STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

B&B HARDWARD, INC., a Michigan Corporation, MICHAEL BOEY and BETSY BOEY, husband and wife,

Plaintiffs,

vs.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, an Executive department of the State of Michigan, JOSEPH COBE, MITCHELL ADELMAN, SYLBIL KOLON, and CHERYL ENGLISH, adult individuals,

Defendants.

FILE NO. 06-000384-CZ

HON. EDWARD J. GRANT

OPINION AND ORDER

Plaintiffs have brought a Motion for Partial Summary Disposition as to Counts One and Two of the Complaint requesting a declaratory judgment by the Court as to the two counts along with an order directing the Michigan Department of Environmental Quality (hereinafter referred to as MDEQ) to release the liens placed against Plaintiff's property with the Jackson County Register of Deeds. The MDEQ has filed Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Disposition and the Plaintiffs have responded thereto with Supplemental Brief in Support of Plaintiff's Motion for Partial Summary Disposition. The Court has now had the opportunity to read and review the pleadings and briefs with attachments as submitted by the parties and has also had the advantage of having heard oral argument by each of the parties.

Mr. and Mrs. Boey are a married couple and own the B&B Hardware, Inc., which in turn owns the hardware store along with a gasoline station and convenience store located at 102 Brooklyn Road in Napoleon Township of Jackson County, Michigan. In 1991 groundwater contaminated with hazardous substances was discovered in residential wells in Napoleon. In 1994 and 1995 the MDEQ investigated the contamination of the groundwater in the Napoleon area by constructing and testing groundwater monitoring wells which revealed hazardous substances at concentrations that exceeded the requirements of the Natural Resources and Environmental Protection Act (hereinafter referred to as NREPA); benzene, toluene, ethyl benzene, and xylene were found in the soil and the MDEQ determined that the property of the Plaintiffs was a source of the hazardous substances and environmental contamination which the Plaintiffs denied. Records indicated that B&B Fuels had operated a filling station at the property from 1979 to 1995 and was therefore an "operator" of an underground storage tank system under the applicable Act. The MDEQ constructed a municipal water system to permanently protect the residents from health risks associated with contaminated drinking water and placed liens upon Plaintiffs property pursuant to statute for costs incurred in installing the water supply replacement system. The Plaintiffs contend that physical on-site work had begun in 1995 and that the 6 year statute of limitations has elapsed which preclude recovery from Plaintiffs by the MDEQ. The MDEQ contends that the installing of the water replacement system was not a "remedial action selected or approved by the department" that would trigger the statute of limitations in question, but was instead an "interim response activity." The Defendant also contends that this Court lacks jurisdiction in this cause as the matter should

properly be before the Court of Claims. This Court is satisfied that for purposes of the equitable and/or declaratory relief sought by the Plaintiffs in this cause, this Court has proper jurisdiction.

The matter before the Court involves an interpretation of the statutes involved. A similar matter has previously been decided in the case of Federated Insurance Company v Oakland County Road Commission by the Michigan Court of Appeals at 263 Mich App 62 (2004), wherein the Court stated: "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature as expressed in the statutory language. Gladych v New Family Homes, Inc., 468 Mich 594, 597; 664 NW2d 705 (2003). If the plain meaning of the language is clear, judicial construction is neither necessary nor permitted. Sun Valley Foods Co v Ward, 460 Mich 230, 236; 596 NW2d 119 (1999). Courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. Pohutski v City of Allen Park, 465 Mich 675, 683; 641 NW2d 219 (2002). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. Sun Valley Foods Co., supra at 236." MCL 24.20140 sets forth the periods within which the MDEQ must file an action under Part 201 of NEWPA for recovery of costs stating in pertinent part: "Sec. 20140(1) except as provided in subsection (2), the limitation period for filing actions under this part is as follows: (a) For the recovery of response activity costs and natural resources damages pursuant to section 20126a(1)(a), (b), or (c) within six years of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility, except as provided in subsection (b)." Response activity

costs is defined as: "Sec. 20101(1)(ee) 'Response Activity' means evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the Department of Public Health, and enforcement actions related to any response activity." Response Activity Costs is defined as: Sec. 20101(1)(ff) 'response activity costs' or 'costs of response activity' means all costs incurred in taking or conducting a response activity, including enforcement costs." Remedial action is set forth at Sec. 20101(cc) "remedial action" includes, but is not limited to cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance, released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare or to the environment." The Defendant admits the installation of the municipal water system in 1995 was necessary to protect the public health, safety, welfare, or the environment or the natural resources, but contends that the actions in 1994 and 1995 were "interim response activities" and not "remedial action" such that the limitation period set forth in MCL 324.20140(1)(a) has not yet been triggered.

The Court is satisfied from the evidence and affidavits presented that the states' activity was in fact a remedial action as above defined and not an interim response activity; a permanent municipal water system was constructed and put into effect at a cost of $1.2 million dollars in order to completely eliminate the hazard to the public health by exposure to contaminated groundwater. The Court therefore finds that the on-

site construction constitutes remedial action within the meaning of the NREPA; the Court is also satisfied and finds that nothing in the statute provides that activities must first be approved by MDNR in a work plan in order to be characterized as remedial action, as that term is defined in the NREPA. "Rather, the statute makes a clear distinction between remedial action and a remedial action plan." See Federated Ins Co v Oakland Co Rd Comm, supra at page 68.

WHEREFORE, the Court GRANTS Plaintiff's Motion for Partial Summary Disposition as to Counts I and II. A Declaratory Judgment is issued to the effect that the statute of limitations has run as to the response activity costs that Plaintiffs would be responsible for. The Court further ORDERS that the liens filed against the property of the Plaintiffs as to this matter will be released by the Defendant in the same manner as they were originally filed posthaste. No costs or attorney fees are awarded.

IT IS SO ORDERED.

Dated: June 29, 2006

Edward J. Grant (P14272)
Circuit Court Judge