

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THE MICHIGAN DEPARTMENT  
OF ENVIRONMENTAL QUALITY,

Case No. 03-1755 CE

Plaintiff,

v

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

WATEROUS COMPANY, a  
Minnesota corporation,

Defendant.

\_\_\_\_\_ /

At a session of said Court held in the City of  
Lansing, Ingham County, Michigan, on the 10<sup>TH</sup>  
day of **July, 2006**, the Honorable Joyce Draganchuk  
presiding.

This case was tried before the Court in October, 2005 and February 2006 and taken under advisement for the Court to make findings of fact and conclusions of law. The Court has listened to the testimony of the witnesses, weighed their credibility, considered the exhibits that were admitted into evidence and considered the weight to be given to the exhibits. The Court has applied to the Plaintiff the burden of proof by a preponderance of the evidence. The following findings of fact are generally uncontested and describe the background of this case and the property that is in issue. The Court makes additional findings of fact on the contested issues in the course of making its conclusions of law below.

This is an environmental clean-up action brought by the Michigan Department of Environmental Quality ("Plaintiff") against Waterous Company

("Defendant") pursuant to the Natural Resources and Environmental Protection Act ("NREPA") and common law nuisance. At the time of trial, the issues to be decided were whether a declaratory judgment should issue finding the Defendant liable for future response activity costs under Parts 31 and 201 of NREPA, whether Plaintiff should receive injunctive relief and whether the Defendant is responsible for abatement of a public nuisance

The site in question is what used to be known as Traverse City Iron Works ("TCIW"), in Traverse City. At one time, Traverse City Iron Works made fire hydrants and pumps for fire trucks and engaged in other manufacturing operations for which it operated a foundry. Its operations began in the late 1800's.

In 1974, TCIW moved its operations to another location. Defendant acquired TCIW by a Plan and Agreement of Merger dated January 31, 1978. The property was conveyed to Defendant on July 15, 1980. On February 24, 1982, Defendant executed a land contract for the sale of the property to TCI Associates. Northern Rock Holdings, L.L.C. d/b/a River's Edge Development ("River's Edge") executed an option on the property on February 11, 1997.

In 1997, River's Edge submitted an application for a site reclamation program grant. The grant was awarded and the redevelopment of the site began. The redevelopment included construction of residential condominiums, retail and commercial structures and parking lots. It also included riverbank stabilization along the Boardman River. The riverbank stabilization entailed placement of a retaining wall along the river with backfill material deposited in

front of the retaining wall. The backfill was comprised of excavated soil and crushed concrete from the TCIW site. Sheet piling was then placed in the river in front of the backfill. The sheet piling extended approximately four feet out into the river from where the original riverbank had been.

River's Edge conducted the redevelopment pursuant to an agreement with the State of Michigan that required River's Edge to use due care in its redevelopment activities and granted River's Edge a Covenant Not to Sue (Defendant's Exhibit 77). The agreement was entered into with the knowledge that the site was a "facility" pursuant to NREPA. River's Edge was also required to record a restrictive covenant for the property advising future owners that the site was a "facility" and requiring them not to interfere with response activities (Defendant's Exhibit 79). The restrictive covenant also required future owners not to excavate the soil or penetrate the exposure barrier and it prohibited use of the water under the property.

The property in the vicinity of the TCIW site was designated as Parcels A, B, C, D, E, F, G, H, H-1, H-2 and Z. Cass Street runs north/south through the area with parcels located on each side. Parcels D, E, F, H, and Z were located along the south bank of the Boardman River. Parcels G, H-1 and H-2 were a railroad right of way that ran on the west/northwest diagonal through the TCIW site. Neither TCIW nor Defendant ever owned Parcels G, H-1, H-2 and Z.

Parcels A, B, C, and D were owned by TCIW and transferred to Defendant as part of the 1978 merger. Parcel E was owned by TCIW, but had been

transferred to the City of Traverse City at the time of the merger. However, Parcel E was later deeded from the City of Traverse City to the Defendant.

Parcel F was never owned by TCIW or Defendant.<sup>1</sup> Parcel F was owned by an individual until 1983 when he deeded it to TCI Associates. Parcel H was owned by TCIW at one time, but it was deeded to the City in 1971. The city turned it into what is now known as Lay Park. Parcel H was never owned by Defendant.

The zoning of the parcels changed over the years, most recently to accommodate redevelopment. In 1958, some of the parcels were zoned M-1 for restricted industrial use and some were zoned C-3 for commercial use. In 1997, the site was designated as a Planned Unit Development (“PUD”), allowing for mixed residential and commercial use. The zoning of the PUD was ultimately changed to D-1, Development District. By the time of trial, the redevelopment had resulted in an attractive landscape of condominiums, a boardwalk along the riverbank, and a variety of retail and commercial buildings.

### **Part 201 liability**

The State has proven by a preponderance of the evidence that the TCIW site is a “facility.” A “facility” is defined in MCL 324 20101 as:

“any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of

---

<sup>1</sup> This fact was disputed at trial. When an application for a Site Reclamation Program Grant was made in 1997, attached documentation showed that TCIW conveyed Parcels A-F to Defendant and Defendant subsequently conveyed Parcels A-F to TCI Associates. Defendant’s position was that F was mistakenly included in the documentation. The Court accepts as true the testimony of James Sauer, Defendant’s Controller, and Defendant’s Exhibit 148, an ownership map, both of which indicate that Parcel F was never owned by TCIW or Defendant.

section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located ”

The proof that the site is a facility comes from the direct eyewitness testimony, environmental testing on the site over a course of years, and from circumstantial evidence

Alfred Bembenek provided credible eyewitness testimony about the activities at the TCIW site. He was employed at TCIW from 1955 to 1983. He was a chipper first, then in 1964 he became a hi-lo driver. Mr. Bembenek hauled the cores used to make castings and was responsible for disposing of excessive foundry sand. He dumped materials every Saturday morning for 13 years. The foreman directed him to do it. The materials he dumped were sand, slag, and pieces of core that were not burned up when the casting was poured. The sand came from making castings and was, to his knowledge, composed of sea coal, ground corn cobs and bentonite. Slag was described by Mr. Bembenek as sand and limestone and it looks like solid green glass. He understood the core material to be sand with a binder in it.

Mr. Bembenek described dumping the sand, slag and pieces of core on the north side of the property on the east side of Cass Street by the foundry building. Mr. Bembenek said the waste was dumped over the riverbank into the river by pushing it with a front end loader. He also testified that he saw three other employees also disposing of materials. They did it every day at the same location where he did it. He was aware of no other business in the area that was

dumping into the Boardman River. Mr. Bembenek acknowledged that the dumping at the TCIW site ceased by 1972.

A series of environmental studies were done on the TCIW site and were introduced into evidence by Plaintiff. The earliest study introduced was a June, 1993 study by Otwell Consultants, P.C., an environmental consulting firm. Roger Mawby testified that he is a geotechnical engineer with Otwell Consultants and that he was the project manager for purposes of preparing the June 1993 study. The study was done for purposes of evaluating the property for a prospective purchaser. He was asked to determine the impact from historical operations. Specifically, he was asked to determine whether sand and other materials were on site and their impact if they were on site. He was asked in particular to estimate the volume of sand at the site. An additional area of inquiry was to determine the impact of the historical use of the site on the quality of the groundwater.

To prepare the assessment, Mr. Mawby testified that he reviewed reports from previous studies by ASI from 1988 and 1990, and he relied on historical information about the site, samples of soil, and samples of groundwater. The Otwell Consultants' report (Plaintiff's Exhibit 2), indicates that the native soil in the area is fine to coarse grained, tan sand. In contrast to the native soil, core mold sand and slag were found at the site at varying levels. The core mold sand and slag was discovered through a series of soil borings (SB 12-30) taken on the TCIW site. These soil borings were taken from locations on both the east and west sides of Cass Street. There were also six soil borings (SB 31-36) taken

from Lay Park, situated on the westernmost end of the site. Ultimately, the Otwell Consultants assessment concluded that there was approximately 80,000 cubic yards of fill material on the site

Core mold sand and slag were identified in soil borings from the east and the west side of Cass Street. Mr. Mawby explained in his testimony that soil borings 15 and 20 illustrate the area of core mold sand and slag. According to the map contained in Plaintiff's Exhibit 2, these two borings came from just west of Cass Street (Parcel E). Figure 5, Cross Section C-C' of Plaintiff's Exhibit 2 is a drawing that Mr. Mawby testified illustrates a cross section of the area of sand. He explained that SB-15 on the drawing was 21 feet deep. The surface conditions were slag and the first 18 feet were core mold sand and slag. The groundwater level was at 19 feet. SB-20 was 20 feet deep. All 20 feet of the boring revealed fill material. The groundwater level at this site was 18 feet. Therefore, the sand and slag did make contact with groundwater at the site of this boring. That is, the fill material was saturated with groundwater. Soil borings from the east side of Cass Street also showed the presence of core mold sand and slag (Parcel D).

Borings taken from Lay Park (Parcel H) revealed that there was core mold sand in the park. The borings consistently showed a one-inch layer of core mold sand.

Mr. Mawby also prepared a baseline environmental assessment of the site east and west of Cass Street (Parcels A-G) in March 1997 (Plaintiff's Exhibit 5). The BEA was conducted pursuant to MCL 324.20126(1)(c) and it concluded that

both the soil samples from the site as well as the groundwater samples exceeded the generic residential clean-up criteria. The BEA therefore concluded that the site was a "facility" under Part 201.

In 1997, a BEA was done on Parcels H-1, H-2, and Z (Plaintiff's Exhibits 13 and 14). Those parcels were also determined to be a "facility." In 2002, the site west of Cass Street was again assessed and found to be a "facility" (Plaintiff's Exhibit 21).

A study was done by The Traverse Group in 1998 to evaluate the riverbank stability in connection with the redevelopment by River's Edge (Slope Stabilization Feasibility Study, Defendant's Exhibit 55). The report notes that when the site was operating as an iron works, core/mold sand and slag were disposed along the northern boundary of the property. The report states that the amount of material dumped was so considerable that it extended the shoreline of the Boardman River 60-120 feet north of its original location.

In addition, a 1998 Site Investigation and Response Activities Report (Plaintiff's Exhibit 15) prepared by The Traverse Group states that the operations of TCIW resulted in disposal of core/mold sand and slag along approximately 1,700 feet of the shoreline of the Boardman River.

Defendant argues that Mr. Bembenek only had knowledge of dumping on the east side of Cass Street (Parcel D). Although Mr. Bembenek only testified to dumping core mold sand and slag on the east side of Cass Street, additional direct and circumstantial evidence supports a finding that core mold sand and slag were deposited throughout the TCIW site, both east and west of Cass

Street. Core mold sand and slag were readily identifiable throughout the many environmental studies and assessments over the years. It was distinguished from the fine to coarse tan sand that was identified as native soil. Mr. Bembenek said he saw three other people who dumped the same materials on a regular, daily basis.

As discussed above, the 1993 environmental study by Otwell Consultants estimated there was 80,000 cubic yards of core mold sand and slag on the site. The Traverse Group reports concluded that core mold sand and slag was dumped along the Boardman River to such an extent that it significantly changed the footprint of the riverbank and extended 1,700 feet along the riverbank. Such large deposits of material are consistent with dumping on a regular basis over a period of time over more than just one location where Mr. Bembenek described that he did his dumping.

The Plaintiff has proven by a preponderance of the evidence that the core mold, sand and slag dumped at the site constitute a hazardous substance. A "hazardous substance" is any substance "that the department demonstrates, on a case by case basis, poses an unacceptable risk to the public health, safety, or welfare, or the environment, considering the fate of the material, dose-response, toxicity, or adverse impact on nature resources." MCL 324.20101(1)(t). Soil sampling data collected in 1998 (Plaintiff's Exhibit 23) demonstrates that the soil on the TCIW site contained arsenic, cadmium, chromium, copper, lead and zinc at levels above the generic residential criteria. In Mr. Vanderhoof's opinion, there was still contamination on the site in the soil and the groundwater that posed a

risk of harm to either human health or the environment. Mr. Vanderhoof's opinion is well supported by the 1993 environmental study and the 1997 and 2002 BEA's, which concluded that the site is a "facility."

Defendant argues that even if it were liable, it could only be liable as to property owned by TCIW. This is so, the defendant says, because the complaint limits liability to property owned by TCIW and does not allege TCIW deposited slag on other property. To the contrary, the Complaint alleges that TCIW "owned and operated a Facility at the time of disposal of a hazardous substance." (Complaint, Paragraph 24)

As noted above, a "facility" is any area where a hazardous substance is released or "otherwise comes to be located." The evidence is uncontroverted that core mold sand and slag were dumped at the TCIW site. Neither the Complaint nor Part 201 limits liability only to the parcel or parcels for which there is direct, eyewitness testimony of dumping. Circumstantial evidence supports the conclusion that dumping occurred on the site along the Boardman River on a regular basis over an extended period of time.

Once dumped, the material may have come to be located in various areas. In fact, the evidence supports the conclusion that the material even came to be located on parcels not owned by TCIW as of the date of the merger (Parcel H) or never owned by TCIW (Parcels F, G, H-1, H-2, and Z). Regardless, all of the evidence in this case points to the TCIW site as the only originating point of core mold sand and slag from foundry operations.

### **Part 31 liability**

The Plaintiff has proven by a preponderance of the evidence that there was a direct or indirect discharge of the core mold sand and slag into the Boardman River. Liability under Part 31 is based on MCL 324.3109, which states as follows:

- (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
  - (a) To the public health, safety, or welfare
  - (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters
  - (c) To the value or utility of riparian lands.
  - (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to the growth, propagation, or the growth or propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired.

Liability is therefore premised on a discharge that is done either directly or indirectly. The evidence in this case supports a finding that both of these were done at the TCIW site. As noted above, Mr. Bembenek testified that there was regular dumping of core mold sand and slag along the riverbank of the Boardman River. The June, 1993 Environmental Assessment (Plaintiff's Exhibit 2), shows in Figures 4-8 that fill material is estimated to extend beyond the riverbank and below the surface of the Boardman River. Although the figures are estimations, they are estimations based on soil borings. Further, the presence of fill material below the surface of the Boardman River is consistent with Mr. Bembenek's eyewitness testimony of systematic dumping at the riverbank over time. Common sense dictates that the material would not come to an abrupt stop just above the surface of the water.

Whether the material was dumped directly into the river or was dumped on the riverbank and encroached over time into the river does not matter. Thus contrary to the defendant's assertion that there was no proof of a discharge into the river at the TCIW site, there was a discharge at the TCIW site into the waters of the Boardman River that was done either directly or indirectly.

As discussed above, the core mold sand and slag have been shown by the testimony and by the environmental studies and BEA's to constitute a hazardous substance. It has been proven that the discharge of this hazardous substance into the waters of this state is or may become injurious to the public health, safety, or welfare.

### **Nuisance**

Plaintiff has proven by a preponderance of the evidence that the conditions at the TCIW site constitute a public nuisance. Defendant, relying on the common law definition of nuisance, argues that there has been no showing of an interference of a common right enjoyed by the public, nor has there been any showing of an ongoing interference. It is difficult to imagine a right more common to the public than the right to a safe and healthy environment. Indeed, Part 201 recognizes that "facilities" pose a danger to the public health, safety, or welfare, or to the environment of this state " MCL 324.20102(a). Part 201 is intended to provide a method of eliminating the danger of environment contamination caused by the mere *existence* of hazardous substances at facilities. MCL 324 20102(b) It is also intended to provide for appropriate response activity to eliminate

unacceptable risks to public health, safety, or welfare *or to the environment* caused by contamination. MCL 324 20102(c)

To accept the defendant's argument that there is no evidence of a continuing interference would virtually eliminate facilities from the realm of public nuisance. A release, once it has been contained, would never constitute an ongoing interference with public health, safety or welfare. Yet the policy of this state as expressed in Part 201 is that damage to the environment poses not only a threat to public health, safety, or welfare, but is worthy of protection as damage to the environment itself. This is expressly addressed in Part 31, which states that discharging injurious substances into the waters of this state is prima facie evidence of the existence of a public nuisance and may be abated in an action such as this one. MCL 324 3109(4).

### **Successor owner liability**

Defendant is liable as the owner of a facility for the discharge of hazardous substances. As a successor to TCIW, Defendant stands in the shoes of TCIW for purposes of liability under MCL 324 20126(1)(a). MCL 324 20126(1)(a) imposes liability on an owner or operator of a facility for a release of hazardous substances. There is no dispute that dumping of core mold sand and slag at the TCIW site ceased by 1972. Defendant owned certain parcels of the TCIW site from June 30, 1980 to February 24, 1982. No foundry operations were conducted at the site during the time Defendant owned its parcels. Although Defendant never owned the site while any release took place,

the Article 1, Sec 11 of the Agreement for Merger between TCIW and Defendant provides:

On the Effective Date of the Merger, TRAVERSE CITY shall be merged into WATEROUS which shall be the Surviving Corporation and WATEROUS on such date shall merge TRAVERSE CITY into itself. The corporate existence of WATEROUS with all its purposes, powers and objects, shall continue unaffected and unimpaired by the merger, and as the Surviving Corporation it shall be governed by the law of the State of Minnesota and shall succeed to all rights, assets, liabilities and obligations of TRAVERSE CITY in accordance with the Michigan Business Corporation Act. The separate existence and corporate organization of TRAVERSE CITY shall cease upon the Effective Date of the Merger and thereupon TRAVERSE CITY and WATEROUS shall be a single corporation, to wit, WATEROUS.

Consistent with the above provision in the Agreement for Merger, the Michigan Business Corporation Act provides:

(1) When a merger takes effect, all of the following apply:

(a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation party to the merger except the surviving corporation ceases

\*\*\*

(d) The surviving corporation has all liabilities of each corporation party to the merger.

MCL 450.1724(1)

Despite the provisions in the Agreement for Merger and the Michigan Business Corporation Act, Article 4.1(g) of the Plan of Reorganization and Agreement of Merger (Defendant's Exhibit 6) contains representations by TCIW that it has no liabilities of any kind, whether accrued or not accrued, that may impose liability on Defendant other than those liabilities disclosed on TCIW

balance sheets. James Sauer, the controller of Defendant, testified that the assets and liabilities of TCIW were purchased as of November 30, 1977. However, he said that the balance sheet, introduced as Defendant's Exhibit 6, showed no entry for environmental liabilities

While Defendant did not intend to assume liabilities not shown on the balance sheets of TCIW, and TCIW represented to Defendant that it had no environmental liabilities, the environmental liabilities were assumed by Defendant by operation of law.

Defendant argues that its assumption of only those liabilities listed on the balance sheets puts it in the position of an innocent purchaser. Furthermore, Defendant argues that the federal statutory scheme under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") allows innocent intermediate landowners to escape liability and NREPA should be read to do the same. The Court notes that federal courts have allowed innocent purchasers to escape liability based on the specific provisions of CERCLA that allow it. However, CERCLA does impose liability on innocent intermediate purchasers in some circumstances. See 42 USCS §9601(35).

Likewise, NREPA allows certain innocent purchasers to avoid liability if they became the owner or operator after June 5, 1995. MCL 324 20126(1)(c). Those purchasers must conduct a baseline environmental assessment and disclose the results to the Department of Environmental Quality and a subsequent purchaser, if the assessment confirms that the property is a facility. Thus, a purchaser who knows within 45 days of sale that a site is a facility may

avoid liability in the event of a sale to a subsequent knowing purchaser. Defendant's argument would create a second category of innocent purchaser prior to June 5, 1995. The second category would include a purchaser who does not know that a site is a facility, does not attempt to determine whether a site is a facility, and then sells the site to a subsequent innocent purchaser. The legislature made a provision for certain innocent purchasers. If the legislature had intended to make those situated similarly to Defendant also included, it could have so provided.

Defendant also argues that the causation requirement in the liability section of NREPA forecloses holding a subsequent innocent purchaser liable. The causation requirement in Section 26 of Part 201 is entirely consistent with the Merger Agreement and the Michigan Business Act's imposition of successor liability. Defendant stepped into the shoes of TCIW, putting Defendant in the position of being an owner who caused a release of a hazardous substance. There is no provision in NREPA that precludes such a finding of liability.

## **Injunctive Relief**

### **Soils**

Having owned or operated a facility, defendant is responsible for defining the extent of contamination and providing an acceptable plan to plaintiff to remediate the damage. Defendant, both during the trial and in its briefing of this matter, has focused on the redevelopment project and has argued that the redevelopment has negated any need for injunctive relief. First, defendant

argues that the redevelopment has covered and encapsulated any soil contamination, obviating the need for defendant to take any further action. Second, the defendant argues that the developer is now responsible to maintain the engineering controls put in place by its due care requirement. Third, defendant argues that the developer's actions in removing vegetation to make a retaining wall, excavating material to use as backfill, and generally spreading contaminated material around serve as an intervening cause that relieves defendant of further liability.

With regard to the defendant's first argument, this Court cannot agree that encapsulation of the contamination has been shown nor can this Court agree that defendant has no further legal requirements. Once it is established that defendant owned or operated a facility, defendant must implement remedial action. MCL 324.20114(1)(h)(iv) and (v). The remedial action must include either implementing a remedial action plan or preparing a closure report. MAC R 299.9532(4). In addition, a remedial investigation may first have to be done to assess site conditions in order to select an appropriate remedial action and to define the nature and extent of contamination that may have migrated beyond the boundary of the source property. MAC R 299.5528.

Even if the testimony could show that the soil was covered and encapsulated by the redevelopment project, the defendant has never provided a remedial investigation, a remedial action plan or a closure report to the plaintiff. Moreover, the testimony does not conclusively show that all the contaminated soil was covered and encapsulated. For example, redevelopment did not extend

to Lay Park (Parcel H), yet the 1993 BEA showed contamination from core mold sand in Lay Park. Contrary to the Defendant's position, the testimony shows that the extent of the soil contamination remains undetermined. Mr. Vanderhoof confirmed in his testimony that the full extent of the contamination was not defined by the environmental testing that had been done over the years.

The developer's due care requirements also do not extinguish any further liability of defendant. The developer, River's Edge, had a statutory and contractual obligation to use due care to mitigate exposure to hazardous substances and prevent exacerbation of the existing contamination. MCL 324.20107a(1). However, compliance with due care requirements does not satisfy a person's obligation to perform response activities required under Part 201. MCL 324.20107a(3).

In accordance with its due care obligations, the developer used certain "engineering controls," such as encapsulating soil with concrete and buildings and placing vegetation and ground cover over exposed areas. However, as discussed above, the extent of the contamination was never completely determined and can only be determined by defendant assuming its statutory duty to provide plaintiff with a remedial action plan and by implementing it. Even the developer's ongoing obligation to maintain engineering controls cannot serve to protect the public health and safety or the environment from harm from the full, unknown extent of the contamination. The developer's due care responsibility to address the currently known and existing contamination cannot extinguish defendant's responsibility to address the full extent of the contamination.

Finally, with respect to the soils claim, defendant argues that the developer's actions in removing vegetation to make a retaining wall, excavating material to use as backfill, and generally spreading contaminated material around serve as an intervening cause that relieves defendant of further liability. Defendant points to federal cases interpreting federal law (CERCLA) to support its argument that a developer may be held liable for exacerbating contamination. Defendant argues that this is essentially recognition of the principal of proximate cause and that a developer's actions may constitute an intervening cause.

The Court finds a distinction between exacerbation by a developer and the principal of proximate cause as applied to NREPA. A developer of a site know to be a "facility" must exercise due care to protect the public health and safety and must prevent exacerbation of existing contamination. MCL 324.20107a(1) Exacerbation of existing contamination includes causing it to migrate beyond the boundaries of the property which is the source of the release to changing the conditions at the facility so as to increase response activity costs. MCL 324.20101(n). A developer who does not exercise due care or act to prevent exacerbation is liable for response activity costs, natural resource damages, fines and other penalties attributable to the violation. MCL 324.20107a(2). The developer is not liable for performance of additional response activities unless it would otherwise be liable under Part 201 for the response activities. MCL 324 20107a(2).

The cases relied upon by defendant confirm that a developer may be liable under CERCLA. A developer, both under CERCLA and under NREPA,

may be liable for failing to exercise due care or exacerbating existing contamination. However, whether an action may be maintained against River's Edge for exacerbation of existing contamination is not at issue here. River's Edge received a covenant not to sue in connection with its activities on the property, as authorized by MCL 324.20133. Plaintiff has never alleged that the developer violated its due care responsibilities and River's Edge is not a part to this action.

Moreover, even a developer who is liable for exacerbation is only responsible for the response activity costs and damages associated with the violation. Contrary to Defendant's argument that exacerbation acts as an intervening cause to extinguish any further liability on its part, Part 201 maintains liability for performance of additional response activities on the person causing the release and fixes liability on the developer only for those costs attributable to the developer's exacerbation of existing contamination.

The treatment of exacerbation in Part 201 is distinguishable from the principals of proximate and intervening causation. Sec. 26 of Part 201 is not a strict liability statute. It imposes liability on a person who causes a release of a hazardous substance. MCL 324.20126(1)(a)(b). Therefore, it requires a causal link, or proximate cause, between a person's actions and a release of a hazardous substance. An intervening cause is a new, independent cause without which injury would not have occurred. *McMillian v Vliet*, 422 Mich 570, 575; 374 NW2d 679 (1985).

Defendant caused a release of a hazardous substance in a finite but perhaps forever undeterminable amount. The developer's movement of contaminated soil from the east side of Cass Street to the west side of Cass Street and vice versa does not constitute an act "without which injury would not have occurred." The injury occurred when the hazardous substances were dumped on the site and their subsequent movement from one contaminated location to another contaminated location on the site does not constitute a new, independent cause.

Defendant also elicited testimony at trial that the core mold found in Lay Park was suggestive of someone having put down a path because it was an even one-inch thick layer. The Court notes that the one-inch thick layer of core mold in Lay Park was discovered when the 1993 environment study was performed. Redevelopment began in 1997-98. Therefore, the presence of core mold in Lay Park cannot be attributed to conduct of River's Edge. In fact, Lay Park (Parcel H) was originally owned by TCIW (although never owned by Defendant) and the evidence soundly supports the conclusion that core mold was either deposited there or came to be located there as a direct result of dumping at the TCIW site.

Defendant also argues that it should not be required to institute remedial action that meets the requirements for residential use when the property historically had an industrial use. Defendant cites *City of Detroit v. Simon*, 247 F3d 619 (6 CA, 2001) for the proposition that requiring a former owner to assume liability for clean-up costs beyond the historic use of the property would constitute

a windfall to the beneficiary of the clean-up. The *Simon* case does not indicate on what basis the City of Detroit was requesting clean-up beyond the industrial use requirements. The property in *Simon* had historically had an industrial use and then the City of Detroit condemned it for purposes of clearing flight paths for a municipal airport. There is no indication that the property in *Simon* had been rezoned. The *Simon* court held that to require clean-up at a level higher than industrial would violate CERCLA's requirement that recoverable response costs be "necessary." See MCL 324.20126a(1)(b).

In addition to the requirement that response costs be necessary, MCL 324.20120a provides:

"The department may establish cleanup criteria and approve of remedial actions in the categories listed in this subsection. The cleanup category proposed shall be the option of the person proposing the remedial action, subject to department approval, considering the appropriateness of the categorical criteria to the facility."

MCL 324.20120a(4) also addresses cleanup criteria with respect to zoning of the property and provides:

"The department shall not approve of a remedial action plan in categories set forth in subsection (1)(b) to (j), unless the person proposing the plan documents that the current zoning of the property is consistent with the categorical criteria being proposed."

In the instant case, the property was rezoned as part of the redevelopment project. The property is now zoned as a Development District and a mixed residential/commercial use is allowed. Thus, the use of the property necessitates any future clean-up be conducted to meet residential zoning requirements

Unlike the costs in *Simon*, the clean-up in this case is "necessary" to meet rezoning of the property and the current residential use of the property. Part 201 requires that remedial action be consistent with current zoning and not historical use of the property.

### **Groundwater**

As with the soils claim, defendant argues that there has been no showing of any threat to public health and safety with respect to groundwater. Defendant premises its argument on the uncontroverted fact that the exposure pathway of groundwater to drinking water has been eliminated by the use of city water for drinking in the area. Further, defendant argues that the only other exposure pathway – groundwater to surface water – is not complete because monitoring well 5, which is down gradient to where groundwater exits the site, shows no exceedance of the groundwater to surface water criteria. This reasoning and conclusion is reflected both in the trial testimony of defendant's expert, Frederick Bickle, and in his report, admitted as defendant's Exhibit 146.

Essential to determining whether monitoring well 5 establishes no GSI exceedance for the site is having sufficient data to map the groundwater flow. Mr. Bickle testified that the current data was adequate to determine groundwater flow. However, his report (defendant's Exhibit 146, p 7) indicates that "[a]vailable data does not include observations of water levels over time as is needed to fully evaluate hydrologic conditions." When questioned at trial about this, Mr. Bickle

agreed that it would be typical to collect data over time if there was concern about the seasonal influences on the water table

Mr. Mawbry testified that the flow of groundwater on and around the site was complex but not undeterminable. The Union Street dam complicated the matter. He did not believe the current data sufficiently defined the groundwater flow. He said that the groundwater on the site ultimately migrates to surface water, but where that occurs is currently unknown.

As in the case of the soil, plaintiff has proven that the extent of groundwater contamination from the site is undetermined. Defendant's argument as to monitoring well 5, although logically appealing, is not supportable. Monitoring well 5 cannot be said to accurately represent the down gradient point where groundwater leaves the site. Plaintiff has demonstrated that the groundwater flow has yet to be determined and hence the extent of groundwater contamination must be investigated further for potential remedial action.

### **Sediments**

Defendant first argues that any contaminated sediments have been contained by the riverbank stabilization project. To accept this conclusion, it is necessary to accept Mr. Bickle's testimony that based on the rube equation, core mold would have moved down the riverbank until it reached an area of slope with a one-to-one ratio. From there, the material that entered the water would only travel a distance of zero to three feet from its entry into the Boardman River. Sheet piling installed as part of the riverbank stabilization project would have

extended beyond three feet from the riverbank and therefore would contain any contaminated sediments.

The equation used by Mr. Bickle is accepted and used in the scientific community. However, its application to the facts of this case is questionable. The equation takes into account gravity, velocity of the river, particle size and the nature of the particles. Data as to the river velocity was collected from the Boardman River one time on one day. Mr. Bickle agreed that there are seasonal fluctuations in water levels.

The evidence supports that foundry waste was systematically dumped on the riverbank for 30 years. The dumping would have necessarily occurred through all seasons of the year. Yet, Mr. Bickle's equation was applied to one sample taken on one day of the year. While the velocity of the river may consistently be slow along the riverbank, the equation cannot account for the effects of seasonal changes. For example, foundry waste deposited on ice could not possibly always end up deposited in the same place once the ice melted because ice does not stay in the same place as it melts. Furthermore, as Mr. Bickle conceded, water levels change as the seasons change. The equation also does not take into account the fact that foundry waste could not possibly have been deposited in the exact same place each time it is dumped and the evidence shows that it was not.

Michael Alexander was plaintiff's expert on sediments. Mr. Alexander has bachelor's and master's degrees in entomology with an emphasis in aquatics and ecology. He has been an aquatics biologist with the Michigan Department of

Environmental Quality since 1996. Since 2002, he had been working on investigating, delineating and remediating contaminated sediments in projects throughout the state. In early 2005, Mr. Alexander was asked to review data compiled by the Traverse Group (Plaintiff's exhibit 15) with respect to river sediments and any potential impact on aquatic life. He explained at trial that the Traverse Group sampling consisted of taking a sample from three locations in a transect across the river. There were three such transects for a total of nine samples.

The samples showed concentrations of arsenic, copper, chromium and lead that represented a reasonable potential for impact to aquatic life. The highest concentrations of these metals occurred in the samples taken closest to the shore by the TCIW site. The levels dropped off as the distance from shore increased. He also reviewed a staff report from the MDEQ prepared in 2001 that analyzed sediment sampling done in 1997. These samples were taken in various locations throughout Boardman Lake and Boardman River. Of particular note to this case are samples taken at Station 72, which is downstream of the TCIW site near the Union Street Dam, and Station 60, which is upstream of the TCIW site in the deepest part of Boardman Lake. Mr. Alexander was of the opinion that samples from Station 72 indicated a reasonable potential for impact to aquatic life.

Mr. Alexander was asked his opinion as to the source of the sediment contamination. To form his opinion, he reviewed the soil sampling conducted by the Traverse Group in 1998 (plaintiff's exhibit 15). His opinion was that the most

significant source of the contamination came from the TCIW site and was attributable to placing foundry fill material along the edge of the Boardman River. He acknowledged that the TCIW site was probably not the sole source of contamination, but it was the predominant source. He did not believe that the full nature and extent of sediments contamination from the TCIW site had been delineated by the sampling done thus far. The next step would be to define the full vertical and horizontal extent of the contamination and to conduct tests to determine the actual impact on aquatic life.

Further testing was done on sediment samples from Stations 60, 70 and 71, which are upstream of the TCIW site. This testing was done by Great Lakes Environmental Center. The GLEC report (Defendant's Exhibit 136) addressed this testing and concluded that there were elevated concentrations of contamination in sediments at the testing locations and that the sediments are toxic to sediment dwelling freshwater organisms.

The GLEC report did not address or take into account the sampling from Station 72, downstream of the TCIW site. The GLEC report concluded that the dominant area of concern was with PAH's, or organic chemicals. By contrast, the sampling by the Traverse Group, including the Station 72 by the TCIW site, showed the dominant area of concern to be metals, with PAH's lower than in the upstream sampling. The upstream sites were in the vicinity of potential other sources.

Mr. Vanderhoof reviewed the locations of potential other sources of contamination, depicted on plaintiff's exhibit 19. Cone Drive Textron was located

upstream of the TCIW site. Mr. Vanderhoof was very familiar with this site because he was the project manager. The principal contaminants of concern at the site were free product petroleum in the groundwater. The contaminants at Cone Drive are classified as VOC's with some metals, selenium being one of them. He was of the opinion that none of the Cone Drive site contamination came to be located at the TCIW site.

Stockbridge Carlson Products was also located on Boardman Lake, also upstream of TCIW. He knew of no connection between Stockbridge Carlson and conditions at the TCIW site. United Technology disposed of liquid, not solid, waste. Their contaminants were cyanide and some volatile organics. He knew of no connection to the TCIW site. MDOT Boardman Yard was adjacent to Cone Drive. They had some documented contamination from fuels and tar. He had no reason to believe they contributed to any foundry waste. Keystone Barlow Road Dump had no known connection to the contamination at the TCIW site.

The Boot Lake Dump was another site for which Mr. Vanderhoof was project manager. They had minor contamination associated with volatile chemicals. The studies were not complete yet, but he knew of no connection to the contamination at the TCIW site. The Boardman Lake Canning Company was discharging tainted water. It caused naturally occurring iron to come out of the oil and form on the lake. Mr. Vanderhoof testified that there was no connection between that and the conditions at the TCIW site.

The Traverse Group testing occurred after the riverbank stabilization project. The project included placing sheet piling in the river to contain near

shore sediment contamination. Mr. Alexander was asked his opinion as to whether the sheet piling fully contained the sediment contamination. His opinion was that even though sediment contamination decreased as sampling moved away from the shore, the levels were high enough to cause concern that exposed sediment could impact biological communities. Additional data is necessary.

Mr. Vanderhoof prepared a chart that compared contamination in the soil with contamination in the river sediment. His chart (plaintiff's exhibit 30) was based on the various different studies that had been done and was coded to reflect which study the data came from. He selected the metals that he compared. The metals he selected were arsenic, copper, lead and chromium. His selection was based on which metals had the highest concentration.

Mr. Bickle rebutted the comparison chart by pointing out that zinc was not an included metal. He prepared his own amendment to the chart (Defendant's exhibit 218) that added zinc. Mr. Bickle explained that foundry sand has high ratio of copper to zinc. The river sediment has a high ratio of zinc to copper. Therefore, he concluded that the river sediment was not consistent with foundry sand.

Mr. Bickle's rebuttal to plaintiff's exhibit 30 is weakened considerably by the fact that numerous other soil samples taken by the Traverse Group in 1998 (plaintiff's exhibit 15) are inconsistent with Mr. Bickle's two-parts-copper-to-one-part-zinc description of foundry sand. In fact, several soil samples had more zinc than copper. Many of the samples that had more copper than zinc, did not fit the

2-to-1 ratio. They were in some cases more than 2-to-1 and in some cases less than 2-to-1

Moreover, not all samples contained only foundry sand. The samples were described in various ways, including black slag medium cohesive, moist; brown-black ground sand with slag, fine, loose, dry; black slag, medium, cohesive loose, moist; slag; fill material, black slag, brown sand with slag; brown, silty, medium sand with slag; tan medium sand, fill material; red-brown-black slag, granular; black-red granular with metal chips; black slag with cinder. Mr. Bembenek's testimony established that foundry sand was not the only waste that was dumped on the TCIW site. In addition to sand, slag and pieces of core were dumped at the site.

Mr. Bickle's testimony cannot overcome the results of sediment testing and the testimony of Mr. Alexander supporting the potential for impact on aquatic life and the need for additional testing. While other businesses in the Boardman Lake watershed may have contributed to sediment contamination, it cannot negate the conclusion that dumping of core mold sand and slag into the Boardman River has had and may continue to have an impact on aquatic life. As in the case of the soil and the groundwater, the full extent of the contamination and its impact are unknown. It is by law the Defendant's responsibility to investigate and remediate.

For the foregoing reasons, this Court finds that Plaintiff has proven by a preponderance of the evidence that it is entitled to declaratory and injunctive

relief as set forth in Plaintiff's proposed Judgment, attached hereto and made a part hereof

Judgment for the Plaintiff is **GRANTED**

This order resolves the last pending claim in this matter and closes the case.

  
Hon. Joyce Draganchuk  
Circuit Judge

#### PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law and the attached Judgment upon Plaintiff and Defendant by placing the documents in a sealed envelope addressed to each with full postage prepaid thereon and placing said envelope in the United States Mail at Lansing, Michigan, on July 10, 2006.

  
Ann Baird  
Judicial Assistant

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THE MICHIGAN DEPARTMENT  
OF ENVIRONMENTAL QUALITY,

Case No. 03-1755 CE

Plaintiff,

v

**JUDGMENT**

WATEROUS COMPANY, a  
Minnesota corporation,

Defendant.

\_\_\_\_\_ /

At a session of said Court held in the City of  
Lansing, Ingham County, Michigan, on the 10<sup>TH</sup>  
day of **July, 2006**, the Honorable Joyce Draganchuk  
presiding.

The Court having considered the evidence presented at trial in the above  
matter and the written and oral arguments of the parties, and the Court having  
made its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that Judgment is entered in favor of Plaintiff  
Michigan Department of Environmental Quality (MDEQ) and against Defendant  
Waterous Company (Waterous) as follows:

Declaratory judgment is entered pursuant to MCL 324 20137(1)(d) that  
Waterous is liable to the MDEQ under MCL 324 20126(1)(b) and MCL  
324 20126a(1)(a) for all future costs of response activity lawfully incurred by the  
State relating to the selection and implementation of response activity at the  
facility that is the subject of this action

Waterous is permanently enjoined to perform all response activity necessary to protect the public health, safety, welfare, and the environment and achieve and maintain compliance with Part 201 and the Natural Resources and Environmental Protection Act (NREPA), MCL 324 20101 *et seq*, and the administrative rules promulgated thereunder with respect to all releases of hazardous substances at and emanating from the former Traverse city Iron Works (TCIW) facility that is the subject of this action, including, but not necessarily limited to, the following:

1 Within one hundred twenty (120) days after entry of this Judgment, Waterous shall submit to the MDEQ for review and approval a work plan for remedial investigation that:

- (a) complies with the requirements of MAC R 299.5528;
- (b) is sufficient to fully determine the nature and extent of contamination of hazardous substances at and emanating from the former TCIW facility in all impacted environmental media, including soils, groundwaters, and sediments, and to support the selection of a remedial action for the facility that complies with Part 201 and its rules; and
- (c) contains a reasonable schedule for implementation of the work plan and completion of a remedial investigation report

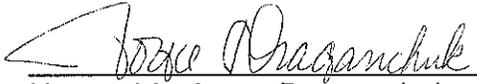
2. Implement the remedial investigation work plan as approved by the MDEQ in accordance with the approved schedule.
3. If the remedial investigation report identifies more than one (1) feasible remedial option for remedial action at the facility, Waterous shall, within ninety (90) days after completion of the remedial investigation report submit to the MDEQ for review and approval, a feasibility study for the facility that:
  - (a) complies with Part 201 and its rules, including MAC R 299 5530; and
  - (b) is sufficient to support the selection of a remedial action for the facility that complies with Part 201 and its rules.
4. Within ninety (90) days after the completion of the remedial investigation report or the feasibility study, whichever is later, submit to the MDEQ for review and approval, a remedial action plan or remedial action closure report that:
  - (a) complies with, and contains all elements required under, Part 201 and its rules, including, without limitation, MCL 324.20118, MCL 324.20120a, MCL 324.20120b, and MAC R 299 5530;
  - (b) is sufficient to support, to achieve, and to maintain compliance with Part 201 and its rules, and assure

protection of the public health, safety, welfare, and the environment; and

(c) contains a reasonable schedule for implementation.

5. Implement the remedial action or closure plan as approved by the MDEQ according to the approved schedule
6. Maintain long-term compliance with all elements of the approved remedial action or closure plan, including, without limitation, land-use or resource-use restrictions, monitoring, operation and maintenance, permanent markers, and financial assurance
7. Implement any other response activity needed to assure protection of public health, safety, welfare and the environment and to achieve and maintain compliance with part 201 and its rules.

This Judgment resolves the last pending claim in this matter and closes the case.

  
Honorable Joyce Draganchuk  
Circuit Judge