14

Michigan Environmental Protection Act

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I. Introduction

A. In General §14.1

The Michigan Environmental Protection Act (MEPA), Part 17 of NREPA, MCL 324.1701-.1706, authorizes courts to prevent conduct that harms the environment based on evidence presented in litigation. Under MEPA, private parties may protect the environment in much the same way as they have historically protected property and contract rights. The statute modifies the traditional view that only public agencies protect the environment. Unlike most of the statutes discussed in this deskbook, MEPA does not regulate through an administrative command-and-control scheme, but rather prohibits agencies from authorizing conduct that harms the air, water, or other natural resources, or the public trust in these resources.

MEPA authorizes any person to bring 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." MCL 324.1701(1) . A defendant may assert an affirmative defense that "there is no feasible and prudent alternative" to its conduct and that its conduct is consistent with "the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction." MCL 324.1703(1). MEPA authorizes courts to grant declaratory or equitable relief, to impose conditions on the defendant to protect the environment, or to remand a case to appropriate administrative proceedings. MCL 324.1704. MEPA prohibits administrative agency authorization of conduct that may pollute, impair, or destroy the environment if there is a feasible and prudent alternative. MCL 324.1705(2) .

In enacting MEPA, the legislature "made a realistic policy decision that the stimulus of possible litigation is now practically necessary to expedite what the ideal of *laissez faire* has been too slow in accomplishing." *Daniels v Allen Industries, Inc*, 391 Mich 398, 411; 216 NW2d 762 (1974). MEPA is a source of supplementary substantive as well as procedural environmental law. *State Highway Comm'n v Vanderkloot*, 392 Mich 159, 184; 220 NW2d 416 (1974). MEPA "signals a dramatic change" from former policies of administrative enforcement of environmental law without citizen participation. *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 305; 224 NW2d 883 (1975). MEPA imposes a duty on both public and private actors "to prevent or minimize degradation of the environment." *Id.* at 306. MEPA authorizes courts to develop "a common law of environmental quality." *Id*. MEPA requires courts to review agency actions de novo, rather than pursuant to the usual deferential standards for judicial review of administrative actions. *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741, 753-754, 763; 275 NW2d 538 (1979). The ability of courts to determine the "validity, applicability, and reasonableness" of pollution control standards is "a vital part of our courts' development of the 'common law of environmental quality'." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 29-30; 576 NW2d 641 (1998). MEPA does not impose specific standards, but authorizes courts to determine adverse environmental effects and issue appropriate relief. *Id*. at 30-31. MEPA authorizes a private cause of action. *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 516; 684 NW2d 847 (2004). MEPA actions are for the

benefit of the state and its inhabitants. *Eyde v Michigan*, 82 Mich App 531, 541 n6; 267 NW2d 442 (1978).

B. Legislative Chronology §14.2

As originally enacted in 1970, MEPA authorized "[t]he attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity" to maintain an action against "the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity." MCL 691.1202(1), repealed by MCL 324.90101(1) . As part of the 1994 recodification of Michigan's environmental statutes in NREPA, 1994 PA 451, MCL 324.101 *et seq.*, the legislature shortened this language to "[t]he attorney general or any person" may maintain an action "against any other person." MCL 324.1701(1). This simplification employs the definition of "person" in NREPA as an "individual, partnership, corporation, association, governmental entity, or other legal entity." MCL 324.301(h). The phrase should be read consistently with the legislature's direction that editorial changes of statutes codified in NREPA not be construed to change the meaning of those statutes. MCL 324.107. Thus, decisions interpreting MEPA before the enactment of 1994 PA 451 can be applied to the present language in MEPA. NREPA renumbered MEPA. The renumbering is set forth in the conversion table following this chapter.

C. Constitutional Issues

1. Michigan Constitution of 1963, Article 4, §52 §14.3

MEPA implements the Michigan Constitution's command to the legislature to protect the state's natural resources. Const 1963, art 4, §52 declares:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Art 4, §52 creates a mandatory duty of the legislature to enact legislation to protect Michigan's natural resources. *State Highway Comm'n v Vanderkloot*, 392 Mich 159, 179, 182; 220 NW2d 416 (1974). In *Vanderkloot*, the Supreme Court determined that the legislature could fulfill its duty by including environmental protective provisions in all legislation or by enacting general legislation. The court found that MEPA constituted such general legislation and that the legislature therefore did not need to enact detailed environmental provisions in the Highway Condemnation Act, MCL 213.361 *et seq*. *Vanderkloot* suggests that legislation that substantially changes MEPA may violate art 4, §52. See *id.* at 194 (Levin, J., concurring). See also *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 403 Mich 215, 231; 268 NW2d 240 (1978) (same, plurality opinion). Art 4, §52 does not state that the public concern is to

promote the development of natural resources. *Whittaker & Gooding Co v Scio Twp*, 117 Mich App 18, 22; 323 NW2d 574 (1982).

If MEPA were repealed or if its substantive provisions were significantly restricted, art 4, §52 could be interpreted to require the legislature to enact substantially similar legislation or face a *Vanderkloot*-type challenge to all legislation.

2. Vagueness §14.4

Ray v Mason Cty Drain Comm'r, 393 Mich 294, 307 n10; 224 NW2d 883 (1975), rejected the argument that the broadly-worded language of MEPA is unconstitutionally vague:

> While the language of the statute paints the standard for environmental quality with a rather broad stroke of the brush, the language used is neither illusive nor vague. "Pollution", "impairment" and "destruction" are taken directly from the constitutional provision which sets forth this state's commitment to preserve the quality of our environment. In addition these and other terms used in establishing the standard have acquired meaning in Michigan jurisprudence. The development of a common law of environmental quality under the EPA is no different from the development of the common law in other areas such as nuisance or torts in general, and we see no valid reason to block the evolution of this new area of common law.

See generally Note, *Michigan Environmental Protection Act: III. The Constitutional Question: Vagueness and Delegation of Powers*, 4 U Mich JL Reform 397, 397-407 (1970).

> ***Unpublished decision***: *Tri-Cities Environmental Action Council, Inc v A Reenders Sons*, 4 ELR 20553, 20554-20556; 6 ERC 1600 (Ottawa Cty Cir Ct, May 6, 1974) (rejecting void-for-vagueness argument by analogizing to public nuisance concepts).

3. Delegation of Legislative Authority §14.5

Ray v Mason Cty Drain Comm'r, 393 Mich 294, 306-307; 224 NW2d 883 (1975) rejected the argument that MCL 324.1701(2), which authorizes circuit courts to review administrative pollution standards and direct the adoption of different standards, improperly delegates legislative authority to the courts:

> The Legislature in establishing environmental rights set the parameters for the standard of environmental quality but did not attempt to set forth an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental pollution or impairment. Rather, the Legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts

> the important task of giving substance to the standard by developing a common law of environmental quality. The act allows the courts to fashion standards in the context of actual problems as they arise in individual cases and to take into consideration changes in technology which the Legislature at the time of the act's passage could not hope to foresee.

See *Roberts v Michigan*, 45 Mich App 252, 254; 206 NW2d 466 (1973) (trial court did not need to reach issue of whether MEPA unconstitutionally delegated legislative authority to courts); see generally Note, *The Michigan Environmental Protection Act: III. The Constitutional Question: Vagueness and Delegation of Powers*, 4 U Mich JL Reform 397, 408-422 (1970). But see Thibodeau, *Michigan's Environmental Protection Act of 1970: Panacea or Pandora's Box*, 48 U Det J Urban L 579, 581-582 (1971).

> ***Unpublished decisions***: *Tri-Cities Environmental Action Council, Inc v A Reenders Sons*, 4 ELR 20553, 20556; 6 ERC 1600 (Ottawa Cty Cir Ct, May 6, 1974) (judicial fact-finding is historical role of courts and not an unconstitutional delegation of legislative powers), *Lakeland Property Owners Ass'n v Northfield Twp*, 2 ELR 20331, 20336; 3 ERC 1893 (Livingston Cty Cir Ct, Feb. 29, 1972) (court can set standards and enforce them).

4. Separation of Powers §14.6

The Supreme Court held that the separation of powers doctrine required MEPA plaintiffs to meet the judicial test of standing to sue in *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629; 684 NW2d 800 (2004), but overruled *Cleveland Cliffs* in *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371; 792 NW2d 686 (2010). See §14.53 for a discussion of standing.

II. Scope

A. In General §14.7

MEPA applies to all natural resources, public and private. The act is not limited to natural resources affecting land in which there is a public trust or a right of public access. *Stevens v Creek*, 121 Mich App 503, 507; 328 NW2d 672 (1982). Caselaw relating to the scope of the phrase "air, water, or other natural resources or the public trust in these resources" discussed in §14.8 through §14.11 should apply to administrative determinations and subsequent judicial review pursuant to MCL 324.1705(2), discussed in §14.46 and §14.80.

B. Air Pollution §14.8

By its text, MEPA applies to air pollution. MCL 324.1701(1). Air pollution control is discussed in Chapter 1. MEPA has been used in conjunction with common-law claims in industrial air pollution cases. *Oakwood Homeowners Ass'n v Ford Motor Co*, 77 Mich App 197; 258 NW2d

475 (1977); *Danyo v Great Lakes Steel Corp*, 93 Mich App 91; 286 NW2d 50 (1979); *Oakwood Homeowners Ass'n v Marathon Oil Co*, 104 Mich App 689; 305 NW2d 567 (1981). MEPA applies to industrial odors. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668; 263 NW2d 778 (1977). MEPA has been alleged, together with a nuisance claim, in an action concerning odors from a compost facility. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 604; 528 NW2d 835 (1995).

MEPA applies to the failure of a county road commission to continue dust palliative programs, although the court in *Canton Twp v Wayne Cty Rd Comm'n*, 141 Mich App 322, 326, 330; 367 NW2d 385 (1985), ultimately held that the defendant had no duty to reduce dust conditions through any specific means. MEPA cannot be used to compel the Department of State and the Department of State Highways to regulate automobile emissions, because the agencies lack authority to promulgate rules to control air pollution. *Roberts v Michigan*, 45 Mich App 252; 206 NW2d 466 (1973). An alternate ground for decision in *Roberts v Michigan* would be federal preemption by the Clean Air Act, 42 USC 7543(a), of state regulation of automobile tailpipe emissions. See Chapter 16, §16.___, concerning preemption.

> ***Unpublished decision***: *Johnson v Indresco, Inc*, 1997 US App Lexis 21725 (6th Cir 1997) (repairable damage to tangible personal property from magnesium oxide emissions does not equate to damage to the atmosphere or other natural resources).

C. Water Pollution §14.9

By its text, MEPA applies to water pollution. MCL 324.1701(1). Water pollution control is discussed in Chapter 2. MEPA applies to pollution of surface waters. *Dwyer v City of Ann Arbor*, 79 Mich App 113; 261 NW2d 231 (1977), rev'd on other grounds 402 Mich 915; 387 NW2d 926 (1978); *Attorney General v Clinton Cty Drain Comm'r*, 91 Mich App 630; 283 NW2d 815 (1979); see also *United States v Reserve Mining Co*, 380 F Supp 11, 25-26 (D Minn 1974), mod sub nom *Reserve Mining Co v Environmental Protection Agency*, 514 F2d 492 (8th Cir 1975) (Michigan intervened as plaintiff under MEPA concerning alleged pollution of Lake Superior). MEPA applies to groundwater contamination. *Attorney General v Thomas Solvent Co*, 146 Mich App 55; 380 NW2d 53 (1985). MEPA applies to groundwater withdrawal that affects surface water. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280; 737 NW2d 447 (2007).

Water pollution enforcement actions brought by the state pursuant to Part 31 of NREPA and other water pollution statutes often contain claims for relief under MEPA. See, e.g., *Michigan v City of Allen Park*, 501 F Supp 1007, 1014 n 8 (ED Mich 1980); *Attorney General v John A Biewer Co*, 140 Mich App 1; 363 NW2d 712 (1985); *Attorney General v Lakes States Wood Preserving, Inc*, 199 Mich App 149, 151; 501 NW2d 213 (1993). See also *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 34-35; 539 NW2d 526 (1995) (private action for water pollution).

Unpublished decision: *Irish v Green*, 2 ELR 20505; 4 ERC 1402 (Emmet Cty Cir Ct, July 15, 1972) (likely groundwater pollution and surface erosion).

D. Other Natural Resources §14.10

The phrase "other natural resources" includes components of the natural environment other than air and water. The court of appeals has uniformly held that trees are natural resources within the scope of MEPA. *Eyde v Michigan*, 82 Mich App 531, 540; 267 NW2d 442 (1978); *Stevens v Creek*, 121 Mich App 503, 508; 328 NW2d 672 (1982); *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276, 281; 355 NW2d 913 (1984) (trees are wildlife); *Kent Cty Rd Comm'n v Hunting*, 170 Mich App 222; 428 NW2d 353 (1988). The finding in *Portage* that trees are wildlife is not only counterintuitive but also contrary to the taxonomy of NREPA that separates regulation and protection of wildlife, NREPA Article III, Chapter 2, Subchapter 1 (wildlife), Parts 401 to 433, MCL 324.40101 *et seq.* to MCL 324.43301 *et seq.*, from regulation and protection of forests, NREPA Article III, Chapter 2, Subchapter 4 (forests), Parts 501 to 529, MCL 324.50101 *et seq.* to MCL 324.52901 *et seq*.

Wildlife habitat is within MEPA's scope. *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 299; 224 NW2d 883 (1975); *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495, 504-505; 320 NW2d 668 (1982). Fish populations are natural resources of the state. *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 106; 280 NW2d 883 (1979). Natural resources include wildlife. *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741; 275 NW2d 538. MEPA applies to wetlands. *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 544-545; 432 NW2d 315 (1988). Gravel is a natural resource. *Whittaker & Gooding Co v Scio Twp*, 117 Mich App 18, 21; 323 NW2d 574 (1982). Sand is a natural resource. *Preserve the Dunes, Inc v Dep't of Environmental Quality (on remand)*, 264 Mich App 257, 260; 690 NW2d 487 (2004). The phrase "natural resources" is not limited to unique or endangered species. *Kimberly Hills*, 114 Mich App at 504.

The plain meaning of "natural resources" does not include the human social and cultural environment under the principle of *ejusdem generis*. *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616, 635-636; 304 NW2d 445 (1981) , overruled on other grounds *Wayne Cty v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004).

Unpublished decisions: *Byce v Dep't of Natural Resources*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 14, 2003 (Docket No. 236727) (MEPA applies to DNR order prohibiting baiting wild deer and elk); *Tri-Cities Environmental Action Council, Inc v A Reenders Sons*, 4 ELR 20553; 6 ERC 1600 (Ottawa Cty Cir Ct, May 6, 1974) (MEPA applies to sand dunes).

E. Public Trust §14.11

By its text, MEPA applies to the public trust in the air, water, and other natural resources. MCL 324.1701(1). MEPA is the legislative enactment of the public trust doctrine. W. Rodgers,

Environmental Law §2.16 at 184 (1977). The public trust doctrine holds that certain types of resources may not be diverted to private use or ownership without express legislative authorization. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970). The public trust doctrine is discussed in Chapter 11.

MEPA may be used to protect public trust resources. See, e.g., *Superior Public Rights, Inc v Dep't of Natural Resources*, 80 Mich App 72, 75; 263 NW2d 290 (1977). Fish populations in the Great Lakes are public trust resources to which MEPA applies. *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 106; 280 NW2d 883 (1979). Public trust claims alleging wrongful diversion of state land to private use duplicate MEPA claims relating to the destruction of natural resources on that state land. *Highland Recreation Defense Foundation v Natural Resources Comm'n*, 180 Mich App 324, 331; 446 NW2d 895 (1989). The extent to which the public trust under MEPA encompasses privately owned natural resources is an open question.

> ***Unpublished decision***: *Irish v Green*, 2 ELR 20505, 20507; 4 ERC 1402 (Emmet Cty Cir Ct, July 15, 1972) (public trust in trees).

F. Future Conduct; Permits §14.12

MEPA applies to probable future environmental harm as well as to actual or past harm. *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975); *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 106; 280 NW2d 883 (1979).

Courts are split on whether MEPA applies to permits issued by administrative agencies. In *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741, 750-751; 275 NW2d 538 (1979), the Supreme Court held that MEPA may be used to review administrative action that is a predicate for permits, such as a consent order, if issuance of permits will be an "inevitable consequence" of the consent order, and that MEPA may be used to review the issuance of permits by administrative agencies as well as the conduct of third persons allowed by such permits. In *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 524; 684 NW2d 847 (2004), the Supreme Court found that MEPA does not apply to DEQ decisions concerning eligibility for sand dune mining permits pursuant to MCL 324.63702(1), observing that: "An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Id*. at 519. The court's observation is overbroad, because the court neither overrules nor mentions *WMEAC*, and the court expressly relies on *Ray*'s quotation of MCL 324.1703(1) that defendant's conduct may be challenged if it "is likely to" pollute, impair or destroy the environment, 471 Mich at 518, which would appear to apply to administrative permits that authorize future conduct.

MEPA applies to issuance of building permits. *Comm for Sensible Land Use v Garfield Twp*, 124 Mich App 559, 564-565; 335 NW2d 216 (1983). MEPA applies to administrative action, such as a permit, that is "the last hurdle in moving from the paperwork to the outdoors." *Wortelboer v Benzie Cty*, 212 Mich App 208, 221; 537 NW2d 603 (1995).

> ***Unpublished decision***: *Thomas v Intercounty Drain Bd for Crapeau Creek Drain*, unpublished opinion per curiam of the

Court of Appeals, issued July 9, 2002 (Docket No. 230185) (allegations of failure to obtain or issue permits states a claim under MEPA).

G. Other Actionable Conduct §14.13

MEPA does not create a claim for intentional interference with assertion of rights under MEPA in a SLAPP[1] lawsuit independent of an abuse of process claim. *Three Lakes Ass'n v Whiting*, 75 Mich App 564, 578-579; 255 NW2d 686 (1977) (dicta, issue abandoned on appeal). MEPA does not protect a landowner's interest in exploiting natural resources (a "reverse" MEPA action). *Whittaker & Gooding Co v Scio Twp*, 117 Mich App 18, 23; 323 NW2d 574 (1982). MEPA does not apply to rezoning, because the legislative act of rezoning, by itself, does not impair or destroy natural resources. *Comm for Sensible Land Use v Garfield Twp*, 124 Mich App 559, 564-565; 335 NW2d 216 (1983). Aesthetic considerations alone do not support a MEPA action. *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276, 282; 355 NW2d 913 (1984). A county resolution establishing seasonal lake levels pursuant to the Inland Lake Level Act, former MCL 281.61 *et seq*. (now Part 307 of NREPA, MCL 324.30701 *et seq*.), is not actionable conduct under MEPA. *Wortelboer v Benzie Cty*, 212 Mich App 208, 221; 537 NW2d 603 (1995).

Unpublished decisions: *Citizens for Environmental Inquiry v Dep't of Environmental Quality*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 10, 2010 (Docket No. 286773) (DEQ failure to promulgate rules controlling carbon dioxide emissions fails to state a claim under MEPA); *Irish v Green*, 2 ELR 20505, 20507; 4 ERC 1402 (Emmet Cty Cir Ct, July 15, 1972) (increase in automobile traffic will destroy scenic quality); *Wacker Chemical Corp v Bayer Cropscience, Inc*, No. 05-72207, 2006 US Dist Lexis 61483 (ED Mich, Aug. 18, 2006) (MEPA does not apply to funding of remediation under Part 201 of NREPA).

III. Prima Facie Case, Rebuttal, and Affirmative Defense

A. In General §14.14

MCL 324.1703(1) provides that once the plaintiff makes a prima facie showing that the defendant's conduct "has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust in these resources," the defendant may either (1) rebut the plaintiff's proofs with contrary evidence, or (2) prove the affirmative defense "that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."

B. The Plaintiff's Prima Facie Case

1. General Nature of the Plaintiff's Proofs §14.15

The Supreme Court has described the general scope of the plaintiff's prima facie case of "pollution, impairment or destruction" of the environment:

> Such a showing is not restricted to actual environmental degradation but also encompasses probable damage to the environment as well.
>
> Obviously the evidence necessary to constitute a prima facie showing will vary with the nature of the alleged environmental degradation involved.

Ray v Mason Cty Drain Comm'r, 393 Mich 294, 309; 224 NW2d 883 (1975). In *Ray*, the defendant conceded that the plaintiffs' proofs of probable lowering of the water table, destruction of a "quaking forest" and woodlands, and disfigurement of an "existing country stream-like channel" proved a prima facie case. *Id.* at 310 n11.

A plaintiff need not show certain harm to make a prima facie case. "[A]pparently serious and lasting, though unquantified, damage" to wildlife establishes a prima facie case. *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741, 760; 275 NW2d 538 (1979). The standard in MEPA actions is "probable rather than guaranteed harm." *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 109; 280 NW2d 883 (1979) (probable impairment of Great Lakes lake trout population establishes prima facie case of impairment). Claims under MEPA to restrain future environmental harm do not have to meet the stringent burden of proof to enjoin an anticipatory nuisance by "practically certain" evidence. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 490; 608 NW2d 531 (2000).

> ***Unpublished decision***: *Delta Properties, Inc v Motor Wheel Corp*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 9, 1997 (Docket No. 177965) (expert opinion of "good possibility of contamination" insufficient to prove prima facie case).

a. The Meaning of "Likely" §14.16

Conduct that is "likely to pollute, impair, or destroy" the environment includes "probable" damage to the environment. *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105; 280 NW2d 883 (1979).

> ***Unpublished decision***: *Irish v Green*, 2 ELR 20505, 20507; 4 ERC 1402 (Emmet Cty Cir Ct, July 15, 1972) (the word "likely" in MCL 324.1703(1) means "probably or reasonably to be expected").

b. The Meaning of "Pollution" §14.17

Fogging of the air and icing of roads are not pollution of any natural resource. *Marshall v Consumers Power Co*, 65 Mich App 237, 264; 237 NW2d 266 (1975).

> ***Unpublished decision***: *Lakeland Property Owners Ass'n v Northfield Twp*, 2 ELR 20331, 20333, 20334; 3 ERC 1893 (Livingston Cty Cir Ct, Feb. 29, 1972) (the word "pollution" in MEPA means the addition of pollutants above background levels, even if the ambient environment is already polluted).

c. The Meaning of "Impairment" §14.18

The word "impair" in MEPA means to "affect in an injurious manner." *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105-106; 280 NW2d 883 (1979) (quoting Black's Law Dictionary 4th ed). Fogging of the air and icing of roads are not impairment of any natural resource. *Marshall v Consumers Power Co*, 65 Mich App 237, 264; 237 NW2d 266 (1975). Statutes, such as the inland lakes and streams act (Part 301) and the wetland protection act (Part 303), can serve as aids to a trial court in establishing a common-law impairment standard. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 97; 709 NW2d 174 (2005), aff'd in part and rev'd in part on other grounds 479 Mich 280, 291; 737 NW2d 447 (2007).

d. The Meaning of "Destruction" §14.19

Removal of trees constitutes destruction of natural resources. *Eyde v Michigan*, 82 Mich App 531, 540; 267 NW2d 442 (1978); *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276, 281; 355 NW2d 913 (1984). Fogging of the air and icing of roads are not destruction of any natural resource. *Marshall v Consumers Power Co*, 65 Mich App 237, 264; 237 NW2d 266 (1975).

2. Threshold of "Pollution, Impairment, or Destruction"

a. In General §14.20

The text of MEPA does not describe a threshold of harm below which a plaintiff fails to prove a prima facie case. Courts have nevertheless formulated several versions of a threshold of harm for plaintiff's prima facie case. The cases are discussed in chronological order in §14.21 through §14.25.

b. "Environmental Risk": *Oscoda Chapter* §14.21

Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources, 403 Mich 215; 268 NW2d 240 (1978), involved the burial of cattle contaminated with polybrominated biphenyl (PBB) in a clay-lined pit on state land in Oscoda County. The trial court found that the clay-lined pit provided "absolute protection" from groundwater contamination, but recommended

incineration of the cattle after six months and denied a temporary restraining order. The Supreme Court, in a 3-2-2 decision, held that the plaintiffs had failed to prove a prima facie case. *Id.* at 233, 236. The plurality opinion observed, "A court is not empowered to prevent any conduct, whether originally proposed or alternative, which does not rise to the level of *environmental risk* proscribed by the environmental protection act." *Id.* at 232-233 (emphasis added). Given the court's split opinions, the plurality's observation is not the decision of the court. See *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 115 Mich App 356, 360-361, 367-368; 320 NW2d 376 (1982).

Courts have substituted the phrase "environmental risk" for the statutory phrase "pollution, impairment, or destruction" in several cases dealing with the threshold of harm. See, e.g., *Whittaker & Gooding Co v Scio Twp*, 117 Mich App 18, 23-24; 323 NW2d 574 (1982) (diesel fuel burned by trucks transporting gravel, dicta); *Comm for Sensible Land Use v Garfield Twp*, 124 Mich App 559, 564; 335 NW2d 216 (1983) (rezoning); *Cook v Grand River Hydroelectric Power Co*, 131 Mich App 821, 829; 346 NW2d 881 (1984) (reflooding of dam); *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276, 282; 355 NW2d 913 (1984) (destruction of trees). The Supreme Court in *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 23: 576 NW2d 641 (1998), by reversing, impliedly repudiated the "environmental risk" basis for the Court of Appeals' decision.

The phrase "environmental risk" does not appear in the text of MEPA and confuses analysis of plaintiff's prima facie case based on the text. Environmental risk ordinarily applies to human health, and includes elements of scientific uncertainty as to causality, internal benefits balanced against external costs, and latency. Talbot Page, *A Generic View of Toxic Chemicals and Similar Risks*, 7 Ecology LQ 207, 218 (1978) ("'environmental risk' pollutants pose long-term, serious threats of uncertain likelihood to health and life"). These concepts of environmental risk may be sufficient, but are not necessary, elements of MEPA's concept of likelihood of pollution, impairment or destruction of the environment. See also §14.27 regarding harm to human health in the prima facie case. If "environmental risk" means some threshold of harm, the phrase is unnecessary to the decision in *Oscoda Chapter*, because plaintiffs at that stage of the litigation failed to show any environmental harm.

c. When Does an Impact "Rise to the Level of Impairment or Destruction"?: *West Michigan Environmental Action Council* §14.22

West Michigan Environmental Action Council, Inc v Natural Resources Comm'n, 405 Mich 741; 275 NW2d 538 (1979), arose from a 1968 sale of oil and gas leases in a large area of state lands in the northern lower peninsula, including the Pigeon River Country State Forest.[2] The Natural Resources Commission negotiated a consent agreement to allow oil drilling in the southern one-third of the forest. The plaintiffs filed suit under MEPA, alleging that the oil drilling would impair wildlife, including an elk herd, in the forest.

WMEAC is known principally for a single phrase concerning the threshold of harm to the environment. Noting that an environmental impact statement prepared by the DNR predicted the decline of wildlife populations as a result of the oil drilling, the court said:

> We recognize that virtually all human activities can be found to adversely impact natural resources in some way or other. The real question before us is when does such impact rise to the level of impairment or destruction?

Id. at 760. The court found that damage to the elk herd was "serious and lasting" because "an unknown number [of elk] will not survive", and held:

> In light of the limited number of the elk, the unique nature and location of this herd, and the apparently serious and lasting, though unquantifiable, damage that will result to the herd from the drilling of the ten exploratory wells, we conclude that defendants' conduct constitutes an impairment or destruction of a natural resource.

Id. The impairment or destruction, therefore, was nontrivial and not temporary. The court enjoined the drilling.

Pursuant to *WMEAC*, trial courts must conduct a two-part inquiry: "(A) whether a natural resource is involved, and (B) whether the impact of the activity on the environment rises to the level of impairment to justify the trial court's injunction." *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495, 503; 320 NW2d 668 (1982), discussed in §14.23. See *Stevens v Creek*, 121 Mich App 503, 508; 328 NW2d 672 (1982) (remand to determine if removal of trees was impairment or destruction of a natural resource).

Reliance on the *Kimberly Hills* interpretation of *WMEAC* (an impairment must "justify the trial court's injunction") causes contradictory analysis such as in *Kent Cty Rd Comm'n v Hunting*, 170 Mich App 222; 428 NW2d 353 (1988), in which the court found that "removal of trees constitutes destruction of natural resources under MEPA," *id*. at 234, but illogically found that plaintiffs did not establish that the tree removal "would likely pollute, impair or destroy the air, water or other natural resource," *id*. at 235. See §14.75 regarding standards for injunctions.

> ***Unpublished decision***: *Byce v Dep't of Natural Resources*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 14, 2003 (Docket No. 236727) (summary disposition properly granted where prohibition of deer baiting did not rise to level of impairment that would justify injunction).

d. "Statewide Perspective": *Kimberly Hills* §14.23

In *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495; 320 NW2d 668 (1982), the court defined the threshold of harm in natural resources cases based on the statewide impact on wildlife populations. The plaintiffs in *Kimberly Hills* sought to prohibit residential development of the northern half of an 18-acre vacant parcel in southeast Ann Arbor. The trial court required the defendants to set aside a four-acre portion of the parcel as a nature preserve together with connecting wildlife corridors. The Court of Appeals reversed, holding that MEPA does not apply to local natural resources:

> Proper application of the impairment standard as it pertains to the preservation of animal and plant life does not limit conservation only to resources that are "biologically unique" or "endangered"; a statewide perspective is necessary. A focus on narrow local problems is contrary to the intent of the Legislature to carry out its constitutional duty under Const 1963, art 4, §52.

Id. at 507 (footnote omitted); see *id*. at 508-509 (no significant impact on wildlife populations). The statewide perspective test of *Kimberly Hills* has been rejected by several subsequent decisions concerning natural resource impairment or destruction, *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276, 283 n2; 355 NW2d 913 (1984), *Rush v Sterner*, 143 Mich App 672, 680 n1; 373 NW2d 183 (1985), but employed in several other decisions, *Thomas Twp v John Sexton Corp of Michigan*, 173 Mich App 507, 517; 434 NW2d 644 (1988) (statewide perspective required finding that draining a 62-acre, artificial, clay-lined lake was not impairment of a "valuable" natural resource), *Preserve the Dunes, Inc v Dep't of Environmental Quality (on remand)*, 264 Mich App 257, 261, 266; 690 NW2d 487 (2004) (critical sand dune areas collectively are a single state-wide resource pursuant to MCL 324.35302(a)). As to a limitation to unique species, see *Cook v Grand River Hydroelectric Power Co*, 131 Mich App 821, 829; 346 NW2d 881 (1984) (prima facie case failed where unique species not involved).

The Supreme Court has impliedly repudiated the "statewide perspective" test by holding that narrowly defining natural resources is not helpful in evaluating a MEPA claim and that a MEPA plaintiff is "not required to show that a multitude of natural resources are affected." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 33 n7, 34; 576 NW2d 641 (1998).

Kimberly Hills inserts the "statewide perspective" qualifier where the statutory text neither contains nor implies such a perspective. The legislative history of the statute and prior cases (many of which involve small-scale wildlife habitat impairment) show that MEPA applies to habitat without regard to statewide wildlife populations. See Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980's*, 12 Ecology LQ 271, 281 n74 (1985); Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as a Model of a Minimal Requirement*, 7 Harv Envtl L Rev 107, 112-114 (1983). The statewide perspective test should be met whenever MEPA is used to protect resources for which the legislature has enacted protective legislation, e.g., inland lakes and streams, Part 301; wetlands, Part 303; and shorelines, Part 323. But see *Preserve the Dunes, Inc v Dep't of Environmental Quality (on remand)*, 264 Mich App 257 at 261, 266 (Part 353 describes critical sand dunes as "a" natural resource, requiring proof of harm to all critical dunes).

> ***Unpublished decision***: *Hope for the Dunes, Inc v Martin-Marietta Aggregates Industrial Sand Division, Inc*, No. 82-28908-CE (Ingham Cty Cir Ct, Feb. 16, 1983) (mining of barrier sand dunes meets statewide perspective test).

e. "Significant" Impact: *City of Portage* §14.24

In *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276; 355 NW2d 913 (1984), the court described the threshold of plaintiff's prima facie case by adding a significance test onto the "environmental risk" language of *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 403 Mich 215, 232-233; 268 NW2d 240 (1978), discussed in §14.21. Plaintiffs sought to prevent the removal of 74 trees adjacent to Portage Road in Kalamazoo County. The trial court enjoined the removal. The Court of Appeals reversed:

> In determining whether the impact of a proposed action on wildlife is so *significant* as to constitute an *environmental risk* and require judicial intervention, the court should evaluate the environmental situation prior to the proposed action and compare it with the probable condition of the particular environment afterwards. The factors the court should consider include: (1) whether the natural resource involved is rare, unique, endangered, or has historical significance, (2) whether the resource is easily replaceable (for example, by replanting trees or restocking fish), (3) whether the proposed action will have any *significant* consequential effect on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed), and (4) whether the direct or consequential impact on animals or vegetation will affect a *critical* number, considering the nature and location of the wildlife affected. The magnitude of the harm likely to result from the proposed action will depend on the characteristics of the resources involved, *Kimberly Hills*, *supra*, p 508. Esthetic considerations alone are not determinative of *significant* environmental impact.

Id. at 282 (emphasis added). *Portage* has been followed in several cases dealing with natural resources, in which courts found that plaintiffs failed to demonstrate that an impairment exceeds a significance threshold. *Rush v Sterner*, 143 Mich App 672; 373 NW2d 183 (1985) (impoundment of "marginal" trout stream); *Rochow v Spring Arbor Twp*, 152 Mich App 773; 394 NW2d 102 (1986) (cutting 248 roadside trees); *Kent Cty Rd Comm'n v Hunting*, 170 Mich App 222; 428 NW2d 353 (1988) (cutting 60 roadside "centennial" trees); *Highland Recreation Defense Foundation v Natural Resources Comm'n*, 180 Mich App 324; 446 NW2d 895 (1989) (removal of 26,000 trees in state recreation area).

In *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37; 576 NW2d 641 (1998), the Supreme Court limited the *Portage* factors, holding that they "are not mandatory, exclusive, or dispositive" because their use in every case stifles the development of the "common law of environmental quality". See also *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 97; 709 NW2d 174 (2005) (instructing trial court on remand that each MEPA violation must be evaluated using the standard appropriate to the violation), aff'd in part and rev'd in part on other grounds 479 Mich 280, 291; 737 NW2d 447 (2007).

Wetland drainage that would harm unique vegetation and put stress on the remaining portion of a wetland violates MEPA under the *Portage* factors. *Attorney General ex rel Natural Resources Comm'n v Balkema*, 191 Mich App 201, 206-207; 477 NW2d 100 (1991). *Portage* requires "the court to evaluate the environmental situation before the proposed action, the effect of the activity on the surrounding environment, and whether the proposed activity will affect the flora, fauna, or other natural resources in the area." *Preserve the Dunes, Inc v Dep't of Environmental Quality (on remand)*, 264 Mich App 257, 268; 690 NW2d 487 (2004).

The significance condition and the four factors adopted in *Portage* are not found in MEPA's text. These requirements compel a plaintiff to show impairment to unique resources (factors (1) and (2)) or the destruction of a large amount of natural resources (factors (3) and (4)). *Nemeth* repudiates factors (1) and (2) by holding that air, water or other natural resources do not need be scarce to be protected under MEPA and repudiates factors (3) and (4) by holding that a MEPA plaintiff need not show harm to a "multitude of natural resources." 457 Mich at 34-35. The legislative history and prior cases do not support the stringent *Portage* requirements. See Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as a Model of a Minimal Requirement*, 7 Harv Envtl L Rev 107, 110-115 (1983). The effect of the *Portage* test is to force a plaintiff to argue that wildlife is unique in small areas. See *Rush v Sterner*, 143 Mich App 672, 680; 373 NW2d 183 (1985). The *Portage* factors do not appear to apply to air pollution, water pollution, or the public trust in natural resources.

> ***Unpublished decisions***: *United States v Ackley*, No 1:94cv 24 at 48 (WD Mich, Feb. 4, 1994) (plaintiff failed to prove proposed drainage would impair wetland under *Portage* factors).

f. "Proper Threshold of Harm": *Nemeth* §14.25

Nemeth v Abonmarche Dev, Inc, 457 Mich 16; 576 NW2d 641 (1998), involved construction of a marina, condominium project and hotel in barrier dunes at the mouth of the Manistee River. The court held that a violation of a pollution control statute constitutes a prima facie violation of MEPA (see §14.26). But the court also clarified other aspects of "the proper threshold of harm for a prima facie MEPA case." *Id*. at 37. The court returned to *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975), discussed in §14.15, to reiterate that a plaintiff establishes a prima facie case when its evidence is sufficient to withstand defendant's motion for a directed verdict. *Nemeth*, 457 Mich at 25. The court in *Nemeth* generally described the threshold of harm as "any adverse environmental effect." *Id*. at 31.

The court described the proper threshold of harm by analyzing what a prima facie case is not. The court impliedly repudiated the concept of "environmental risk," discussed in §14.21, which was used as the basis for decision by the Court of Appeals. *Id*. at 23. The court impliedly repudiated the "statewide perspective" test of *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495; 320 NW2d 668 (1982), discussed in §14.23, by holding that narrowly defining natural resources is not helpful in evaluating a MEPA claim. *Nemeth*, 457 Mich at 33 n7. The court limited the factors adopted in *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276; 355 NW2d 913 (1984), discussed in §14.24: a MEPA plaintiff is not required to show harm to "a multitude of natural resources," nor show that the natural resources are scarce or unique. *Id*.

at 34. Finally, the court limited *Portage* to its facts by observing that each MEPA case must be evaluated by pollution control standards appropriate to each case. *Id*. at 35. The court rejected the use of the *Portage* factors "in every case" because that practice stifles the development of "the common law of environmental quality" and because the *Portage* factors are not the "proper threshold of harm for a prima facie MEPA case." *Id*. at 37.

Nemeth is consistent with air and water pollution cases that suggest that a nondegradation standard is an appropriate threshold for a MEPA prima facie case. The status quo ante for the purpose of issuing a preliminary injunction is an unpolluted environment. *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 64; 380 NW2d 53 (1985) (water pollution). No one has a right to pollute. *Detroit Edison Co v Michigan Air Pollution Control Comm'n*, 167 Mich App 651, 661; 423 NW2d 306 (1988) (air pollution).

> ***Unpublished decision***: *Lakeland Property Owners Ass'n v Northfield Twp*, 2 ELR 20331, 20333, 20334; 3 ERC 1893 (Livingston Cty Cir Ct, Feb. 29, 1972) (the word "pollution" in MEPA means the addition of pollutants above background levels, even if the ambient environment is already polluted).

3. Violations of Statutes, Rules or Permits §14.26

Statutes. Evidence of violation of a pollution control statute establishes a prima facie case under MEPA. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 29-36; 576 NW2d 641 (1998), discussed in §14.25. The absence of a cause of action under such a statute does not preclude its use as a pollution control standard under MEPA. *Id*. at 31. Probable violation of the Wetlands Protection Act (now Part 303 of NREPA, see Chapter 10) also violates MEPA. *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 547; 432 NW2d 315 (1988) (finding by contested case hearing officer). Violation of a statute that is not a pollution control standard is not a prima facie violation of MEPA. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 91; 709 NW2d 174 (2005) (Parts 301 and 303, however, can serve as aids to the trial court in establishing a common law impairment standard), aff'd in part and rev'd in part on other grounds 479 Mich 280, 291; 737 NW2d 447 (2007). The holding in *Citizens Disposal* is probably not good law in view of the holding in *Michigan Citizens* that Part 303 is not a pollution control standard. 269 Mich App at 95.

Rules. Evidence of commercial fishing without compliance with DNR rules proves a prima facie case of impairment. *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 108; 280 NW2d 883 (1979).

Permits. If a MEPA plaintiff establishes a violation of effluent limitations in the defendant's water pollution discharge permit, the plaintiff proves a prima facie case without showing injury to the environment, because defendant cannot lawfully discharge in excess of permitted effluent limitations. *Dwyer v City of Ann Arbor*, 79 Mich App 113, 122-123; 261 NW2d 231 (1977) , rev'd on other grounds 402 Mich 915; 387 NW2d 926 (1978). *Dwyer* does not discuss whether plaintiff establishes a prima facie case by showing pollution caused by discharges at levels below effluent limitations in a permit.

4. Miscellanea §14.27

One technique that a MEPA plaintiff can use to prove the prima facie case is to introduce into evidence an environmental impact statement (EIS) prepared in conjunction with a proposed project, as plaintiffs did in *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741, 756-760; 275 NW2d 538 (1979). But see *Preserve the Dunes, Inc v Dep't of Environmental Quality (on remand)*, 264 Mich App 257, 267; 690 NW2d 487 (2004) (findings of defendant's EIS rebutted by defendant's expert testimony). A MEPA plaintiff may prove a prima facie case by showing actual or probable pollution, impairment, or destruction of (1) natural resources or (2) the public trust in these resources, but does not have to prove both. *Stevens v Creek*, 121 Mich App 503, 507; 328 NW2d 672 (1982). In evaluating the plaintiff's prima facie case, trial courts may not balance the environmental harm of the defendant's conduct against the good to be accomplished by the conduct. *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276, 282; 355 NW2d 913 (1984).

A question that has received scant treatment is whether a MEPA plaintiff must demonstrate harm to human health to prove a prima facie case of air or water pollution. The analysis in *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668; 263 NW2d 778 (1977), implies that evidence of harm to human health as a result of air or water pollution may be sufficient, but is not necessary, to prove a prima facie case. See §14.21 regarding "environmental risk" as it applies to harm to human health.

C. Rebuttal by the Defendant §14.28

A MEPA defendant may rebut the plaintiff's prima facie showing by "the submission of evidence to the contrary." MCL 324.1703(1). In describing the nature of the defendant's proofs, the Supreme Court in *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 311-312; 224 NW2d 883 (1975), established an arguably heavier burden for defendants:

> In some cases, no doubt, testimony by expert witnesses may be sufficient to rebut plaintiff's prima facie showing. While in other actions the defendant may find it necessary to bring forward field studies, actual tests, and analyses which support his contention that the environment has not or will not be polluted, impaired or destroyed by his conduct. Such proofs become necessary when the impact upon the environment resulting from defendant's conduct cannot be ascertained with any degree of reasonable certainty absent empirical studies or tests.

If the plaintiff shows probable pollution, impairment, or destruction of the environment, whether by lay or expert witnesses, then the defendant, to prevail, must show with "reasonable certainty" the absence of such pollution, impairment, or destruction. After-the-fact tests by untrained personnel are not sufficient to rebut a prima facie showing. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 699; 263 NW2d 778 (1977). Trial court findings that defendant conclusively rebutted plaintiff's prima facie showing of flora impairment or destruction were not clearly erroneous. *Preserve the Dunes, Inc v Dep't of Environmental*

Quality (on remand), 264 Mich App 257, 267; 690 NW2d 487 (2004). MEPA does not require a defendant to rebut plaintiff's prima facie case by establishing the affirmative defense of no feasible and prudent alternative. *Michigan Bear Hunters Ass'n v Natural Resources Comm'n*, 277 Mich App 512, 528; 746 NW2d 320 (2008). The affirmative defense is discussed in §14.29 and following.

The trial tactic of not rebutting plaintiff's evidence can be risky. In *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741, 755; 275 NW2d 538 (1979), the plaintiffs proved impairment of the elk herd "for some unknown period to some unknown degree." The defendants offered no rebuttal evidence, and the Supreme Court on appeal found for the plaintiffs.

> ***Unpublished decisions***: *Property Owners' Rights Ass'n v Centerline of Calhoun County, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 6, 1998 (Docket No. 198305) (possibility of lead contamination from operation of gun club rebutted by testimony that lead unlikely to migrate in soil).

D. Affirmative Defense

1. In General §14.29

In addition to introducing evidence to rebut a plaintiff's prima facie case (see §14.28), a defendant may assert the affirmative defense authorized by MCL 324.1703(1). The affirmative defense is the heart of the statute. *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975), describes the operation of the affirmative defense as follows:

> The EPA prohibits pollution, destruction, or impairment of the environment unless it can be shown that "there is no feasible and prudent alternative" and that defendant's conduct "is consistent with the promotion of public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources * * * ". MCLA 691.1203; MSA 14.528(203).

A defendant must prove both elements of the defense to prevail. *Dwyer v City of Ann Arbor*, 79 Mich App 113, 125; 261 NW2d 231 (1977), rev'd on other grounds 402 Mich 915; 387 NW2d 926 (1978). The defendant carries a "heavy burden of environmental justification" if the affirmative defense is pled. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 701; 263 NW2d 778 (1977). MEPA does not require a defendant to rebut plaintiff's prima facie case by establishing the affirmative defense of no feasible and prudent alternative. *Michigan Bear Hunters Ass'n v Natural Resources Comm'n*, 277 Mich App 512, 528; 746 NW2d 320 (2008).

> ***Unpublished decision***: *Thomas v George Jerome & Co*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2002 (Docket No. 224259) (granting motion to add

affirmative defense not an abuse of discretion where plaintiff not prejudiced).

2. Feasible and Prudent Alternatives

a. In General §14.30

A "feasible" alternative is one that is likely to be put into effect successfully. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 702; 263 NW2d 778 (1977). An alternative may be feasible even though a particular defendant may not be able to afford it or may be forced to go out of business. *Id.* at 703-704. The consideration of prudent alternatives does not require a wide-ranging balancing of competing interests. An alternative is "'prudent' unless adopting it would involve 'truly unusual factors' or costs reaching 'extraordinary magnitudes.'" *Id.* at 705 (quoting *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 411 (1971)).

> ***Unpublished decisions***: *Lakeland Property Owners Ass'n v Northfield Twp*, 2 ELR 20331, 20336; 3 ERC 1893 (Livingston Cty Cir Ct, Feb. 29, 1972) (a defendant does not prove the affirmative defense merely by reciting economic considerations); *Platte Lake Improvement Ass'n v Dep't of Natural Resources*, No. 86-57122-CE, Opinion and Order (Ingham Cty Cir Ct, July 15, 1988) (defendant failed to prove no feasible and prudent alternatives to operation of polluting fish hatchery).

b. Search for Alternatives §14.31

The courts have split over whether MEPA authorizes them to order a particular alternative to a defendant's conduct. *State Highway Comm'n v Vanderkloot*, 392 Mich 159, 185-186; 220 NW2d 416 (1974), appears to hold that MEPA imposes an independent duty on all persons to affirmatively investigate less environmentally destructive conduct, thus authorizing a court to evaluate alternatives whether or not a defendant pleads the affirmative defense. The plurality opinion in *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 403 Mich 215, 231; 268 NW2d 240 (1978) (discussed in §14.21), on the other hand, observed that, absent a successful prima facie case by the plaintiff, the trial court is not authorized to order another alternative, even though it finds it more desirable. The "reverse" MEPA plaintiff in *Whittaker & Gooding Co v Scio Twp*, 117 Mich App 18, 23-24; 323 NW2d 574 (1982), attempted to show that the alternative to its mining gravel—the burning of diesel fuel to haul gravel into the township—would cause pollution, but the Court of Appeals affirmed summary disposition because the plaintiff's claim did not rise to the level of environmental risk, citing *Oscoda Chapter*. A plaintiff need not prove that alternatives to defendant's conduct exist in order to prove a prima facie case.

> ***Unpublished decision***: *Irish v Green*, 2 ELR 20505, 20506; 4 ERC 1402 (Emmet Cty Cir Ct, July 15, 1972) (plaintiffs cannot dictate alternative property developments to the defendant). The court, however, imposed conditions on the defendant's development

> under MCL 691.1204(1) (now MCL 324.1704(1)), which may have served as a judicial choice of alternatives to the defendant's conduct.

3. Conduct Consistent with the Public Health, Safety and Welfare §14.32

In *Dwyer v City of Ann Arbor*, 79 Mich App 113, 125; 261 NW2d 231 (1977), rev'd on other grounds 402 Mich 915; 387 NW2d 926 (1978), the court recognized that there was no alternative to the operation of the existing sewage treatment plant, but found that allowing the expansion of the plant would aggravate existing environmental pollution. The defendant thus did not establish its affirmative defense, because defendant's conduct was not "consistent with the promotion of public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction." MCL 324.1703(1). The lesson to be drawn from *Dwyer* is that a defendant may not continue pollution, impairment, or destruction indefinitely, even though no alternatives exist.

4. Tactical Lessons §14.33

Not asserting the affirmative defense can be risky. For example, the defendants in *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741; 275 NW2d 538 (1979) (discussed in §14.22), did not plead the affirmative defense that they had no feasible and prudent alternative to drilling for oil in the Pigeon River forest, *id*. at 754-755, a defense that would have opened up oil industry practices to judicial scrutiny. Because defendants did not attempt rebuttal, their case rose or fell on their argument that plaintiffs failed to prove a prima facie case, which the Supreme Court rejected. Faced with the choice, most defendants plead the affirmative defense, notwithstanding their "heavy burden of environmental justification." *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 701; 263 NW2d 778 (1977).

E. Trial Court Findings

1. In General §14.34

A trial judge must make findings of fact pursuant to MCR 2.517 for each element in MCL 324.1703(1):

> In the final analysis the very efficacy of the EPA will turn on how well circuit court judges meet their responsibility for giving vitality and meaning to the act through detailed findings of fact.

Ray v Mason Cty Drain Comm'r, 393 Mich 294, 307-308; 224 NW2d 883 (1975). The Supreme Court reaffirmed the "basic import" of *Ray* in *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 25; 576 NW2d 641 (1998), discussed in §14.25. Courts should look to §1703(1) for guidance with respect to what should be included in the findings of fact. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 488; 608 NW2d 531 (2000) (citing *Nemeth* and *Ray* and remanding for findings). See *Jamens v Avon Twp*, 71 Mich App 70, 81; 246 NW2d 410 (1976)

(trial judge must set forth actual facts on which the judge relies in fashioning decree), remanded on other grounds 399 Mich 894 (1977).

> ***Unpublished decision***: *Siefman v Kuhn*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 3, 2000 (Docket No. 214538) (trial court not required to make detailed findings of fact in ruling on motion for summary disposition).

2. No Deference to Agency §14.35

It is reversible error for a trial court to defer to an administrative agency's conclusion that no pollution, impairment or destruction of a natural resource will occur. *West Michigan Environmental Action Council v Natural Resources Comm'n*, 405 Mich 741, 752-754; 275 NW2d 538 (1979). Merely because an agency witness testifies that issuance of a permit does not have MEPA implications does not make it so. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 34; 576 NW2d 641 (1998).

IV. Relationship to Other Law

A. In General §14.36

Judicial review pursuant to MEPA is in addition to existing methods of judicial review of agency action. *State Highway Comm'n v Vanderkloot*, 392 Mich 159, 189; 220 NW2d 416 (1974). Condemnation actions are not in rem with regard to rights under MEPA. *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975). MEPA supplements federal legal and administrative procedures. *Her Majesty the Queen v City of Detroit*, 874 F2d 332, 344 (6th Cir 1989). See §14.26 (evidence of violation of pollution control statutes proves plaintiff's prima facie case under MEPA).

B. De Novo Review; Michigan Administrative Procedures Act §14.37

MEPA authorizes the court to remit the action to administrative proceedings under the Michigan Administrative Procedures Act, MCL 24.201 *et seq*. (MAPA), if available, to determine the legality of the defendant's conduct, subject to orders issued by the court to protect the environment pending completion of the action. MCL 324.1704(2). Judicial review of administrative action under MEPA is not necessarily limited to the administrative record; the court may hear additional evidence to protect the rights recognized by MEPA. MCL 324.1704(3). The remanding court retains jurisdiction for further judicial review, notwithstanding any contrary provisions of MAPA. MCL 324.1704(4). MAPA is discussed in Chapter 15.

Review of administrative action under MEPA is de novo and not on the record under MAPA. *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741, 754; 275 NW2d 538 (1979) ("The environmental protection act would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands."). Review for a MEPA claim is de novo even if the

action is originally brought to review an administrative action under MAPA. *Thomas Twp v John Sexton Corp of Michigan*, 173 Mich App 507, 511; 434 NW2d 644 (1988). After completion of administrative proceedings as directed by a court pursuant to §1704(2), the subsequent review is de novo. *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 471; 554 NW2d 328 (1996). Courts are not bound by any state administrative finding. *Her Majesty the Queen v City of Detroit*, 874 F2d 332, 341 (6th Cir 1989).

Failure of an agency to consider MEPA is harmless in relation to MAPA's standard of review where the agency properly denied the permit pursuant to the inland lakes and streams act (now Part 301 of NREPA, MCL 324.30101 *et seq*.). *Blue Water Isles Co v Dep't of Natural Resources*, 171 Mich App 526, 534-535; 431 NW2d 53 (1988). Failure by the trial court to conduct review de novo under MEPA is harmless error if a permit is also properly denied under the wetlands protection act (now Part 303 of NREPA, MCL 324.30301 *et seq*). *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 545-547; 432 NW2d 315 (1988).

MEPA does not apply to a sand dune mining permit under Part 637 of NREPA; an appeal filed 18 months after issuance of such a permit is time-barred under MAPA's 60-day appeal period. *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 520; 684 NW2d 847 (2004). The court noted that review of administrative action is generally pursuant to "a statute applicable to a particular agency," MAPA or MCL 600.631 (see §14.38). *Id*. at 519. The court, however, overlooked that MEPA applies to all agencies, and thus MEPA is a "statute applicable to the particular agency." MEPA actions, therefore, should not be governed by MAPA's 60-day appeal period.

> ***Unpublished decision***: *United States v Ackley*, No. 1:94cv 24 at 44 n5 (WD Mich, Feb. 4, 1994) (federal court must exercise independent de novo review in MEPA action).

C. MCL 600.631 §14.38

When the DNR used MEPA, as well as Act 641 (now Part 115 of NREPA), to deny an application for a landfill construction permit and the applicant sought review de novo under MEPA, MEPA did not apply, because the applicant did not claim that the denial of the application would violate MEPA and because the DNR's decision should be reviewed under the narrower standard in the Revised Judicature Act (RJA) §631, MCL 600.631. *Michigan Waste Systems v Dep't of Natural Resources*, 147 Mich App 729, 735-736; 383 NW2d 112 (1985) (standard of review under RJA §631 tests whether decision is in violation of law, in excess of statutory authority, made upon unlawful procedure or is arbitrary or capricious).

The court in *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 519; 684 NW2d 847 (2004), noted that review of administrative action is generally pursuant to "a statute applicable to a particular agency," MAPA (see §14.37), or RJA §631, MCL 600.631. The court overlooked that MEPA applies to all agencies, and thus MEPA is a "statute applicable to the particular agency." MEPA actions, therefore, should not be governed by the 21-day appeal period in MCL 600.631.

If MEPA is raised in the administrative process, subsequent review under RJA §631 should be de novo rather than the narrow standard ordinarily used under RJA §631, based on agencies' duties to consider MEPA pursuant to MCL 324.1705(2), discussed in §14.80.

D. Other Environmental Statutes

1. The *In Pari Materia* Doctrine §14.39

The courts have given mixed answers to the question of how MEPA relates to other natural resources statutes. Statutes that relate to the same class of things or have a common purpose are called *in pari materia*. See *City of Detroit v Michigan Bell Telephone Co*, 374 Mich 543, 558; 132 NW2d 660 (1965). Statutes *in pari materia* are interpreted together as though constituting one law, even though enacted at different times and without reference to one another.

In *State Highway Comm'n v Vanderkloot*, 392 Mich 159, 182; 220 NW2d 416 (1974), the court held that MEPA "must be read in concert with the Highway Condemnation Act" and infused an "environmental element" in the standard of "necessity" for highway condemnation. *Id.* at 184. The court concluded that failure to consider substantive environmental duties in highway condemnation actions could be the basis for a judicial finding of fraud or abuse of discretion under the Highway Condemnation Act. *Id.* at 190.

In *Michigan Oil Co v Natural Resources Comm'n*, 406 Mich 1, 32-33; 276 NW2d 141 (1979), the plurality opinion declined to rule whether MEPA is *in pari materia* with the Supervisor of Wells Act, MCL 319.1 *et seq*. (now Part 615, MCL 324.61501 *et seq*.), even though it would be logical to read MEPA *in pari materia* with other statutes relating to natural resources. 406 Mich at 33. The dissent argued that MEPA need not be read *in pari materia* with other statutes, since MEPA by itself adequately protects the environment by fulfilling the legislature's responsibilities under Const 1963, art 4, §52. 406 Mich at 55.

MEPA and Part 201 (see Chapter 5) are *in pari materia* because they share the same general purpose of protecting the environment. *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 53; 645 NW2d 319 (2002). DEQ must comply with MEPA, but judicial review as to whether DEQ action is "arbitrary and capricious and otherwise not in accordance with law" (see MCL 324.20137(5)) under MEPA occurs after the response activity is completed. *Id*. at 55 (applying *Vanderkloot*).

MEPA is now Part 17 of NREPA. Because NREPA was enacted as a single statute, the logic of *Vanderkloot*, *Michigan Oil* and *Genesco* suggests that MEPA should be read *in pari materia* with all parts of NREPA. If so, MEPA's provisions should be incorporated into those parts and all litigation arising under other parts of NREPA could be structured in MEPA terms. Conversely, if MEPA incorporates the provisions of the other parts of NREPA, then MEPA can be used to enforce statutes that lack a private right of action and grant enforcement powers only to the state. See *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 31; 576 NW2d 641 (1998) (Part 91 of NREPA can be used as a pollution control standard under MEPA even though Part 91 lacks a cause of action), discussed in §14.26. See, e.g., NREPA Part 31, Water Resources, MCL 324.3115 (enforcement by attorney general), discussed in Chapter 2, §2.31; Annotation, *Standing*

to Sue for Violation of State Environmental Regulatory Statute, 66 ALR4th 685 (1988). The same conclusion may be drawn from the rule in *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975), that all persons have a duty to consider MEPA in their conduct.

> ***Unpublished decision***: *Thomas v Intercounty Drain Bd for Crapeau Creek Drain*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 2002 (Docket No. 230185) (MEPA should be read *in pari materia* with other environmental statutes, citing *Michigan Oil* and construing *Nemeth*).

2. State Statutes §14.40

Absent statutory preclusion, conduct authorized by statute can be challenged under MEPA. For example, the burial of PBB-contaminated cattle was specifically authorized by the PBB Act, MCL 288.421 *et seq.* (now expired), yet challenged under MEPA in *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 403 Mich 215; 268 NW2d 240 (1978) (discussed in §14.21). Injunctive relief requested in a class-action air pollution action would not unnecessarily entangle the court in administrative regulation of the air pollution source because NREPA (through MEPA) contemplates private enforcement suits and similar injunctive relief. *Olden v Lafarge Corp*, 383 F3d 495, 511 (6th Cir 2004). See §14.26 (violation of pollution control statute as prima facie MEPA violation).

Some statutes preclude MEPA actions or modify relief under MEPA. A court lacks jurisdiction to apply MEPA to preenforcement review of a Part 201 response activity selected or approved by DEQ. *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 53; 645 NW2d 319 (2002). An administrative order on consent negotiated with DEQ pursuant to Part 201 precludes subject matter jurisdiction to consider additional remedial actions. *Abnet v Coca-Cola Co*, 786 F Supp 2d 1341, 1347 (WD Mich 2011). MEPA and the Sand Dune Protection and Management Act, Part 353 of NREPA, MCL 324.35301 *et seq*., do not bar permanent removal of sand for commercial or industrial purposes because to do so would render the Sand Dune Mining Act, Part 637 of NREPA, MCL 324.63701 *et seq*., meaningless. *Preserve the Dunes, Inc v Dep't of Environmental Quality (on remand)*, 264 Mich App 257, 264; 690 NW2d 487 (2004).

Can conduct that complies with standards promulgated under other statutes violate MEPA? The hearing officer in the Kolke Creek administrative hearing answered "no". *Petition of Anglers of the AuSable*, No. MIG085051, Opinion at 9 (State Office of Admin Hearings, Feb. 22, 2006), rev'd on other grounds No. 07-12072, Opinion and Order (Otsego Cty Cir Ct, Jan. 31, 2008) (proposed wastewater discharge into headwaters of AuSable River would violate MEPA under *Portage* factors), lv den *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, unpublished order of the Court of Appeals, entered Sept. 24, 2008 (Docket No. 284315), lv gtd 482 Mich 1078; 758 NW2d 258 (2008), order granting leave vacated, lv den 483 Mich 887; 760 NW2d 230 (2009). The answer, however, should be "yes" (1) under *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 30; 576 NW2d 641 (1998) (discussed in §14.25), (2) in view of §1701(2), which authorizes courts to determine the adequacy of pollution control standards, (3) the court's duty of de novo review, and (4) the prohibition in §1705(2) of agency action authorizing pollution (discussed in §14.80).

Unpublished decisions: *United States v Ackley*, No. 1:94cv 24 at 44 (WD Mich, Feb. 4, 1994) (state courts would allow MEPA plaintiffs to protect wetlands to the same extent that administrative agencies could do so); *Macomb Twp v South Macomb Disposal Authority*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 3, 2004 (Docket No. 244542) (finding in earlier action of no MEPA liability does not preclude later finding, after further investigation, of PRP status under Part 201 of NREPA); *Wacker Chemical Corp v Bayer Cropscience, Inc*, No. 05-72207, 2006 US Dist Lexis 61483 (ED Mich, Aug. 18, 2006) (MEPA does not apply to funding of remediation under Part 201 of NREPA); *Zanke-Jodway v City of Boyne City*, 2009 US Dist Lexis 89362 (WD Mich, Sept. 28, 2009) (if plaintiffs prevail in claims under NREPA Parts 31 (water pollution), 91 (soil erosion) and 301 (inland lakes and streams), the court can grant equitable relief under MEPA).

a. Pollution Control Standards §14.41

Courts must independently determine whether statutes or administrative rules promulgated pursuant to those statutes are appropriate pollution control standards to be applied to a claim under MEPA; if they are not, the court can specify a different pollution control standard. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 30; 576 NW2d 641 (1998) (citing MCL 324.1701(2)). To determine if a statute contains a pollution control standard, courts should determine whether the statutory "purposes are to protect natural resources or to prevent pollution and environmental degradation." *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 91-92; 709 NW2d 174 (2005), aff'd in part and rev'd in part on other grounds 479 Mich 280, 291; 737 NW2d 447 (2007).

b. MEPA Standard Incorporated in Other Statutes §14.42

Several parts of NREPA expressly incorporate MEPA. The Sand Dune Mining Act, MCL 324.63709, prohibits the DEQ from issuing a sand dune mining permit if an applicant's proposed conduct is likely to pollute, impair or destroy the environment. See *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 515-516; 684 NW2d 847 (2004) (MEPA expressly controls DEQ's 63709 determination). DEQ may revoke a metallic mining permit under Part 631 of NREPA if DEQ determines that the permittee has violated MEPA. MCL 324.63103c(1)(b). Under Part 632 of NREPA, DEQ must approve a permit if it finds that the proposed nonferrous mining operation will not violate MEPA. MCL 324.63205(11)(b).

c. Statutory Exceptions to MEPA §14.43

In Part 201 of NREPA (discussed in Chapter 5), MCL 324.20142(1) exempts from a claim for performance of response activities under MEPA a person who has complied with or is exempt from liability under Part 201, except for permitted releases described in MCL 324.20126a(5). In Part 632, MCL 324.63205(11)(b) declares that excavation and removal of nonferrous metallic

minerals and waste rock, by themselves, do not constitute pollution, impairment or destruction of those natural resources. Statutory exceptions to MEPA may be constitutionally infirm in light of the legislature's fulfillment, by enacting MEPA, of its constitutional duty under Const 1963, art 4, §52 to enact environmentally protective statutes. See §14.3.

d. MEPA as Supplementing Other Statutes §14.44

MCL 324.1706 declares that MEPA "is supplementary to existing administrative and regulatory procedures provided by law." *State Highway Comm'n v Vanderkloot*, 392 Mich 159, 189; 220 NW2d 416 (1974). Part 55 (air pollution) of NREPA (see Chapter 1) provides additional remedies to control air pollution to existing remedies of private nuisance suits and citizen suits under MEPA. *DaimlerChrysler Corp v State Tax Comm'n*, 482 Mich 220, 230-231 n24; 753 NW2d 605 (2008) (quoting MCL 324.5540). MEPA and Part 201 (see Chapter 5) supplement each other. *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 53; 645 NW2d 319 (2002).

3. Federal Statutes §14.45

The Clean Air Act does not impliedly preempt MEPA. *Her Majesty the Queen v City of Detroit*, 874 F2d 332, 342-344 (6th Cir 1989). See Chapter 1 for a discussion of the Clean Air Act. An agreed-upon remedy for a hazardous waste site under CERCLA may not be challenged under MEPA, because CERCLA preempts state law to the extent that state law would allow remedies that conflict with a federally selected remedy. *United States v Akzo Coatings of America, Inc*, 719 F Supp 571, 579-580 (ED Mich 1989), aff'd 949 F2d 1409 (6th Cir 1991). Contra *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 67; 380 NW2d 53 (1985) (CERCLA does not preempt state programs). See Chapter 5 for a discussion of CERCLA. DEQ has used MEPA as an "applicable or relevant and appropriate requirement" (ARAR) for the remediation of hazardous waste sites under CERCLA.

E. Administrative Proceedings §14.46

It is reversible error for a trial court to defer to an administrative agency's conclusion that no pollution, impairment or destruction of a natural resource will occur. *West Michigan Environmental Action Council v Natural Resources Comm'n*, 405 Mich 741, 752-754; 275 NW2d 538 (1979). Merely because an agency witness testifies that issuance of a permit does not have MEPA implications does not make it so. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 34; 576 NW2d 641 (1998). The DNR rejected an oil drilling permit sought pursuant to the oil and gas conservation act, MCL 391.1 *et seq*. (now Part 615 of NREPA) in part pursuant to MEPA. *Schommer v Director, Dep't of Natural Resources*, 162 Mich App 110, 113; 412 NW2d 663 (1987). The DNR denied a landfill construction permit, in part, pursuant to MEPA. *Citizens Disposal, Inc v Dep't of Natural Resources*, 172 Mich App 541, 544; 432 NW2d 315 (1988). Although the Court of Appeals held in *Michigan Bear Hunters Ass'n v Natural Resources Comm'n*, 277 Mich App 512, 524; 746 NW2d 320 (2008), that MCL 324.1705 addresses only intervention in administrative proceedings and subsequent judicial review, and does not authorize an independent circuit court action, the holding is overbroad, as only MCL 324.1705(1) addresses invention; MCL 324.1705(2) prohibits administrative approval of

environmentally-harmful conduct (see §14.80) and MCL 324.1705(3) deals with res judicata and collateral estoppel (see §14.57).

> ***Unpublished decision***: *Petition of Anglers of the AuSable*, No. MIG085051, Opinion and Order at 9 (State Office of Administrative Hearings, Feb. 22, 2006) (MCL 324.1705(2) requires hearing officer to apply MEPA in Part 31 contested case), rev'd on other grounds No. 07-12072, Opinion and Order (Otsego Cty Cir Ct, Jan. 31, 2008) (proposed wastewater discharge into headwaters of AuSable River would violate MEPA under *Portage* factors), lv den *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, unpublished order of the Court of Appeals, entered Sept. 24, 2008 (Docket No. 284315), lv gtd 482 Mich 1078; 758 NW2d 258 (2008), order granting leave vacated, lv den 483 Mich 887; 760 NW2d 230 (2009).

F. Governmental Immunity §14.47

The DNR performs a governmental function when it brings a MEPA action and is therefore immune from tort liability. *Attorney General ex rel Natural Resources Comm'n v Balkema*, 191 Mich App 201, 207; 477 NW2d 100 (1991).

G. Common Law §14.48

Like many environmental statutes, MEPA traces its roots to the common law (see Chapter 13). MEPA is "a legislative recognition of the ancient powers of a court to hear nuisance cases, balance equities, and fashion suitable remedies," including a remedy to prevent anticipated harm. *Opal Lake Ass'n v Michaywe Ltd Partnership*, 47 Mich App 354, 364 n3; 209 NW2d 478 (1973) (dicta). MEPA's reach, however, extends beyond common-law boundaries. MEPA supplants nuisance law to the extent of a conflict; MCL 691.1202(2) (now MCL 324.1701(2)) is a legislative recognition that changes in technology may permit a court to require the adoption of standards more precise and exacting than those required under nuisance law. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 693-694; 263 NW2d 778 (1977). MEPA imposes a duty of care actionable in tort because liability flows to any member of the public whose natural resources are injured by contamination. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 16, 18; 539 NW2d 526 (1999). Unlike de novo review in MEPA actions (see §14.35 and §14.46), a circuit court may consider an administrative determination in ruling on a common-law nuisance claim. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 491; 608 NW2d 531 (2000).

V. Procedure

A. Jurisdiction

1. In General §14.49

MEPA vests jurisdiction in the circuit courts. MCL 324.1701(1). A circuit court lacks jurisdiction to adjudicate a claim that state officials violated MEPA by issuing automobile licenses without promulgating rules governing automobile air pollution; jurisdiction over such claims lies in the court of claims. *Roberts v Michigan*, 45 Mich App 252; 206 NW2d 466 (1973). MCL 324.20137(4) deprives a court of jurisdiction to hear a MEPA preenforcement challenge to a response activity selected or approved by DEQ, *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45; 645 NW2d 319 (2002), including a request for remedial actions in addition to those required by an administrative order on consent with DEQ, *Abnet v Coca-Cola Co*, 786 F Supp 2d 1341, 1347 (WD Mich 2011).

> ***Unpublished decision***: *Thomas v Intercounty Drain Bd for Crapeau Creek Drain*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 2002 (Docket No. 230185) (circuit court, not court of claims, has jurisdiction to hear MEPA claim against DEQ).

2. Federal Court Jurisdiction §14.50

In the absence of complete preemption, the federal courts lack removal jurisdiction over MEPA actions. *Her Majesty the Queen v City of Detroit*, 874 F2d 332 (6th Cir 1989). When plaintiffs' federal claims were dismissed, a federal district court declined to exercise pendent jurisdiction over MEPA claims against state defendants. *Hendrickson v Wilson*, 374 F Supp 865, 875-878 (WD Mich 1973). See *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 66-67; 380 NW2d 53 (1985) (42 USC 9614 grants concurrent jurisdiction over pollution abatement claims to both federal and state governments).

3. Primary Jurisdiction §14.51

The primary jurisdiction doctrine allows courts to decline initial jurisdiction if an administrative agency has concurrent jurisdiction. See Chapter 16, §16.___, for a discussion of primary jurisdiction. Before the enactment of MEPA, the primary jurisdiction doctrine limited direct access to the courts in environmental cases. See *White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262; 177 NW2d 473 (1970). See also *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 67-68; 380 NW2d 53 (1985) (primary jurisdiction not applied where agency conceded circuit court injunction properly issued). Although no appellate court has directly addressed the issue, MEPA probably negates the primary jurisdiction doctrine in view of circuit courts' duty to make de novo findings without deference to findings of an administrative agency, as held in *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741, 754; 275 NW2d 538 (1979), discussed in §14.37.

> ***Unpublished decision***: *Lakeland Property Owners Ass'n v Northfield Twp*, 2 ELR 20331, 20336; 3 ERC 1893 (Livingston Cty Cir Ct, Feb. 29, 1972) (Water Resources Commission does not have primary jurisdiction in a MEPA claim for water pollution).

B. Venue §14.52

A MEPA plaintiff "may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur." MCL 324.1701(1). This language is a permissive venue provision, allowing venue in the county where the environmental harm will occur or in the county where an agency made an administrative decision that results in environmental harm. *Robinson v Dep't of Transportation*, 120 Mich App 656, 659-660; 327 NW2d 317 (1981). See MCL 600.1615 (venue proper in county of principal office of governmental unit). See also, e.g., *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741; 275 NW2d 538 (1979) (venue in Ingham County for drilling activity to occur in the northern Lower Peninsula).

Where defendant's conduct causes environmental harm that crosses county lines, venue is probably proper in any county where the harm occurs. For instance, an action alleging that defendants over-fished the Great Lakes was brought in Ottawa County but the claim encompassed the Michigan waters of the Great Lakes. *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 103; 280 NW2d 883 (1979). An action alleging that air pollution from a municipal incinerator proposed to be built in the City of Detroit would affect Windsor, Ontario was brought in Wayne County. *Her Majesty the Queen v City of Detroit*, 874 F2d 332 (6th Cir 1989).

> ***Unpublished decision***: *Attorney General v Delene*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 30, 1999 (Docket No. 204086) (MCL 324.1701(1), as a venue provision, does not provide a jurisdictional basis for setting aside a properly entered default).

C. Standing §14.53

MEPA grants universal standing to any person to bring an action against any other person for the protection of the environment:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

MCL 324.1701(1). *Ray v Mason Cty Dr Comm'n*, 393 Mich 294, 304-305; 224 NW2d 883 (1975). In 2004, the Supreme Court held that plaintiffs in Michigan courts, however, must meet

the standing requirements applicable in federal courts of (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 628-629; 684 NW2d 800 (2004). In *Cleveland Cliffs*, MEPA plaintiffs who alleged that they use an affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity adequately alleged injury in fact. *Id*. at 629-630 (quoting *Friends of the Earth, Inc v Laidlaw Environmental Services, Inc*, 528 US 167, 183 (2000)). The Court, however, overruled *Cleveland Cliffs* in *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371; 792 NW2d 686 (2010). In *Lansing Schools*, the Court observed that the legislature's unambiguous intent to confer standing in a statute's text is sufficient to confer standing. *Id*., slip opinion at 24 n 23. MEPA, as such a statute, confers statutory standing on "the attorney general or any person."

Plaintiffs who did not allege that they used, had access to, or enjoyed a recreational, aesthetic, or economic interest in lakes and wetlands lack standing to assert a MEPA claim concerning those areas. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 479 Mich 280, 297; 737 NW2d 447 (2007) (rejecting "interconnectedness" or "ecosystem nexus" theory of standing, *id*. at 298-300). Prior owners of contaminated property lack standing under US Const, art III, to pursue a MEPA claim for injunctive relief in federal court if no practical obstacles prevent the current owner from asserting such claims. *Niecko v Emro Marketing Co*, 769 F Supp 973, 991-992 (ED Mich 1991).

MEPA reverses the ordinary rule that private citizens lack standing to sue on behalf of the public unless the citizens suffer substantial damage not common to others similarly situated. See *Home Tel Co of Grass Lake v Michigan R Comm'n*, 174 Mich 219; 140 NW 496 (1913); *Comstock v Wheelock*, 63 Mich App 195, 202; 234 NW2d 448 (1975). *Michigan Citizens for Water Conservation*, however, requires a MEPA plaintiff to establish a "substantial interest" that is "distinct from the interest of the general public." 479 Mich at 297.

> ***Unpublished decisions***: *Thomas v Intercounty Drain Bd for Crapeau Creek Drain*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 2002 (Docket No. 230185) (summary disposition pursuant to MCR 2.116(C)(5) for lack of standing improperly granted); *Her Majesty the Queen v Greater Detroit Resource Recovery Authority*, No. 87-709234-CE (Wayne Cty Cir Ct, Opinion and Order, Mar. 2, 1990) (Province of Ontario has standing to protect "the common airshed of Michigan and Ontario"); *United States v Ackley*, No. 1:94cv 24 at 39-41 (WD Mich, Feb. 4, 1994) (federal government has standing under MEPA).

D. Ripeness §14.54

A MEPA claim challenging a rezoning is premature because natural resources can be adequately protected at later stages of land use regulation, such as when building permits are issued. *Comm for Sensible Land Use v Garfield Twp*, 124 Mich App 559, 564-565; 335 NW2d 216 (1983). A

county resolution establishing lake levels does not give rise to a MEPA action, where statutory hearings provide a further step in "moving from the paperwork to the outdoors". *Wortelboer v Benzie Cty*, 212 Mich App 208, 221; 537 NW2d 603 (1995).

E. Statute of Limitations §14.55

MEPA contains no limitations period. In *Attorney General v Harkins*, 257 Mich App 564; 669 NW2d 296 (2003), the court held that the six-year statute of limitations contained in MCL 600.5813 applied to equitable actions brought under NREPA. Thus, it appears that the limitations period for MEPA actions is six years.

F. Exhaustion of Other Remedies §14.56

MEPA plaintiffs need not exhaust remedies available pursuant to other statutes. *Addison Twp v Gout*, 171 Mich App 122; 429 NW2d 612 (1988) (comparing to Wetland Protection Act and Inland Lakes and Streams Act, both of which require exhaustion of administrative remedies), rev'd on other grounds 432 Mich 627, 633; 443 NW2d 139, vacated, lv granted 433 Mich 1201; 444 NW2d 528 (1989), reaff'd 435 Mich 809; 460 NW2d 215 (1990); *Attorney General v Clinton Cty Drain Comm'r*, 91 Mich App 630; 283 NW2d 815 (1979) (drain code).

G. Res Judicata and Collateral Estoppel §14.57

MCL 324.1705(3) authorizes a court to apply res judicata and collateral estoppel to successive MEPA actions. Neither res judicata nor collateral estoppel bars a MEPA action concerning real property that was the subject of a prior condemnation action. *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975). If a subsequent MEPA action is subject to the defense at law of res judicata, the equitable remedy of a bill of peace does not lie. *Hooker Chemicals & Plastic Corp v Attorney General*, 100 Mich App 203, 207; 298 NW2d 710 (1980). A second MEPA plaintiff may not be subject to collateral estoppel, because successive MEPA plaintiffs may not be considered to be in privity under traditional privity concepts. See generally Note, *Michigan Environmental Protection Act: II. Multiplicity of Suits*, 4 U Mich JL Ref 370, 382-386 (1970).

In an air pollution or water pollution context, if more efficient pollution control technology becomes available after a judicial finding that a defendant must install certain pollution control equipment, the defendant may be subject to a later-filed MEPA action to install the more efficient technology.

H. Mootness §14.58

Appellate review of a MEPA claim is not precluded, even if the challenged work is completed, where there is an issue of public significance that may recur and yet evade review. *Highland Recreation Defense Foundation v Natural Resources Comm'n*, 180 Mich App 324, 327; 446 NW2d 895 (1989). Where the drainage project at issue was complete but similar projects were planned, the Court of Appeals considered the issue of exhaustion of administrative remedies sufficiently important to address the issue. *Attorney General v Clinton Cty Drain Comm'r*, 91 Mich App 630, 631 n1; 283 NW2d 815 (1979).

I. Joinder §14.59

Trial courts may, in their discretion, allow claims against third party defendants more than 21 days after a third-party plaintiff's answer is due to the original plaintiff. MCR 2.204(A)(1). A trial court did not abuse its discretion by denying third-party joinder late in a case where such joinder would make the trial unmanageable. *Danyo v Great Lakes Steel Corp*, 93 Mich App 91, 98; 286 NW2d 50 (1979).

> ***Unpublished decision***: *Attorney General ex rel Michigan Dep't of Natural Resources v Chalet du Paw Paw Condominium Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 3, 1999 (Docket No. 205384) (joinder of MEPA claim and Part 301 claim alleging need for marina operating permit not an abuse of discretion).

J. Intervention

1. Court Actions §14.60

MEPA does not expressly provide for intervention in circuit court actions, so intervention in MEPA actions proceeds under MCR 2.209. A circuit court did not abuse its discretion by reversing intervention as of right and granting only permissive intervention to neighbors in an air pollution action brought by a county health department. *Wayne Cty Dep't of Heath v Chrysler Corp*, 43 Mich App 235; 203 NW2d 912 (1972). The state of Michigan used MEPA to intervene in a case involving the pollution of the interstate waters of Lake Superior. *United States v Reserve Mining Co*, 380 F Supp 11, 25-26 (D Minn 1974), mod sub nom *Reserve Mining Co v Environmental Protection Agency*, 514 F2d 492 (8th Cir 1975). If intervention is denied, the proposed intervenor could file a separate MEPA action and seek independent review or seek consolidation with the existing proceeding pursuant to MCR 2.505(A).

> ***Unpublished decision***: *Lakeland Property Owners Ass'n v Northfield Twp*, 2 ELR 20331, 20331; 3 ERC 1893 (Livingston Cty Cir Ct, Feb. 29, 1972) (intervention as of right granted to other lake associations).

2. Administrative Proceedings §14.61

MCL 324.1705(1) authorizes permissive intervention in administrative proceedings and subsequent judicial review. Intervention in an administrative proceeding should permit a full airing of MEPA issues as authorized by MCL 324.1705(2) rather than being limited to the original issues. In the administrative proceedings leading up to *Michigan Oil Co v Natural Resources Comm'n*, 406 Mich 1; 276 NW2d 141 (1979), the administrative law judge restricted intervenors to existing issues, a procedure criticized by the dissent. 406 Mich at 55-56 n31 (Levin, J., dissenting). Although the Court of Appeals in *Michigan Bear Hunters Ass'n v Natural Resources Comm'n*, 277 Mich App 512, 524; 746 NW2d 320 (2008), held that MCL 324.1705 addresses only intervention in administrative proceedings and subsequent judicial review, and

does not authorize an independent circuit court action, the holding overbroad, as only a subsection of §1705, MCL 324.1705(1), addresses invention; the other subsections of §1705 prohibit administrative approval of environmentally-harmful conduct (MCL 324.1705(2), see §14.80) and deal with res judicata and collateral estoppel MCL 324.1705(3), see §14.57).

DEQ rules for intervention in contested case hearings require reference to "applicable statute and rules" for standing to intervene. 2003 AACS, R 324.59d(4). Thus, MEPA standing confers standing to intervene in contested cases. See §14.53 regarding standing.

K. Severance §14.62

Trial courts may order separate trials for any claims or issues to promote convenience or avoid prejudice. MCR 2.505(B). A trial court did not abuse its discretion by denying a motion to sever plaintiffs' MEPA claim from their damage claims. *Danyo v Great Lakes Steel Corp*, 93 Mich App 91, 96-97; 286 NW2d 50 (1979); *Oakwood Homeowners Ass'n v Ford Motor Co*, 77 Mich App 197, 221; 258 NW2d 475 (1977).

L. Class Actions §14.63

Through 1985, 25 class actions had been filed that included MEPA claims. Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980's*, 12 Ecology LQ 271, 275 (1985). Most of these actions primarily sought damages resulting from industrial air pollution. See, e.g., *Danyo v Great Lakes Steel Corp*, 93 Mich App 91; 286 NW2d 50 (1979); *Oakwood Homeowners Ass'n v Ford Motor Co*, 77 Mich App 197; 258 NW2d 475 (1977). For a discussion of class actions generally (MCR 3.501), see Chapter 16, §16.____. Certification of a defendant class would be appropriate to bind all persons necessary to achieve effective relief. See *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99; 280 NW2d 883 (1979) (syllabus). A broad release in an air pollution class action settlement serves the public interest because plaintiffs retain the ability to sue for violations of MEPA. *Moulton v United States Steel Corp*, 581 F3d 344, 350 (6th Cir 2009). Certification as a plaintiff class action is unnecessary to secure declaratory or equitable relief for a MEPA plaintiff, because a MEPA plaintiff acts as a private attorney general on behalf of the public.

> ***Unpublished decision***: *Muskegon Cty v Environmental Protection Organization*, No. C-5585 (Muskegon Cty Cir Ct, March 15, 1971), discussed in Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1004, 1035-1037 n 124 (1972) (putative environmental defendant sued a class of assumed environmental plaintiffs to bar future challenges to a spray-irrigation sewage treatment project).

M. Appointment of a Master §14.64

MCL 324.1703(2) authorizes the court to appoint a disinterested, technically qualified master or referee to take testimony and report findings to the court. Trial courts appointed masters in *Eyde v Michigan*, 82 Mich App 531; 267 NW2d 442 (1978), and *Rosselott v Muskegon Cty*, 123 Mich

App 361, 366-368; 333 NW2d 282 (1983). In *Eyde*, the Court of Appeals affirmed the trial court's acceptance of the master's recommendation for reforestation of trees in a sewer easement. In *Rosselott* the master's report tended to negate plaintiff's theory of causation of groundwater pollution. The court's authority under MCL 324.1703(2) to appoint a master may be unconstitutional pursuant to Const 1963, art 6, §5, which prohibits the office of master in chancery. See *Karibian v Paletta*, 122 Mich App 353, 356; 332 NW2d 484 (1983). Practitioners should therefore approach the appointment of a master or referee in MEPA cases with care.

> ***Unpublished decision*:** *Platte Lake Improvement Ass'n v Dep't of Natural Resources*, No. 86-57122-CE, Opinion and Order (Ingham Cty Cir Ct, July 15, 1988) (master appointed to oversee implementation of remedy).

N. Summary Disposition

1. Lack of Subject Matter Jurisdiction – MCR 2.116(C)(4) §14.65

The Court of Appeals affirmed summary disposition on jurisdictional grounds in *Roberts v Michigan*, 45 Mich App 252, 254; 206 NW2d 466 (1973) (Secretary of State and Department of State Highways lack authority to promulgate rules to control air pollution). A trial court properly granted summary disposition pursuant to MCR 2.116(C)(4) where MCL 324.20137(4) (see Chapter 5) deprived the court of jurisdiction to review a response activity selected or approved by DEQ in advance of a DEQ enforcement action. *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 53; 645 NW2d 319 (2002).

2. Lack of Legal Capacity to Sue – MCR 2.116(C)(5) §14.66

The standing issue in *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 678 n2; 684 NW2d 800 (2004), overruled *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371; 792 NW2d 686 (2010), was presented in a motion pursuant to MCR 2.116(C)(8) (see §14.67), rather than a motion pursuant to MCR 2.116(C)(5).

> ***Unpublished decision***: *Thomas v Intercounty Drain Bd for Crapeau Creek Drain*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 2002 (Docket No. 230185) (summary disposition for lack of standing improperly granted).

3. Failure to State a Claim – MCR 2.116(C)(8) §14.67

In *Marshall v Consumers Power Co*, 65 Mich App 237, 264; 237 NW2d 266 (1975), the court affirmed summary disposition that plaintiff failed to state a claim (see MCR 2.116(C)(8)) that fogging of the air and icing of roads constituted pollution, impairment or destruction of natural resources. A "reverse" MEPA action seeking approval to exploit natural resources fails to state a claim. *Whittaker & Gooding Co v Scio Twp*, 117 Mich App 18; 323 NW2d 574 (1982). Summary disposition is appropriate where a MEPA action is premature. *Comm for Sensible Land Use v Garfield Twp*, 124 Mich App 559, 565; 335 NW2d 216 (1983); *Wortelboer v Benzie Cty*,

212 Mich App 208, 220-222; 537 NW2d 603 (1995). Plaintiff failed to state a claim by not pleading that defendant would endanger the air, water or other natural resources. *Flanders Industries, Inc v Michigan*, 203 Mich App 15, 24; 512 NW2d 328 (1993).

> ***Unpublished decisions***: *Thomas v Intercounty Drain Bd for Crapeau Creek Drain*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 2002 (Docket No. 230185) (summary disposition for lack of standing improperly granted); *Lake Village of Rochester Hills v REI Brownstown, LLC*, No. 2004-058323-CE (Oakland Cty Cir Ct, Opinion and Order, Nov. 10, 2004) (hypothetical allegations fail to state a MEPA claim); *Wacker Chemical Corp v Bayer Cropscience, Inc*, No. 05-72207, 2006 US Dist Lexis 61483 (ED Mich, Aug 18, 2006) (request for funding of remediation under Part 201 of NREPA fails to state a claim (applying FR Civ P 12(b)(6) in state action removed to federal court)); *Citizens for Environmental Inquiry v Dep't of Environmental Quality*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 10, 2010 (Docket No. 286773) (DEQ failure to promulgate rules controlling carbon dioxide emissions fails to state a claim under MEPA).

4. No Genuine Issue of Material Fact – MCR 2.116(C)(10) §14.68

Summary disposition pursuant to MCR 2.116(C)(10) occurs infrequently in MEPA cases, in view of the court's duty to review de novo defendants' conduct. The trial court properly granted summary disposition pursuant to MCR 2.116(C)(10) where the plaintiff's complaint generally alleged that defendant would pollute, impair or destroy the air, water or other natural resources without supporting facts. *Dafter Sanitary Landfill v Superior Sanitation Service, Inc*, 198 Mich App 499, 504; 499 NW2d 383 (1993). *Dafter* is wrong in suggesting that summary disposition under MCR 2.116(C)(10) is appropriate to determine that plaintiff failed to state a MEPA claim. Such a motion should be brought under MCR 2.116(C)(8).

> ***Unpublished decisions***: *Siefman v Kuhn*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 3, 2000 (Docket No. 214538) (trial court not required to make detailed findings of fact in ruling on motion for summary disposition); *Byce v Dep't of Natural Resources*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 14, 2003 (Docket No. 236727) (summary disposition properly granted where "weight of authority on record" supports prohibitions on baiting wild deer and elk).

O. Bonds §14.69

MCL 324.1702 allows the court to require a plaintiff to post a cash or surety bond not to exceed $500, but only if "the court has reasonable grounds to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment that might be rendered against him or her." The

Supreme Court denied a motion for security after it issued an injunction pending appeal in the Pigeon River oil drilling controversy. *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 402 Mich 836 (1977) (injunction), 402 Mich 845 (1978) (security). The Supreme Court's decision on the merits is discussed in §14.22. Section 1702 is a special statutory provision that supersedes conflicting bond requirements of the court rule concerning injunctions. MCR 3.310(I).

> ***Unpublished decision***: *Thomas v George Jerome & Co*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2002 (Docket No. 224259) (MCL 324.1702 conflicts with MCR 2.109 (security for costs), which is a matter of practice and procedure; case remanded for hearing on amount of bond), but see *id.*, 468 Mich 906; 661 NW2d 582 (2003) (in denying leave, Supreme Court "is not expressing an opinion regarding whether MCR 2.109 and MCL 324.1702 are in conflict").

P. Costs; Attorney Fees §14.70

MCL 324.1703(3) provides that "[c]osts may be apportioned to the parties if the interests of justice require." The word "costs" does not include attorney fees. *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 37-43; 576 NW2d 641 (1998). To the extent that cases discussed in this section and decided before *Nemeth* hold that attorney fees can be awarded under MEPA, *Nemeth* repudiates those holdings. The discussion in this section relates to those holdings concerning awards of costs.

MCL 324.1703(3) is a statutory exception to MCR 2.625 (former GCR 1963, 526.1), which ordinarily requires costs to be paid to the prevailing party. *Taxpayers & Citizens in the Public Interest v Dep't of State Highways*, 70 Mich App 385, 387-388; 245 NW2d 761 (1976) (award of costs in MEPA cases was "within the broad and unfettered discretion" of the trial court); *Superior Public Rights, Inc v Dep't of Natural Resources*, 80 Mich App 72, 89-90; 263 NW2d 290 (1977). The "broad and unfettered discretion" language of *Taxpayers* and similar cases is overbroad. A trial court's discretion is fettered—even if slightly—when appellate review is for an abuse of discretion. See §14.71.

A trial court does not abuse its discretion by declining to award costs where the equities were not completely with either party. *Three Lakes Ass'n v Kessler*, 101 Mich App 170, 177; 300 NW2d 485 (1980). MCL 324.1703(3) authorizes a circuit court to apportion only those costs that are otherwise taxable. *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 115 Mich App 356, 362-364; 320 NW2d 376 (1982). A trial court may grant costs in a MEPA case to a party who did not fully prevail. *Dafter Twp v Reid*, 131 Mich App 283, 288-289; 345 NW2d 689 (1983). The trial court abused its discretion in awarding costs to plaintiffs where the record allowed the trial court to separate taxable from non-taxable costs. *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 109-110; 709 NW2d 174 (2005), aff'd in part and rev'd in part on other grounds 479 Mich 280, 291; 737 NW2d 447 (2007).

Apportionment of costs pursuant to §1703(3) should be guided by the concept that "no unnecessary burden should be imposed on persons seeking relief" under MEPA. *State Highway Comm'n v Vanderkloot*, 392 Mich 159, 193 n5; 220 NW2d 416 (1974) (Levin, J., concurring). An award of attorney fees pursuant to MEPA is not appropriate if the relief the plaintiff seeks and receives is based solely on federal law. *West Michigan Environmental Action Council, Inc v Nuclear Regulatory Comm'n*, 570 F Supp 1052, 1054-1055 (WD Mich 1983). After *Nemeth*, this holding presumably applies to apportionment of costs pursuant to MEPA in a suit based on federal law.

> ***Unpublished decision***: *Property Owners' Rights Ass'n v Centerline of Calhoun County, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 6, 1998 (Docket No. 198305) (MEPA supersedes policy of not awarding costs in public question cases).

Q. Standards of Appellate Review §14.71

In MEPA cases, appellate courts will review interpretation of MEPA under the de novo standard, will review findings of fact under the clearly erroneous standard, and will review remedies under the abuse of discretion standard.

Interpretation of MEPA is a question of law that the Court of Appeals reviews de novo. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8; 596 NW2d 620 (1999). Appellate courts review de novo actions brought under MEPA, *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 513; 684 NW2d 847 (2004), although courts use the clearly erroneous standard of MCR 2.613(C) to review findings of fact. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 694; 263 NW2d 778 (1977); *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105; 280 NW2d 883 (1979); *City of Portage v Kalamazoo Cty Rd Comm'n*, 136 Mich App 276, 279; 355 NW2d 913 (1984). See also *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 303; 224 NW2d 883 (1975), quoting *Martin v Ardnt*, 356 Mich 128, 140; 95 NW2d 858 (1959) (same). The Court of Appeals will not overturn a trial court's findings of fact in a MEPA action unless the findings are clearly erroneous, which requires the Court of Appeals to be left with a definite and firm conviction that the trial court made a mistake, or unless the Court of Appeals is convinced it would have reached a different result. *Kent Cty Rd Comm'n v Hunting*, 170 Mich App 222, 232-233; 428 NW2d 353 (1988).

The Court of Appeals reviews grant or denial of an injunction for an abuse of discretion. *Cipri*, 235 Mich App at 9-10. The Court of Appeals reviews apportionment of costs pursuant to MCL 324.1703(3) for an abuse of discretion. *Taxpayers & Citizens in the Public Interest v Dep't of State Highways*, 70 Mich App 385, 389; 245 NW2d 761 (1976); *Three Lakes Ass'n v Kessler*, 101 Mich App 170, 178; 300 NW2d 485 (1980). The Supreme Court's current formulation for abuse of discretion is found in *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), which adopted as a "default" standard that a trial court abuses its discretion when its decision falls outside a "principled range of outcomes" as set forth in *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). No case has defined what constitutes a "principled range of outcomes" under *Maldonado* and *Babcock* in MEPA actions.

VI. Remedies

A. In General §14.72

MEPA authorizes declaratory and equitable relief, MCL 324.1701(1); authorizes the court to direct the adoption of antipollution standards, MCL 324.1701(2); allows the court to impose conditions on a defendant to protect the environment, MCL 324.1704(1); and prohibits conduct reviewed in administrative proceedings and subsequent judicial review from polluting, impairing, or destroying the environment, MCL 324.1705(2). MEPA allows "courts to fashion standards in the context of actual problems as they arise in individual cases." *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 306-307; 224 NW2d 883 (1975). MEPA is a legislative recognition of the court's power to recognize anticipated harm and fashion suitable remedies. *Opal Lake Ass'n v Michaywe Ltd Partnership*, 47 Mich App 354, 364 n3; 209 NW2d 478 (1973) (dicta). MEPA does not provide for an award of money damages.

> ***Unpublished decisions***: *Wacker Chemical Corp v Bayer Cropscience, Inc*, No. 05-72207, 2006 US Dist Lexis 61483 (ED Mich, Aug. 18, 2006) (request for funding of remediation under Part 201 of NREPA not relief contemplated by MEPA; note that the court's statement that MEPA "was not designed to address remediation" is overbroad, see *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 59-60; 380 NW2d 53 (1985) (groundwater treatment)); *Zanke-Jodway v City of Boyne City*, 2009 US Dist Lexis 89362 (WD Mich, Sept. 28, 2009) (if plaintiffs prevail in claims under NREPA Parts 31 (water pollution), 91 (soil erosion) and 301 (inland lakes and streams), the court can grant equitable relief under MEPA).

B. Injunctions §14.73

To issue an injunction pursuant to MEPA, the trial court should determine the appropriate temporary or permanent relief and whether conditions should be imposed on defendant to protect the environment; such relief is to be considered without balancing the cost to the defendant if the court grants relief to the plaintiff. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 21-22 & n3; 576 NW2d 641 (1998). See Chapter 16, §16.___, for a discussion of injunctions generally; see also Chapter 13, §13.46; see MCR 3.310 (injunctions).

1. Preliminary Injunctions §14.74

The only appellate decision discussing the grant of a preliminary injunction (see MCR 3.310 (A)) in a MEPA case routinely analyzed the standard factors for discretionary issuance of a preliminary injunction applied in *Bratton v Detroit Automobile Inter-Ins-Exchange*, 120 Mich App 73, 79; 327 NW2d 396 (1982): (1) preservation of the status quo; (2) irreparable injury; (3) less than complete relief granted; and (4) no adequate remedy at law. *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 60-65; 380 NW2d 53 (1985). The status quo ante for the purpose of issuing a preliminary injunction is an unpolluted environment. *Attorney General v Thomas*

Solvent Co, 146 Mich App 55,64; 380 NW2d 53 (1985). If a preliminary injunction is denied, MCR 3.310(G) bars further applications for preliminary injunctive relief. *Robinson v Dep't of Transportation*, 120 Mich App 656, 661; 327 NW2d 317 (1981). Analyses of the timing and efficacy of preliminary injunctions issued in early MEPA cases are found in Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1004, 1042-1050 (1972), and Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 Ecology LQ 1, 43-48 (1974).

> ***Unpublished decisions***: *Antrim Cty v Doug's Underground Services, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 8, 2003 (Docket No. 236828) (preliminary injunction granted where defendant failed to obtain soil erosion permit); *United States v Ackley*, No 1:94cv 24 at 39 (WD Mich, Feb. 4, 1994) (Michigan courts apply standards for injunctive relief generally applied by federal courts).

2. Injunctions Following Trial §14.75

MCL 691.1204(1) (now MCL 324.1704(1)) is a discretionary grant of authority to trial courts to enjoin conduct that violates MEPA. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 707; 263 NW2d 778 (1977). There is authority, however, for the proposition that a court sitting in equity is compelled to enjoin conduct that violates a clear statutory directive. *Tennessee Valley Authority v Hill*, 437 US 153 (1978). MCL 324.1701(1) is such a statutory directive. *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975) (see §14.1). MEPA authorizes courts to issue mandatory injunctions. *Eyde v Michigan*, 82 Mich App 531; 267 NW2d 442 (1978) (restoration of land to preconstruction condition); *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 59-60; 380 NW2d 53 (1985) (installation of groundwater purge, treatment, and monitoring systems).

The discretionary authority for issuing injunctions underlies the perplexing "threshold of harm" interpretation of *West Michigan Environmental Action Council, Inc v Natural Resources Comm'n*, 405 Mich 741; 275 NW2d 538 (1979) (discussed in §14.22), in *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495, 503; 320 NW2d 668 (1982), discussed in §14.23. *Kimberly Hills* requires a plaintiff to prove that "the impact of the activity on the environment rises to the level of impairment to justify the trial court's injunction." Presumably, a trivial, temporary violation of MEPA would not justify an injunction. Allowing trial court discretion to fashion an injunction explains the contradictory findings in *Kent Cty Rd Comm'n v Hunting*, 170 Mich App 222, 234, 235; 428 NW2d 353 (1988) ("removal of trees constitutes destruction of natural resources under MEPA" but removal of 60 "centennial" trees would not "likely pollute, impair or destroy the air, water or other natural resource").

C. Declaratory Judgments §14.76

The plaintiff in *Marshall v Consumers Power Co*, 65 Mich App 237, 264; 237 NW2d 266 (1975), sought a declaration that fogging of air and icing of roads constituted pollution, impairment or destruction of the air, water or other natural resources. The plaintiff in *Superior*

Public Rights, Inc v Dep't of Natural Resources, 80 Mich App 72; 263 NW2d 290 (1977), sought a declaratory judgment to invalidate agreements permitting use of public trust bottomlands for commercial purposes. The plaintiff in *Flanders Industries, Inc v Michigan*, 203 Mich App 15, 24; 512 NW2d 328 (1993), sought a declaration of non-liability for contamination on Great Lakes bottomlands. In each case, plaintiff was unsuccessful. See MCR 2.605 (declaratory judgment rule). MEPA plaintiffs typically seek injunctive, as well as declaratory, relief.

> ***Unpublished decision***: *Muskegon Cty v Environmental Protection Organization*, No. C-5585 (Muskegon Cty Cir Ct, filed March 15, 1971) (county filed a declaratory action seeking a judgment that its proposed spray-irrigation sewage treatment plant was not a nuisance and did not violate MEPA). The trial court's decision in favor of the county is discussed in Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1004, 1035-1037 (1972). One practical problem of such a suit would be determining an appropriate defendant.

D. Adoption of Standards §14.77

MCL 324.1701(2) authorizes the trial court to "[d]etermine the validity, applicability and reasonableness" of any antipollution standard and, if the court "finds a standard to be deficient, direct the adoption of a standard approved and specified by the court." This subsection is a "vital part" of judicial development of a common law of environmental quality. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 29-30; 576 NW2d 641 (1998). Before entering such an order, the trial court must first conduct a de novo review of existing standards. *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 697-698; 263 NW2d 778 (1977). Cf *Reserve Mining Co v Environmental Protection Agency*, 514 F2d 492, 539 n85 (8th Cir 1975) (discharger ordered to meet a "court-fashioned standard" that may be more stringent than existing air pollution regulations).

> ***Unpublished decision***: *Lakeland Property Owners Ass'n v Northfield Twp*, 2 ELR 20331, 20336-20337; 3 ERC 1893 (Livingston Cty Cir Ct, Feb. 29, 1972) (judicial imposition of water pollution standards following trial).

E. Imposition of Conditions on the Defendant §14.78

MCL 324.1704(1) authorizes the court to impose conditions on a defendant to protect the environment. In *Wayne Cty Dep't of Health v Olsonite Corp*, 79 Mich App 668, 707; 263 NW2d 778 (1977), the Court of Appeals affirmed an order requiring the defendant to investigate alternative odor control systems. Conditions imposed on a defendant after trial may not be later amended without an evidentiary hearing. *Irish v State Treasurer*, 158 Mich App 337, 345; 404 NW2d 733 (1987).

> ***Unpublished decisions***: *Lakeland Property Owners Ass'n v Northfield Twp*, 2 ELR 20331, 20336; 3 ERC 1893 (Livingston Cty Cir Ct, Feb. 29, 1972) ("fix or stop" order: defendant enjoined until meets effluent standards set by court); *Irish v Green*, 2 ELR 20505, 20507; 4 ERC 1402 (Emmet Cty Cir Ct, July 15, 1972) (residential construction limited until central sewer and water systems built).

F. Restoration §14.79

MEPA allows a court to undo environmental harm that has been done as well as to prevent harm to the environment before the harm has occurred. Restoration of the environment is an appropriate remedy under MEPA. *Stevens v Creek*, 121 Mich App 503, 508; 328 NW2d 672 (1982); *Eyde v Michigan*, 82 Mich App 531; 267 NW2d 442 (1978). Restoration will not be ordered where the effectiveness of the restoration is questionable. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9-10; 539 NW2d 526 (1999).

Paradoxically, MEPA may afford a private property owner comparatively less protection for natural resources on his or her own property. If the conduct of the defendant injures private property, the owner may have an action at law for damages and therefore might not, under the traditional injunction tests, be able to secure an injunction pursuant to MEPA for restoration. See Chapter 16, §16.___, for a discussion of injunctions. See Chapter 13 generally for a discussion of common-law actions for damages.

G. Administrative Proceedings §14.80

MCL 324.1705(2) prohibits administrative agencies from authorizing or approving conduct that will cause environmental harm:

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.

The "feasible and prudent alternative" language of §1705(2) differs slightly from the affirmative defense contained in MCL 324.1703(1) (see §14.29 and following), which requires the defendant's conduct to be consistent with the public health, safety, and welfare "in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction."

The prohibition in MCL 324.1705(2) applies to all agency action and is therefore broader than the prima facie case language for circuit court actions pursuant to MCL 324.1703(1).

Nevertheless, judicial interpretation of the phrase "air, water, or other natural resources or the public trust in these resources" (discussed in §14.8 through §14.11) and the meaning of "pollution, impairment, or destruction" (discussed in §14.17 through §14.19) should apply to administrative determinations pursuant to MCL 324.1705(2).

DEQ's Air Quality Division ordinarily reserves the right in consent orders to use MEPA, as well as authority under Part 55, MCL 324.5530, to enforce the orders. See proposed consent orders on the DEQ-AQD-enforcement webpage, typically near or in paragraph 22. DEQ's Water Bureau typically reserves the right to enforce its consent orders pursuant to MEPA.

> ***Unpublished decision***: *Petition of Anglers of the AuSable*, No. MIG085051, Opinion and Order at 9 (State Office of Administrative Hearings, Feb. 22, 2006) (MCL 324.1705(2) requires hearing officer to apply MEPA in Part 31 contested case), rev'd on other grounds No. 07-12072, Opinion and Order (Otsego Cty Cir Ct, Jan. 31, 2008) (proposed wastewater discharge into headwaters of AuSable River would violate MEPA under *Portage* factors), lv den *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, unpublished order of the Court of Appeals, entered Sept. 24, 2008 (Docket No. 284315), lv gtd 482 Mich 1078; 758 NW2d 258 (2008), order granting leave vacated, lv den 483 Mich 887; 760 NW2d 230 (2009).

Endnotes

[1] See generally Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envt'l L Rev 3 (1989).

[2] The background of the leasing decisions is described in *Michigan Oil Co v Natural Resources Comm'n*, 71 Mich App 667; 249 NW2d 135 (1976), aff'd 406 Mich 1; 276 NW2d 141 (1979).

Conversion Table

Former MCL	Current MCL
691.1202(1)	324.1701(1)
691.1202(2)	324.1701(2)
691.1202a	324.1702
691.1203(1)	324.1703(1)
691.1203(2)	324.1703(2)
691.1203(3)	324.1703(3)
691.1204(1)	324.1704(1)
691.1204(2)	324.1704(2)
691.1204(3)	324.1704(3)
691.1204(4)	324.1704(4)
691.1205(1)	324.1705(1)
691.1205(2)	324.1705(2)
691.1205(3)	324.1705(3)
691.1206	324.1706

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