, 2003 decision should be vacated, but opposed the vacatur of the May 15, 2003 Sixth Circuit and original district court decisions.

A panel of the Sixth Circuit addressed the appeal. Concerning the October 22, 2003 injunction, the Sixth Circuit agreed with the City and Corps that vacatur was appropriate because the injunction and the appeal were moot. The court noted that the "voluntary-cessation rule," which prevents an appeal from being even voluntarily dismissed unless the conduct at issue in the appeal "could not reasonably be expected to occur," was not a concern because the rule was "meant to protect a party from an opponent who seeks to defeat judicial review by temporarily altering its behavior;" in light of the Corps' position that the appeal was moot, the Corps was clearly unconcerned with that possibility and, therefore, did not require the protection of the voluntary-cessation rule.

Concerning the May 15, 2003 Sixth Circuit and original district court decisions, however, the Sixth Circuit sided with the City and held that the judgments would not be vacated. Noting that the determination of whether a judgment should be vacated on the basis of mootness is an equitable decision, the court observed that it was inclined to not vacate those decisions because, as a general matter, it was prohibited by Sixth Circuit procedural rules from overruling the en banc May 15, 2003 decision, which could only be altered in another en banc decision.

Additionally, the court noted, the Corps could have appealed the May 15, 2003 decision to the United States Supreme Court, but did not, despite being granted an extension of time to prepare such an appeal. Although its reasoning was not explicitly set forth in the decision, the court apparently believed that it would be inappropriate to vacate an en banc decision where it was prohibited from overruling it, and that the Corps was not prejudiced where it could have sought further judicial review of the decision but chose not to.

Therefore, the Sixth Circuit granted the Corps' motion to dismiss the appeal and to vacate the October 22, 2003 injunction, but denied the Corps' motion to vacate the earlier decisions in this case.

United States v. City of Detroit, 401 F.3d 448 (6th Cir. Mar. 16, 2005).

H. Kirk Meadows

MDEQ FAILS TO PROVE THAT GASOLINE STATION OPERATOR VIOLATED PART 201 CLEANUP ORDER

In early January 1993, the Michigan Department of Natural Resources (now the Michigan Department of Environmental Quality, or "MDEQ") found that gasoline had been released from underground storage tanks at a gasoline station in Caro, Michigan, operated by Imlay City Gas & Oil Company ("Imlay City"). MDEQ told Imlay City that it was responsible to remediate the site under the Michigan Leaking Underground Storage Tanks Act.

MDEQ inspected the site again in 1997 and found that gasoline had migrated to an offsite monitoring well. It notified Imlay City again that it was responsible to remediate the site. Imlay City hired an environmental consultant who submitted a remediation workplan to MDEQ, which MDEQ approved in September, 1997. In November, 1998, MDEQ issued an administrative order to Imlay City under Part 201 of the Natural Resources and Environmental Protection Act. Although Imlay City told MDEQ that it would comply with the order, MDEQ was not satisfied with Imlay City's efforts to comply. MDEQ, acting through the Michigan Department of Attorney General, filed a complaint in Michigan Circuit Court claiming that Imlay City had failed to comply with the order, and asking the court to require Imlay City to comply with the order, pay MDEQ's response costs, and pay civil penalties for violating the order.

In early 2004, MDEQ filed a motion with the court asking it to rule before trial that Imlay City had violated the order. MDEQ based its motion on the administrative record for the site and an affidavit signed by MDEQ's project coordinator. Imlay City contended that it had fully complied with the order, or that at least there was a genuine factual dispute as to whether it had complied with the order, so that the court should not decide the case without having a full trial. Imlay City submitted affidavits from its environmental consultants to support its position. The trial court denied MDEQ's motion because it found that there were genuine issues of fact that the court could not resolve without a trial.

MDEQ appealed the trial court's decision to the Michigan Court of Appeals. MDEQ's first argument was that the trial court should have accepted MDEQ's determination that Imlay City had violated the order, unless the trial court found that MDEQ's decision was arbitrary and capricious. The Court of Appeals rejected this argument, holding that under Part 201 the "arbitrary and capricious"

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standard of review applies only to MDEQ's selection of a response action, not to MDEQ's determination of whether a company has complied with an administrative order. MDEQ next argued that the trial court should have granted MDEQ's motion because, in MDEQ's opinion, the affidavits and other evidence submitted to the court left no reasonable doubt that Imlay City had failed to comply with the MDEQ compliance order. The Court of Appeals rejected this argument, as well, and explained in detail why and how MDEQ had failed to present convincing evidence to the trial court.

First, MDEQ argued that it had proven that Imlay City violated §5.1 of the order, which required Imlay City to use active methods to recover free product unless it could show that a passive recovery method would work. The court rejected MDEQ's argument because: (1) the administrative record showed several instances in which MDEQ refused to approve active recovery methods that Imlay City had proposed; and (2) there was evidence that the recovery methods that Imlay City was using were successfully controlling the size of the gasoline plume.

Second, MDEQ argued that Imlay City had violated the order by failing to define the full extent of groundwater contamination and soil contamination. The Court rejected this argument because several maps from Imlay City's consultant showed that the levels of contamination in several monitoring wells were below risk-based screening levels. The court also rejected MDEQ's argument based on alleged failure to define the extent of soil contamination, because Imlay City's consultant produced evidence tending to show that it had defined the outer edge of the soil contamination.

Third, MDEQ argued that Imlay City violated §5.3 of the order which required it to notify members of the public who were affected by the contamination. Imlay City identified 87 properties that were affected by the migrating contamination and sent notices to owners of at least 81 properties. However, MDEQ argued that Imlay City had failed to notify easement holders, public utilities, and highway authorities, and complained that Imlay City had failed to notify the owners of six properties who were listed as "unknown" in the consultant's Final Assessment Report. The court rejected MDEQ's argument because MDEQ failed to include within the record on appeal any proof showing that the properties whose owners had not been notified were in fact located within the area of the contamination. Further, MDEQ failed to include any evidence in the record on appeal showing that any easements were located within the area of contamination. Therefore, MDEQ had failed to prove that Imlay City had violated the order by failing to notify landowners affected by the contamination.

Fourth, MDEQ argued that Imlay City had failed to submit a final assessment report and a corrective action plan as required by §§5.5 and 5.6 of the order. The court held that the trial court correctly rejected this argument, because the affidavits submitted by Imlay City's consultants were sufficient to raise genuine issues of fact as to whether the report Imlay City submitted contained an appropriate corrective action plan.

Accordingly, the Court of Appeals affirmed the trial court's decision to deny MDEQ's motion for a judgment before trial.

Attorney General and MDEQ v. Imlay City Gas & Oil Company, No. 254418 (unpublished, Mich. Ct. App. July 14, 2005).

Christopher J. Dunsky

MICHIGAN SUPREME COURT REJECTS MEDICAL MONITORING CLAIM

In a 5-2 opinion, the Michigan Supreme Court recently rejected a tort claim for medical monitoring expenses, finding that, because Plaintiffs did not allege a present injury, they did not present a viable negligence claim under Michigan's common law.

Plaintiffs, 173 individuals who asked to represent a putative class of thousands of individuals who have resided in the Tittabawassee River flood plain area at some point since 1984, filed suit in Saginaw County Circuit Court alleging that Defendant The Dow Chemical Company ("Dow") negligently released dioxin, a known human carcinogen, from its plant in Midland, Michigan. In 2003 the Michigan Department of Environmental Quality ("MDEQ") identified Dow's plant as the "principal source of dioxin contamination in the Tittabawassee riverbed and flood plain soils." MDEQ found as much as 7,300 parts per trillion ("ppt") of dioxin in the flood plain, more than 80 times Michigan's 90 ppt cleanup standard for direct residential contact. Plaintiffs filed a motion to certify them as a class action seeking Dow moved for a judgment before trial, arguing that the Plaintiffs' claims for medical monitoring were not valid under Michigan law. The Circuit Court denied Dow's motion and the Michigan Court of Appeals denied Dow's appeal of the Circuit Court decision. Dow then appealed to the Michigan Supreme Court the creation of a program to be funded by Dow and supervised by the court that would monitor the class for possible future manifestations of dioxin-related diseases.

The Court reversed the Saginaw Circuit Court and remanded the case for entry of summary disposition in favor of Dow, finding that "[b]ecause plaintiffs do not allege a present injury, plaintiffs do not present a viable negligence claim under Michigan's common law." The Court found that whether Plaintiffs' claim was for injuries they may suffer in the future, or that, by virtue of their potential exposure to dioxin they have suffered an "injury" in that any person so exposed would incur the expense of medical monitoring, their claim is precluded because Michigan law requires an actual present injury to person or property as a precondition to recover under a negligence theory. "While the courts of this state may not have always clearly articulated this injury requirement, nor finely delineated the distinction between an 'injury' and the 'damages' flowing therefrom, the injury requirement has always been present in our negligence analysis."

Recognizing that "the common law is an instrument that may change as times and circumstances require," the Court rejected Plaintiffs' argument that it should modify the common law of negligence to permit their claim to proceed for two principal reasons. First, recognizing a cause of action that departs drastically from traditional notions of a valid negligence claim could have undesirable effects that neither the Court nor the parties can satisfactorily predict.

It is less than obvious, therefore, that the benefits of a medical monitoring cause of action would outweigh the burdens imposed on plaintiffs with manifest injuries, our judicial system, and those responsible for administering and financing medical care. Because such a balancing process would necessarily require extensive fact-finding and the weighing of important, and sometimes conflicting, policy concerns, and because here we lack sufficient information to assess intelligently and fully the potential consequences of our decision, we do not believe that the instant question is one suitable for resolution by the judicial branch.

Second, the Court relied on the "stronger prudential principle . . . [of] the judiciary's obligation to exercise caution and to defer to the Legislature when called upon to make a new and potentially societally dislocating change to the common law." Citing the Natural Resources and Environmental Protection Act ("NREPA"), MCL §§ 324.101 et seq., the Court found that "[t]he propriety of judicial deference to the

legislative branch in expanding common-law causes of action is further underscored where, as here, the Legislature has already created a body of law that provides plaintiffs with a remedy.” “Not only is the MDEQ specifically authorized under the NREPA to undertake ‘health assessments’ and ‘health effect studies,’ . . . but the department is also empowered to take ‘other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.’”

In a dissenting opinion, Justices Cavanagh and Kelly argued that the heightened exposure to dioxin Plaintiffs received because of Dow’s acts is “akin to an injury,” and that “merely because an illness is latent does not mean that plaintiffs have not been injured and suffered damages.” The dissent also argued that Plaintiffs’ request for medical monitoring is an equitable remedy, and that “[t]he court has equitable jurisdiction to provide a remedy where none exists at law.”

Responding to issues raised by the dissent, the majority stated that “the question is not whether an injured party should recover for Dow’s contamination of the environment but when a party may be considered ‘injured’ under Michigan tort law and recover for Dow’s negligence.”

Accordingly, the Court remanded this case to the Saginaw County Circuit Court with instructions to dismiss Plaintiffs’ claim for medical monitoring damages.

Henry v. Dow Chemical Co., 473 Mich. 63 (July 13, 2005).

Christina C. Howard

LEGISLATIVE SUMMARY

Enacted Legislation

SENATE

SB 0073 2005 PA 0057 Environmental protection; air pollution; nonattainment area offsets; establish conditions for. Amends sec. 5505 of 1994 PA 451 (MCL 324.5505).

SB 0211 2005 PA 0077 Natural resources; nonnative species; prohibited insect and aquatic plant species; identify. Amends sec. 41301 of 1994 PA 451 (MCL 324.41301).

SB 0212 2005 PA 0078 Natural resources; nonnative species; prohibition on possession of certain species; create exceptions to. Amends sec. 41303 of 1994 PA 451 (MCL 324.41303).

SB 0215 2005 PA 0080 Natural resources; nonnative species; requirements and penalties; require to post on department of natural resources website and create invasive species fund. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 41311 & 41313.

SB 0282 2005 PA 0056 Natural resources; soil and erosion; soil erosion and sedimentation control program; provide exemption from permit requirements for certain activities. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 9115a.

SB 0332 2005 PA 0033 Environmental protection; water pollution; discharge of aquatic nuisance species from oceangoing vessels; prohibit. Amends secs. 3103, 3104 & 3112 of 1994 PA 451 (MCL 324.3103 et seq.)

SB 0747 2005 PA 0243 Environmental protection; landfills; research, development and demonstration projects; allow disposal of septage waste. Amends sec. 11514 of 1994 PA 451 (MCL 324.11514).

SB 0778 2005 PA 0313 Environmental protection; other; environmental indicator report; eliminate sunset and reduce frequency. Amends sec. 2521 of 1994 PA 451 (MCL 324.2521).

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SB 0783 2005 PA 0056 Environmental protection; solid waste; foreign waste; require return to country of origin if illegally disposed of in Michigan. Amends sec. 11546 of 1994 PA 451 (MCL 324.11546).

SB 0789 2005 PA 0253 Environmental protection; water pollution; strategic water quality initiatives fund; allow to be used for a strategic water quality initiatives grant program. Amends sec. 5204 of 1994 PA 451 (MCL 324.5204).

SB 0790 2005 PA 0257 Environmental protection; water pollution; strategic water quality initiatives grant program; provide technical amendments for. Amends sec. 5201 of 1994 PA 451 (MCL 324.5201).

SB 0799 2005 PA 0255 Environmental protection; water pollution; loans from state water pollution control revolving fund; allow to be used for project planning. Amends sec. 5301 of 1994 PA 451 (MCL 324.5301).

SB 0850 2005 PA 0033 Water; conservation; regulation of water withdrawals; provide for. Amends secs. 30103, 32701, 32702, 32703, 32707, 32713 & 32714 of 1994 PA 451 (MCL 324.30103 et seq.); adds secs. 32703a, 32704a, 32721, 32722, 32723, 32724, 32726, 32727 * 32728 & repeals secs. 32711 & 32712 of 1994 PA 451 (MCL 324.32711 & 324.32712).

SB 0851 2005 PA 0034 Water; conservation; groundwater conservation advisory council; expand membership and make recommendations on the development of a waste withdrawal assessment tool. Amends sec. 32803 of 1994 PA 451 (MCL 324.32803).

SB 0852 2005 PA 0035 Water; conservation; water withdrawal registration and reporting requirements; modify. Amends secs. 32705 & 32708 of 1994 PA 451 (MCL 324.32705 & 324.32708) & adds sec. 32708a.

SB 0854 2005 PA 0036 Water; conservation; water users committees; provide to assess impacts of water withdrawals. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 32725.

HOUSE

HB 4444 2005 PA 55 Natural resources; soil and erosion; soil erosion and sedimentation control program; provide exemptions for gardening and seawall maintenance. Amends secs. 9101, 9105, 9106, 9110 & 9113 of 1994 PA 451 (MCL 324.9101 et seq.).

HB 4572 2005 of PA 254 Environmental protection; water pollution; strategic water quality initiatives grant program; establish. Amends 1994 PA 451 (MCL 324.101 – 324.90106).

HB 4573 2005 of PA 256 Environmental protection; water pollution; Great Lakes water quality bonds; transfer a portion of the money to the strategic water quality initiatives fund. Amends sec. 19708 of 1994 PA 451 (MCL 324.19708).

HB 4603 2005 of PA 32 Environmental protection; water pollution; unauthorized discharge of ballast water; provide for enforcement. Amends 1994 PA 451 (MCL 324.3109).

HB 4714 2005 of PA 74 Natural resources; nonnative species; invasive species advisory council; establish. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 41321 & repeals sec. 41321 of 1994 PA 451 (MCL 324.41321).

HB 4715 2005 of PA 75 Natural resources; nonnative species; invasive species advisory council; specify duties of. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 41323 & repeals sec. 41323 of 1994 PA 451 (MCL 324.41323).

HB 4716 2005 of PA 76 Natural resources; nonnative species; penalties; revise and extend to cover violations relating to aquatic plants. Amends sec. 41309 of 1994 PA 451 (MCL 324.41309).

HB 4774 2005 of PA 42 Environmental protection; water pollution; baseline environmental assessment program; extends sunset to 2007. Amends sec. 20129a of 1994 PA 451 (MCL 324.20129a).

HB 4860 2005 of PA 241 Environmental protection; water pollution; unauthorized discharges into a municipal sewer system; exempt municipalities from liability. Amends sec. 3109 of 1994 PA 451 (MCL 324.3109).

HB 5094 2005 of PA 169 Environmental protection; air pollution; air fee program; extend sunset. Amends sec. 5522 of 1994 PA 451 (MCL 324.5522).

HB 5148 2005 of PA 236 Environmental protection; landfills; research, development, and demonstration projects; authorize. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 11511b.

HB 5149 2005 of PA 199 Environmental protection; sewage; “receiving facility” for domestic septage; revise to accommodate use of septage for landfill research and demonstration project. Amends secs. 11701, 11702 & 11715b of 1994 PA 451 (MCL 324.11701 et seq.).

HB 5176 2005 of PA 57 Environmental protection; solid waste; foreign municipal solid waste; provide penalty for violation of disposal prohibition. Amends sec. 11549 of 1994 PA 451 (MCL 324.11549).

HB 5177 2005 PA 58 Environmental protection; soil waste; foreign municipal solid waste; provide penalty for violation of disposal prohibition. Amends sec. 11549 of 1994 PA 451 (MCL 324.11549).

HB 5427 2005 of PA 299 Natural resources; mining; rules regarding mineral mining; change promulgation deadline. Amends sec. 63203 of 1994 PA 451 (MCL 324.63203).

Introduced Legislation

SENATE

SB 1040 of 2006 Water; dams; small dam removal; provided for general permits. Amends secs. 30101, 30104 & 30105 of 1994 PA 451 (MCL 324.30101 et seq.).

SB 1059 of 2006 Environmental protection; water pollution; clean water assistance nonpoint source programs; designate department of agriculture to oversee. Amends secs. 5301 & 5304 of 1994 PA 451 (MCL 324.5301 & 324.5304) & repeals sec. 5315 of 1994 PA 451 (MCL 324.5315).

SB 1060 of 2006 Environmental protection; water pollution; clean water fund nonpoint source program; designate department of agriculture to oversee. Amends secs. 8801, 8802, 8803, 8807, 19608, 19616 of 1994 PA 451 (MCL 324.8801 et seq.) & repeals sec. 5315 of 1994 PA 451 (MCL 324.5315).

SB 1063 of 2006 Environmental protection; water pollution; CAFOs; regulate land application of manure. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 8627.

SB 1065 of 2006 Environmental protection; water pollution; CAFO; require certification of operators and require NPDES permits in certain circumstances. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8069, 8611, 8613, 8615, 8619 & 8621.

SB 1066 of 2006 Environmental protection; water pollution; CAFOs; require licensing of animal waste handlers and use of manifests. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8623 & 8625.

SB 1067 of 2006 Environmental protection; water pollution; CAFOs; provide for private civil actions against. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 8635.

SB 1068 of 2006 Environmental protection; water pollution; CAFOs; require departments of agriculture and environmental quality to promote alternative means to dispose of manure, require CAFO air emissions plan, and require financial security for CAFO NPDES permit. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8629, 8651 & 8633.

SB 1069 of 2006 Environmental protection; water pollution; CAFOs' add definitions. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding pt. 86.

SB 1070 of 2006 Natural resources; other; CAFOs registered as withdrawing large volumes of water; require to file annual reports. Amends sec. 32708 of 1994 PA 451 (MCL 324.32708).

SB 1071 of 2006 Environmental protection; water pollution; CAFOs; establish CAFO cleanup and enforcement fund. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8637 & 8639.

SB 1072 of 2006 Environmental protection; water pollution; CAFOs; provide for recovery of damages to natural resources and disposition of permit fees. Amends secs. 3115 & 3120 of 1994 PA 451 (MCL 324.3115 & 324.3120).

SB 1114 of 2006 Controlled substances; other; methamphetamine and manufacturing premises and by-products; classify as hazardous substances. Amends sec. 20101 of 1994 PA 451 (MCL 324.20101).

HOUSE

HB 5552 of 2006 Environmental protection; cleanups; response costs incurred by certain local units of government; provide for recovery of. Amends secs. 20126 & 20126a of 1994 PA 451 (MCL 324.20126 & 324.20126a).

HB 5554 of 2006 Environmental protection; other; designation of a school as a "green school"; establish criteria. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 2511.

HB 5573 of 2006 Environmental protection; toxic substances or products; release or use of decabromodiphenyl ethers (deca-BDEs); prohibit. Amends secs. 14721 & 14724 of 1994 PA 451 (MCL 324.14721 & 324.14724) & adds sec. 14723a.

HB 5575 of 2006 Environmental protection; prohibited products; sale of lead sinkers, weights, and tackle; regulate. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding pt. 174.

HB 5615 of 2006 Environmental protection; landfills; surcharge on disposal of solid waste; establish. Amends secs. 11502, 11503, 11504, 11505 & 11506 of 1994 PA 451 (MCL 324.11502 et seq.); adds secs. 11532a, 11532b, 11532c, 11532d, 11532e, 11532f, 11532g & 11532h & repeals (See bill).

HB 5623 of 2006 Water; other; maintenance of normal lake levels; allow deviation under certain circumstances. Amends sec. 30708 of 1994 PA 451 (MCL 324.30708) & adds sec. 30708a.

HB 5639 of 2006 Environmental protection; prohibited products; use of phosphorus in dishwashing detergents; prohibit. Amends sec. 3901 of 1994 PA 451 (MCL 324.3902).

HB 5711 of 2006 Environmental protection; other; presumption of compliance with environmental law; provide for farm participating in MAEAP program. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding pt. 86.

HB 5712 of 2006 Agriculture; other; authority for permitting livestock facilities; revise. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8601a & 8605.

HB 5713 of 2006 Environmental protection; other; booklet regarding on-farm fuel storage; require department of environmental quality to publish. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8601b & 8607.

HB 5714 of 2006 Environmental protection; other; complainant's name to be given when filing a complaint concerning a farm with the department of environmental quality; require. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8601c, 8609 & 8611.

HB 5715 of 2006 Environmental protection; water pollution; clean water fund nonpoint source program; designate department of agriculture to oversee. Amends secs. 8801, 8802, 8803, 8807, 19608 & 19616 of 1994 PA 451 (MCL 324.8801 et seq.) & repeals sec. 5315 of 1994 PA 451 (MCL 324.5315).

HB 5716 of 2006 Environmental protection; water pollution; clean water assistance nonpoint source programs; designate department of agriculture to oversee. Amends secs. 5301 & 5304 of 1994 PA 451 (MCL 324.5301 & 324.5304) & repeals sec. 5315 of 1994 PA 451 (MCL 324.5315).

HB 5749 of 2006 Natural resources; inland lakes; use determination on certain inland lakes; provide authority to local units of government. Amends secs. 80109, 80112 & 80113 of 1994 PA 451 (MCL 324.80109 et seq.) & repeals secs. 80110 & 80111 of 1994 PA 451 (MCL 324.80110 & 324.80111).

HB 5765 of 2006 Natural resources; Great Lakes; civil penalties for certain transfers of water outside the Great Lakes basin; provide for. Amends sec. 32713 of 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 121511c & repeals PA451 (MCL 324.101 – 324.90106) by adding sec. 11511c & repeals sec. 11511c of 1994 PA 451 (MCL 324.11511c).

HB 5773 of 2006 Environmental protection; landfills; moratorium on construction of new landfills and limits on expansions of existing landfills; provide for. Amends 1994 PA 451 (MCL 314.101 – 324.90106) by adding sec. 11511c & repeals sec. 11511c of 1994 PA 451 (MCL 324.11511c).

HB 5801 of 2006 Environmental protection; water pollution; CAFOs; add definitions. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 11511c & repeals sec. 11511c of 1994 PA 451 (MCL 324.11511c).

HB 5802 of 2006 Environmental protection; water pollution; CAFOs; provide for recovery of damages to natural resources and disposition of permit fees. Amends secs. 3115 & 3120 of 1994 PA 451 (MCL 324.3115 & 324.3120).

HB 5803 of 2006 Environmental protection; water pollution; CAFOs; require certification of operators and require NPDES permits in certain circumstances. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8609, 8611, 8613, 8617, 8619 & 8621.

HB 5804 of 2006 Environmental protection; water pollution; CAFOs; require licensing of animal waste handlers and use of manifests. Amends 1994 PA 451 (MCL 324.101 – 324-90106) by adding secs. 8623 & 8625.

HB 5805 of 2006 Environmental protection; water pollution; CAFOs; regulate land application of manure. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 8627.

HB 5806 of 2006 Environmental protection; water pollution; CAFOs; require department of agriculture and environmental quality to promote alternative means to dispose of manure, require CAFO air emission plan, and require financial security for CAFO NPDES permit. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8629, 8631 & 8633.

HB 5807 of 2006 Environmental protection; water pollution; CAFOs; provide for private civil actions against. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding sec. 8635.

HB 5808 of 2006 Environmental protection; water pollution; CAFOs; establish CAFO cleanup and enforcement fund. Amends 1994 PA 451 (MCL 324.101 – 324.90106) by adding secs. 8637 & 8639.

HB 5809 of 2006 Natural resources; other; CAFOs registered as withdrawing large volumes of water; require to file annual reports. Amends sec. 32708 of 1994 PA 451 (MCL 324.32708).

HB 5845 of 2006 Controlled substances; other; methamphetamine and manufacturing premises and by-products; classify as hazardous substances. Amends sec. 20101 of 1994 PA 451 (MCL 324.20101).

HB 5863 of 2006 Fire; NREPA; amend to reflect transfer of fire marshal from state police to department of labor and economic growth. Amends sec. 77101 of 1994 PA 451 (MCL 324.77101).

HB 5872 of 2006 Environmental protection; cleanups; dioxin; provide cleanup standard based upon federal guidelines. Amends sec. 20120a of 1994 PA 451 (MCL 324.20120a)

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