

ENVIRONMENTAL LAW FOCUS

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S. Lee Johnson

COURT CLEARS WAY FOR ROMULUS HAZARDOUS WASTE DEEP INJECTION WELLS

The Michigan Court of Appeals has upheld a lower court's ruling that the Michigan Department of Environmental Quality ("MDEQ") can properly issue a permit to build a hazardous waste facility on a wetland in Romulus, so long as that wetland is legally eliminated before the facility is constructed, and that MDEQ is not required to consider the "need" for a hazardous waste facility when deciding whether to issue a permit for such a facility. The court further held that MDEQ's market-driven approach to determining the need for hazardous waste facilities was not a "rule" that requires official promulgation.

Environmental Disposal Systems ("EDS"), a hazardous waste disposal company, applied for a permit

under Part 111 of the Michigan Natural Resources and Environmental Protection Act ("NREPA") to allow the construction of a hazardous waste underground deep injection well facility in Romulus, Michigan. As required by administrative rules, MDEQ referred the matter to a site review board ("SRB"). After a public hearing and other informal hearings, the SRB recommended in March 2000 that MDEQ deny EDS's application for several reasons, including: (a) wetlands existed on the site; and (b) there was a surplus of hazardous waste disposal capacity in the area, and, therefore, no need for the facility. In the interim, EDS had applied for a permit under Part 303 of NREPA to allow it to fill and eliminate the wetlands on the site. That permit was granted by MDEQ in June 2000.

In December 2000, MDEQ issued a "Fact Sheet" explaining why it planned to issue a Part 111 permit to EDS despite the SRB's recommendations. In particular, MDEQ stated that: (a) the wetlands on the site were not a concern because they would be filled and eliminated under the Part 303 permit that had been issued to EDS; and (b) the "need" for hazardous waste facilities is market-driven and determined by demand for such facilities, so a lack of "need" was not a valid reason for denying the permit. MDEQ issued the Part 111 permit to EDS in February 2001.

The City of Romulus and Wayne County ("Petitioners"), both of which opposed the permit, appealed MDEQ's decision in circuit court. In August 2001, the

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circuit court affirmed MDEQ's decision. The Petitioners appealed to the Court of Appeals. By October 2001, the wetlands on the site had been filled and eliminated.

Standard of Review

The Court of Appeals first noted the standard of review that it would apply to the case, which differs according to whether factual or legal issues are being considered. Concerning factual issues, the court observed that:

This Court's review is limited to determining whether the circuit court "misapprehended or grossly misapplied" its review of the agency's factual findings. The circuit court's review of the MDEQ's factual findings is limited to determining whether the decision was supported by competent, material, and substantial evidence ... Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views.

On the other hand, concerning legal issues, the court observed that:

We must also determine "whether the lower court applied correct legal principles..." The circuit court's review of an administrative agency's decision on a matter of law is limited to determining whether the decision is authorized by law. ... As a general rule, we review *de novo* the interpretation and application of unambiguous statutes and administrative rules.

Therefore, the circuit court's factual findings could be overturned only if it was grossly mistaken in concluding that MDEQ's factual findings were sound. However, the court owed no deference to the circuit court or MDEQ concerning their conclusions on matters of law (i.e., statutory and administrative rule interpretation), so long as the relevant statute or rule was unambiguous.

Authority to Issue Part 111 Permit Despite the Existence of Wetlands

The Petitioners claimed that by issuing a Part 111 permit to EDS based upon an understanding that the wetlands would be eliminated, MDEQ had exceeded its

statutory authority. This argument was based upon Mich. Admin. Code r. 299.9603 ("Rule 603"), which governs the location of hazardous waste facilities and provides in pertinent part that "[a]ctive portions of new treatment, storage, or disposal facilities or expansions, enlargements, or alterations of existing facilities shall not be located ... [i]n a wetland." According to petitioners, Rule 603 absolutely prohibited the issuance of Part 111 permits for sites containing wetlands.

More specifically, the Petitioners advanced a two-pronged argument. First, they claimed that because Rule 603 expressly includes certain exceptions, but does not include an exception pertaining to wetlands, MDEQ's issuance of a permit was tantamount to its creating a rule exception that did not really exist. Second, the Petitioners noted the implications of Rule 299.4416 ("Rule 416"), which provides that a "type II landfill" cannot be located in a wetland unless the owner/operator can show, among other things, that a Part 303 wetlands permit has been obtained. Under the doctrine of *expressio unius est exclusio alterius* - that expressly mentioning one thing in a statute generally implies the exclusion of similar things not mentioned in the statute - Petitioners argued that Rule 603 should not be interpreted as providing an exception for wetlands where a Part 303 permit had been issued. In other words, because Rule 416 explicitly contains such an exception but Rule 603 does not, Rule 603 should not be interpreted to contain such an exception.

The court disagreed. First, the court held that under the plain language of Rule 603, MDEQ's actions were not prohibited: "[n]othing in Rule 603 provides that a Part 111 permit cannot be granted when a wetland exists on the site - Rule 603 only provides that active portions of the facility may not be located in a wetland. Therefore, the MDEQ can issue a Part 111 permit when the wetlands on the site will be legally eliminated before construction of the facility. ... There is nothing in Rule 603 that prohibits a treatment, storage, or disposal facility from being located in an area that was *formerly* a wetland."

Second, the court noted that the Petitioners were attempting to read Rule 603 as saying not merely that a hazardous waste facility cannot be located in a wetland, but instead, that such facility cannot be located in a wetland "even if the wetland is eliminated pursuant to a Part 303 permit." Because such a limitation was not present in the rule, the situation was not one of MDEQ creating an ad hoc exemption; instead, the court observed, Petitioners

were attempting to insert an extra limitation that simply did not exist.

Third, the court observed that the Petitioners' argument concerning Rule 416 was without merit: "Rule 416 provides the MDEQ with discretion to allow construction of a type II landfill unit *in a wetland*. By contrast, Rule 603 does not provide the MDEQ with discretion to allow construction of a hazardous waste...facility *in a wetland*. We nonetheless conclude that Rule 603 does not prohibit construction on land formerly classified as a wetland."

Considering "Need" In Issuing Part 111 Permits

The Petitioners also claimed that MDEQ must consider the need for an additional hazardous waste facility before issuing a Part 111 permit for such facility. To support their argument, the Petitioners cited various sections of Part 111 pertaining to MDEQ's duties in updating the Hazardous Waste Management Plan for Michigan ("Plan"), which is a general framework for the planned expansion of hazardous waste facilities and future utilization of existing facilities. More specifically, those provisions require MDEQ to base its updated Plan upon such considerations as the locations of hazardous waste facilities, data on the statewide capacity of such facilities, a "reasonable geographic distribution" of such facilities, and studies of projected need for such facilities. Further, the Petitioners pointed out, Mich. Comp. Laws ("M.C.L.") § 324.11115 provides that MDEQ cannot issue a permit for a hazardous waste facility unless that permit issuance would be consistent with the updated Plan. The Petitioners pointed to several provisions of the Plan in arguing that, to be consistent with the Plan, a permit must consider the statewide need for and geographic distribution of hazardous waste facilities. Because there was no regional or statewide need for the EDS facility, the Petitioners contended that MDEQ's issuance of the permit was inconsistent with the Plan and in violation of law.

The court disagreed. First, the court observed that the provisions governing the updated Plan deal with the preparation of the Plan alone, and do not impact MDEQ's permitting authority. Second, concerning M.C.L. § 324.11115, the court held that the Plan did not require a need-based analysis: "[t]he drafters of the updated plan clearly wanted to ensure that Michigan would not lack necessary hazardous waste facilities. Nothing in the

updated plan implies that one of its goals is to avoid an overcapacity of facilities." The court further held that MDEQ's policy of using a market-based analysis for determining need was consistent with the Plan: "[a]llowing private enterprise to determine whether there is need for new hazardous waste facilities is not contrary to the updated plan's goal of reducing risks to human health and the environment. New facilities...are cheaper, more efficient, and better for the environment... Disallowing new facilities because there is a perceived "overcapacity" of facilities could stifle competition and allow facilities with older, less environmentally-friendly technology to remain."

The Petitioners also claimed that the EDS permit was illegal because Part 111 requires the SRB to consider the concerns raised by the public, which in this case included concerns that there was no need for the facility. The court observed that the SRB had considered those concerns, and in fact, had recommended that the permit be denied on that basis. However, the court held, there was no similar requirement that the MDEQ consider public concerns, and the MDEQ was not bound by the SRB's recommendations. Therefore, the court held that the public's concerns have no legal impact on MDEQ's permitting decision.

Is MDEQ's Market-Driven Approach A "Rule"?

The Petitioners argued that MDEQ's market-based approach to the "need" issue was a "rule" that required formal promulgation, including public notice and a hearing, under the Administrative Procedures Act. The court rejected this argument, observing that a "rule" is:

- (1) "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability,"
 - (2) "that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency..."
- However, a "rule" does not include, *inter alia*, "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected."

The court determined that MDEQ's market-driven approach to need was not a "rule" because Part 111 does not require MDEQ to develop standards governing its permit decisions and does not require MDEQ to consider need in making its decisions, and, therefore, the MDEQ's decision of whether to consider need is merely a "decision

not to exercise a permissive statutory power.” Furthermore, the court observed that “[l]ogically, an agency cannot be required to promulgate a rule regarding everything that it will *not* consider before issuing a permit. If this were the case, an agency would never be able to take any action.”

Competence Of The MDEQ's Decision

The Petitioners finally argued that the lower court had erred in determining that MDEQ's decision to issue the permit was supported by competent, material, and substantial evidence, and claimed that the decision instead was arbitrary and capricious. The court found that the MDEQ's decision was sound, and rejected the Petitioners' argument. Accordingly, the Court of Appeals upheld the trial court's decision discussing the challenge to the Part III permit issued to EDS by MDEQ.

City of Romulus v. Michigan Department of Environmental Quality (236673, Mich. App. December 16, 2003)

H. Kirk Meadows

SIXTH CIRCUIT COURT OF APPEALS UPHOLDS KALAMAZOO RIVER ALLOCATIONS

The United States Court of Appeals for the Sixth Circuit recently upheld two separate decisions of the United States District Court for the Western District of Michigan concerning the liability of two manufacturers under the federal Comprehensive Environmental, Compensation, and Liability Act (“CERCLA”). The case involved a CERCLA contribution action brought against Rockwell International Corporation (“Rockwell”) and Eaton Corporation (“Eaton”) by a consortium of four former paper mill owners, known as the Kalamazoo River Study Group (“KRSG”), whose facilities had polluted sediments in the Kalamazoo River with polychlorinated biphenyls (“PCBs”). Although the district court had found that both Rockwell and Eaton were liable for some of the PCB contamination, it allocated none of the investigation costs to Rockwell, while it allocated only a small portion of the investigation costs to Eaton, and assessed neither party any cleanup costs.

In the case of Rockwell, KRSG had asked the district court to reopen the case against Rockwell because KRSG

claimed it had discovered new evidence of increased environmental contamination after the district court issued its order allocating no costs to Rockwell. The district court refused to reopen the case because it was brought after the time allowed for such reopening of cases under the Federal Rules of Civil Procedure. In the case of Eaton, KRSG argued that the district court had applied an inappropriate standard of liability and had also made several errors in its factual findings.

Background

In 1990, the United States Environmental Protection Agency (“EPA”) added a 35 mile stretch of the Kalamazoo River to the National Priorities List (“NPL”) promulgated under CERCLA after discovering, in coordination with the Michigan Department of Natural Resources (“MDNR”), that sediments in the river were contaminated with PCBs. The members of KRSG entered into an administrative order with MDNR to perform a remedial investigation/feasibility study (“RI/FS”) of an expanded 95-mile stretch of the river. The expanded study zone included Eaton's Battle Creek plant and Rockwell's Allegan facility.

The members of KRSG have not disputed their liability for a type of PCB known as Aroclor 1242. The KRSG members used Aroclor 1242 extensively in their paper de-inking and manufacturing operations for several decades beginning in the 1930s. The KRSG also used Aroclor 1254 in electrical transformers, capacitors, hydraulic systems and paints; however, they have argued that they only contributed minimally to Aroclor 1254 and 1260 contamination at the site and that other industrial users were responsible for that contamination. Therefore, KRSG brought contribution actions under CERCLA against Rockwell, Eaton and other industrial facilities located along the Kalamazoo River in 1995

Rockwell

The Sixth Circuit first considered KRSG's appeal of the district court's decision regarding Rockwell. Rockwell's Allegan facility produced universal joints for automobiles and construction equipment from the early 1900s until 1989. Soil tests at Rockwell's Allegan facility showed the presence of Aroclor 1254 (and also some Aroclor 1242 and 1260) in the groundwater and oil floating

on the water table. Thus, even though there was no definitive proof that Rockwell ever purchased PCB-containing oils, the presence of PCBs at Rockwell's facility showed that it did, in fact, use PCBs. In a December 1998 decision, the district court held that Rockwell released PCBs to the Kalamazoo River NPL site and was, therefore, liable for some of the PCB contamination in the river. In a June 2003 opinion, the district court ruled that, taking into consideration the low levels of PCB on the Rockwell Property and that the river sediments and fish tended to show no significant contribution of PCBs by Rockwell, Rockwell's PCB contribution was very minimal, particularly in comparison to the amount contributed by the KRSR members. The district court held that KRSR was not entitled to recover from Rockwell. KRSR appealed and in December 2001 the Sixth Circuit upheld the district court's zero-allocation, holding that there was no inconsistency between the court's finding of liability, but zero-allocation assessment, because the district court had broad discretion to allocate the costs of the remedial investigation.

The new evidence that KRSR argued justified reopening the district court's zero allocation decision came about as a result of investigations of Rockwell's facility by EPA that showed that the facility, in fact, had higher PCB levels than were reported at the time of the court's decision - in some instances, 100 times higher than the previously reported levels. EPA also indicted that one PCB plume was entering the Kalamazoo River and that another was migrating towards it.

Thus, KRSR filed a motion with the district court on September 21, 2001 to reopen the CERCLA allocation proceeding, which was 15 months after the court made its June 2000 allocation order. KRSR argued that Rockwell had deliberately obfuscated the data on its site in contravention of its duty under CERCLA and asked the court to use its equitable power to reconsider the allocation. Although KRSR did not identify its motion for reconsideration as being made under Federal Rule of Civil Procedure 60(b)(2), the district court ruled that it was and denied KRSR's motion for reconsideration because it was filed after the one-year time limit for bringing such motions.

On appeal, KRSR made several alternative arguments. First, that the district court was wrong in considering its motion as being made under Rule 60(b)(2) because CERCLA itself provides for reopening an

allocation order based on changed circumstances. Second, KRSR argued that if Rule 60(b) did apply, then the court should have considered its motion to be made under Rule 60(b)(5), which allows a "prospective" order to be reopened within a "reasonable" time, which could be more than one year. Thirdly, implicit in KRSR's motion for reopening was the position that the new evidence itself was a sufficient basis for reopening the allocation for remediation costs.

KRSR argued that the inherently equitable nature of the CERCLA allocation process permitted reopening of an allocation decision independent of Rule 60(b), arguing that CERCLA allocations are subject to revision whenever the equities underlying the allocation decision change. The Sixth Circuit disagreed. The court held that there is nothing in CERCLA that indicates that the Federal Rules of Civil Procedure do not apply to CERCLA allocations and that CERCLA, in fact, expressly states that all CERCLA claims are to be brought in accordance with the Federal Rules of Civil Procedure.

KRSR cited several CERCLA cases in which an allocation was later changed by the court. The Sixth Circuit distinguished these cases as not showing that CERCLA allocation decisions are inherently subject to change, but as showing that courts have the power to fashion relief in an allocation case that is subject to future change. That is, in the cases cited by KRSR, the courts expressly made their rulings provisional in the face of uncertainty of the underlying evidence or other factors involved in the allocation. In the case of Rockwell's allocation, the Sixth Circuit observed that the district court gave no indication that its allocation was provisional or subject to future alteration.

Regarding KRSR's arguments that the more generous time limits of Rule 60(b)(5) should apply, the Sixth Circuit held that the district court's allocation order was not "prospective" within the meaning of the rule and, therefore, the one-year limit of Rule 60(b)(2) applied. The Sixth Circuit stated that the application of Rule 60(b)(5) turned on whether the allocation order was of "prospective application" as required by the rule. It stated that the mere possibility that a judgment has some future effect did not make it "prospective" within the meaning of the rule - and that "[v]irtually every court order causes at least some reverberations into the future..." The Sixth Circuit further reasoned that the allocation order was not "prospective" as follows:

KRSG is incorrect in its assertion that the district court's allocation was "prospective" in the Rule 60(b)(5) sense of the word. The district court's allocation order was not a consent decree, an injunction, or even a declaratory judgment. Rather, the allocation decision stated that Rockwell was not responsible for any measurable PCB contamination to the NPL site; this was a one-time judgment that Rockwell was not required to contribute and that it did not provide for any future supervision or alteration by the district court. Merely because KRSG requested contribution for future costs, which the district court denied, and merely because KRSG's prospective remediation expenses would be higher in a relative sense as a result of the district judge's order, does not mean that the order was "prospective" under Rule 60(b)(5).

Therefore, the Sixth Circuit held that the district court properly denied KRSG's motion to reopen the allocation for Rockwell because it was brought more than one year after entry of the original judgment.

Eaton

Eaton's Battle Creek facility manufactured automotive parts and undisputedly released significant quantities of oil into the Kalamazoo River for over four decades. The issue, however, was whether that oil contained PCBs and, if so, did the PCBs affect the area investigated under the RI/FS. In the underlying case, the district court concluded that Eaton only minimally used some PCBs in what were normally closed systems, such as electrical equipment and hydraulic oils, and that the oils from these systems were not directly discharged to the river, but only leaked in small amounts onto the floor of the plant and possibly into drainage ditches on the Eaton property.

KRSG attempted to show that PCBs from Eaton actually entered the river and contributed to contamination of the NPL site by showing that Morrow Lake, which is located downstream of Battle Creek but upstream of the NPL site, was contaminated with Aroclors 1254 and 1260. KRSG could not be responsible for the Morrow Lake contamination because it is upstream of the KRSG facilities. In May 2001, the district court ruled that, although "there was only the most scant evidence of a

measurable PCB discharge into the NPL site from [Eaton's] Battle Creek" facility, it was "constrained to find that Eaton is liable for some PCB releases ... to the Kalamazoo River."

In August 2002, the district court ordered Eaton to pay ten percent of KRSG's investigation costs under the RI/FS and none of the future remediation costs. The district court agreed with Eaton's expert that other parties contributed to the PCB contamination in Morrow Lake and that Eaton contributed only a "de micromis" amount of PCB to the ditch on its property, that only a fraction of that amount made it to the lake, and further, only a fraction of that fraction actually washed over the lake's dam and downstream to the NPL site. The district court accepted Eaton's expert's estimate that only 1.3% of the PCBs in the NPL site could have come from Morrow Lake.

On appeal, KRSG argued that the district court only "paid lip service" to the CERCLA preponderance of the evidence standard in its allocation, but actually applied a standard that required KRSG to absolutely disprove the potential responsibility of upstream contributors other than Eaton. KRSG further argued that the district court committed clear factual errors when it accepted Eaton's theory that PCB contamination in Morrow Lake and the NPL site might have come from sources other than Eaton. The Sixth Circuit rejected KRSG arguments and upheld the district court's decision.

The Sixth Circuit found that the district court appropriately weighed the evidence presented by both KRSG and Eaton and concluded that Eaton was only minimally responsible for KRSG's investigation costs. While the Sixth Circuit agreed that some of the evidence presented by KRSG supported its theory that Eaton contributed to the PCB contamination for which KRSG is responsible, Eaton presented evidence in support of its position and the district court ultimately found Eaton's evidence more compelling. The district court assessed the evidence presented by both parties and concluded that Eaton's PCB use "was exceedingly minimal and that any PCBs it did use barely impacted the pollution at Morrow Lake, let alone the contamination at the actual NPL site" for which KRSG was liable.

The Sixth Circuit also found flawed KRSG's argument that, instead of requiring it to prove Eaton's complicity, the district court required KRSG to disprove that potential responsibility of several other industrial facilities for the PCBs in the Eaton drainage ditch and Morrow Lake. The Sixth Circuit stated: "The district court

did not require KRSG to disprove in any absolute sense the potential contamination by those facilities, but rather considered the significant probability that they added to the pollution for which Eaton was being blamed. Thus we cannot agree that the district court clearly erred in reaching its factual findings." The court further stated: "Whereas KRSG views the district court as requiring it to disprove other parties' potential responsibility, the district court in reality recognized that some convincing evidence demonstrated that parties other than Eaton may have been the chief polluters of the wastewater ditch, Morrow Lake, and the NPL site."

Thus, the Sixth Circuit upheld the district court's decisions with respect to the liability of both Rockwell and Eaton.

Kalamazoo River Study Group v Rockwell International Corporation, (355 F.3d 574)

Brian Negele

WORKGROUP DISCUSSES REVISIONS TO MAJOR SOURCE AIR PERMIT RULES

The MDEQ Air Quality Division ("AQD") has organized a stakeholder workgroup to discuss potential revisions to AQD's regulations governing new major emission sources and major modifications. The first two workgroup meetings were held on March 19 and April 7, 2004.

The Clean Air Act ("CAA") requires states to implement permit programs to regulate major sources and major modifications of emission sources. These programs, generally known as New Source Review ("NSR"), impose different requirements depending on whether the emission source is located in an area that meets federal air quality standards (an "attainment area") or an area that does not meet the federal standards (a "nonattainment area"). In attainment areas, the permit requirements are referred to as Prevention of Significant Deterioration ("PSD") requirements and in nonattainment areas the permit requirements are referred to as "Nonattainment New Source Review" or "NANSR."

PSD requirements apply to new emission sources with the potential to emit 250 tons per year (or 100 tons per year for certain industrial categories) of contaminants regulated under the CAA in an attainment area and

modifications to such sources that increase emissions above certain thresholds. NANSR requirements apply to new emission sources in nonattainment areas with the potential to emit 100 tons per year of CAA regulated contaminants and modifications to such sources that increase emissions above certain thresholds.

Currently, the NANSR program is inactive in Michigan because there are no areas of Michigan that are designated as nonattainment. However, the EPA is expected to designate some areas of Michigan as nonattainment with the newest EPA standard for ozone (smog) in April or May 2004. Once those designations are effective, the NANSR program will apply in the designated nonattainment areas.

The NANSR program in Michigan is implemented through a series of regulations that were adopted in the 1980's and 1990's and that have not been revised to include significant regulatory reforms to the NSR rules made by EPA in 2003. The stakeholder workgroup is expected to help MDEQ draft regulations to bring Michigan's NANSR regulations in line with current federal rules.

The PSD program in Michigan is implemented through a delegation of regulatory authority from EPA. Because federal PSD regulations are directly applicable in Michigan, the recent federal NSR reforms already apply. Through the stakeholder workgroup, MDEQ intends to develop state regulations that will give MDEQ "more autonomy in the review and issuance of air quality permits."

MDEQ has stated that it intends to promulgate new NSR regulations in time for them to be submitted to EPA and receive EPA approval by March 2006.

Copies of draft regulations being considered by the workgroup are available from S. Lee Johnson, sljohnson@honigman.com. If you would like to participate in the workgroup directly, contact Paul Collins, Supervisor, Operating Programs Unit, MDEQ AQD Permit Section (517)373-1209 or collinpm@michigan.gov.

S. Lee Johnson

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