

Detroit Wastewater Treatment Plant
Permit Litigation Summary

GLU
Waste
Management

Introduction

The Detroit River makes up the lower 51 km of the connecting channels between Lake Huron and Lake Erie. The international boundary between Canada and the U.S. runs along the center of the channel.

The International Joint Commission has designated the entire Detroit River as a Great Lakes Area of Concern because of its severe environmental quality problems.

The Detroit River Bi-national Public Advisory Committee (B-PAC), is a voluntary, non-profit organization made up of representatives from academia, industry, citizens groups and municipalities from both Canada and the U.S. Its goal is to provide citizen input to the development of a Remedial Action Plan (RAP) for the Detroit River.

The Detroit Wastewater Treatment Plant (DWWTP) is the largest publicly owned wastewater treatment plant in North America. Effluent from the plant discharges a volume of water equal to that of all the tributaries flowing into the Detroit River.

While improvements in controlling conventional pollutants, such as oil, grease and nutrients, have been made over the past two decades, the Upper Great Lakes Connecting Channel Study (UGLCCS) shows that more needs to be done to control persistent toxic chemicals. The DWWTP is a significant source of persistent toxic chemicals to the Detroit River (see table 1). Specifically, the UGLCCS identified DWWTP as the single largest source of PCBs, mercury, lead and cadmium to the Detroit River. Sediments downstream of the DWWTP are also contaminated with persistent toxic substances from the DWWTP and other sources, to the point of violating the U.S. Army Corp of Engineers dredge spoil criteria. Based on the UGLCCS, sediments along the Michigan shoreline exceeded dredging guidelines for PCBs, mercury, lead, arsenic, cadmium, copper, zinc, chromium, nickel, manganese, and iron. In addition, carp in the lower Detroit River exceed the U.S. FDA action level and the Great Lakes Water Quality Agreement (GLWQA) objective for PCBs. The Michigan Department of Public Health advises no one consume carp from the Detroit River due to PCB contamination.

The UGLCCS concluded that there were no data available on the percentage of industries that were in compliance with Detroit's Industrial Pretreatment Program. Persistent toxic substances come from industries that discharge into the DWWTP system. The DWWTP system is not capable of treating persistent toxics, therefore the industries must pretreat

before discharging to the system. Further, UGLCCS recommended that Detroit's Industrial Pretreatment Program should be examined, compliance of industrial contributors determined, and adequacy of pretreatment requirements assessed. Enforcement and compliance of the pretreatment program are essential.

Combined sewers discharge directly to the Detroit and Rouge Rivers when the hydraulic capacity of the system is exceeded. Approximately 284,000 cubic meters/day of wastewater is discharged by industries to the municipal system. Therefore, combined sewer overflows (CSOs) are undoubtedly a major source of persistent toxic substances to the Detroit and Rouge Rivers. The table 2 presents the most recent comprehensive data on toxic substance concentrations in CSOs. Enforcing Detroit's Industrial Pretreatment Program and upgrading Detroit's sewer system are essential to controlling toxic substance loadings from CSOs.

On October 19, 1989 the Michigan Water Resources Commission (WRC) issued a new National Pollutant Discharge Elimination System (NPDES) permit to the DWWTP allowing it to discharge waste water into the Detroit River. The new permit allows the DWWTP to discharge certain persistent toxic substances without limits, requiring only monthly monitoring.

Procedural Legal Background

The NPDES program is part of U.S. federal law from the Clean Water Act. The federal government delegated its authority to issue discharge permits within Michigan to the state.

In Michigan, after an NPDES application has been received, the Department of Natural Resources (DNR) issues notices for public hearings and comments on the draft permit. Anyone may speak to the parameters, standards and requirements in the permit.

After the time for public comment is over, the WRC issues a permit based on DNR staff recommendations and consideration of public comments.

Each permit states on its face that "Any person who feels aggrieved by this permit must file a sworn petition within sixty (60) days of the Commission's approval of the permit. The Commission may reject any petition filed after sixty days for being untimely. The petition must set forth the grounds for the challenge and specify which conditions of the permit are challenged. The Commission retains the right to stay the effectiveness of any challenged condition of the permit during the contested case proceedings."

The right of any person to contest a permit is made

pursuant to the Water Resources Act, MCL 323.1 et seq, and the Administrative Procedures Act, MCL. 24.201 et seq. After the agency receives a timely petition for contested case, and if it decides to grant the petition, it is sent to an administrative law judge where a pre-hearing schedule is set. At the pre-hearing the facts and issues are narrowed, and any motions are heard. If the matter is not resolved it will be given a contested case hearing date. Currently it takes between eight months and one year from the date the petition is filed before the contested case hearing takes place. However, motions on purely legal issues, that could resolve the case, may be heard much sooner.

The administrative law judge makes a recommended decision to the WRC, who can either accept or reject the recommendation, thereby making its own decision. The final WRC decision can be appealed to court for judicial review under the Administrative Procedures Act, supra.

Petition Filed Regarding the DWWTP Permit

The Detroit River B-PAC voted to express its displeasure with the DWWTP permit to the WRC, and assigned the task to the DWWTP subcommittee. When the subcommittee met it was unclear of its charge. Because time was of the essence, it asked two B-PAC members to file a petition in their individual capacities, not on behalf of B-PAC. The petition was filed before the deadline of Dec. 18, 1989 by Eugene Ferrin, M.D. and Rick Coronado.

The key issue of protest in the petition is that the goals of the GLWQA should be applied in determining effluent limits for persistent toxic chemicals into a boundary water connecting channel. The GLWQA is an Executive Agreement that supercedes state law. In Michigan the application of Rule 57 allows the connecting channel's voluminous flow to dilute the effluent at the mixing zone, the area where the effluent goes into the channel.

While Rule 57 is an effective tool for determining effluent limits in slow-moving streams and rivers, it is not appropriate for a boundary water connecting channel, such as the Detroit River, where the water from Lake Huron rushes to Lake Erie.

The GLWQA states in Article II that it is the policy of the Parties that, "...the discharge of any or all persistent toxic substances be virtually eliminated." In Annex 12 three principles are stated: "i. The intent of programs specified in the Annex is to virtually eliminate the input of persistent toxic substances..."; "ii. The philosophy adopted for control of persistent toxic substances shall be zero discharge."; and "iii. The reduction in the generation of contaminants, particularly persistent toxic substances...

shall, wherever possible, be encouraged." Further, Annex 2 states that remedial action plans shall... "serve as an important step toward virtual elimination of persistent toxic substances and toward restoring and maintaining the chemical, physical and biological integrity of the Great Lakes Basin Ecosystem."

Recently, the UGLCCS recommended that Michigan and Ontario incorporate the GLWQA goal of virtual elimination of all persistent toxic substances into their respective regulatory programs.

The GLWQA prohibits the use of dilution in determining effluent limits. Article V of the Agreement states in part, "Flow augmentation shall not be considered as a substitute for adequate treatment to meet water quality standards..."

Because the flow in the Detroit River is so great, by applying Rule 57 many persistent toxic chemical are released into the river untreated.

The GLWQA, while not a perfect document, has a goal of "zero discharge" of persistent toxic chemicals into the Great Lakes. The application of Rule 57 will never reach that goal as long as dilution is an element.

Novel Legal Argument

Many states and provinces around the Great Lakes believe that the GLWQA is a document between the federal governments that does not apply to them. However, there has never been an official legal opinion to that effect. The petition argues that the GLWQA is an Executive Agreement that supercedes state law. In regard to the Great Lakes and its connecting channels, the standards of the Agreement should apply, and not less-restrictive state law.

The recently amended Clean Water Act now explicitly states as its purpose in section 113 to "seek the goals of the GLWQA." This would indicate that Michigan's delegated authority must include the GLWQA in its regulatory program.

This issue has never been argued before. The decision of the WRC, and ultimately the courts, will set legal precedent. Initial legal research indicates that the arguments are valid. It should be noted that, as with all groundbreaking legal arguments, the court may not agree. Keeping this in mind, we will also argue in the alternative, that even if the GLWQA does not supercede state law, it should be applied for remediation and protection of the Great Lakes.

Because there is no argument as to the facts of the permit, i.e., the effluent limits derived at, it is believed

that a motion and brief arguing the law above can dispose of the matter long before a contested case is required.

Federal Court Action

Since 1977, Judge Feikens of the U.S. Federal Court in Detroit has had jurisdiction over the operation of the DWWTP. Recently, he addressed the issues of CSOs and industrial pretreatment of wastes prior to discharge into the Detroit sewer system. On Dec. 15, 1989, the Judge ruled that he had complete jurisdiction over the DWWTP permit. But he refused to enjoin the WRC from deciding the petition we filed. While this is a confusing ruling, it means that ultimately Judge Feikens will rule on our issue.

We are considering intervening in the Federal case because none of the parties are representing the interests of the GLWQA. This would give the Court a new perspective on the standards that should be set for the Detroit River. And realistically, the only way zero discharge can be achieved is if the industrial pretreatment program is enforced.

GLU Options

The time for filing a petition for contested case hearing on the permit expired on Dec. 18, 1989. Since GLU would argue the same issue as the existing petition, the WRC would probably deny a separate petition for intervention. However, if GLU wants to be a named party in the contested case action, we could ask to amend our existing petition to add GLU as a party on our petition, since Rick Coronado is on the Board of Directors.

If GLU would like to intervene in the Federal Action, that could be done at any time. The Court would probably be more likely to allow the intervention if GLU joined our motion to intervene because we have standing through the petition.

Finally, one of the reasons for not listing E-FAC as a named party is because E-FAC is set up and funded by MDNR and OME, therefore funding the litigation through E-FAC would be impossible.

Legal service is provided free of charge for Coronado and Ferrin by Patricia D. Hartig, an environmental lawyer licensed in Michigan. There will be certain expences that must be paid such as filing fees, photocopying, telephone, milage, and other necessary expences. It is estimated that total expences would be approximately \$US 2000.00.

Coronado and Ferrin propose that GLU finance the necessary expences, but not legal fees, for their litigation. GLU would be consulted on litigation matters and would receive all court documentation and expence documentation.

TABLE I

MEAN CONTAMINANT LOADINGS (kg/d) FROM THE DETROIT
WASTEWATER TREATMENT PLANT TO THE DETROIT RIVER, 1982-1985

PARAMETER	1982	1983	1984	1985
Flow (MGD)	637.5	709.0	660.4	735.2
Mercury	0.69	0.80	0.60	0.64
Cadmium	16.26	14.98	9.97	13.03
Cobalt	49.92	90.53	27.53	30.89
Nickel	261.86	284.27	251.55	196.49
Lead	72.07	113.43	58.54	100.75
Zinc	211.92	322.29	312.10	249.61
Iron	6181.7	11627.2	9702.2	6947.3
PCBs	0.47	0.88	1.06	0.41

Source: EPA - STORET.

Rathke, D.E. and G. McRae. 1989. 1987 Report on Great Lakes Water Quality.
App. B. Great Lakes Surveillance. Int. Joint Comm. Windsor, Ontario, Canada.

TABLE 2

MEAN CSO CONCENTRATIONS

<u>Parameter</u>	<u>Units</u>	<u>All Sites All Events</u>	<u>Rouge River Sites All Events</u>	<u>Detroit River Sites All Events</u>
BOD ₅	mg/l	78	73	85
TSS ₅	mg/l	169	149	205
TDS	mg/l	358	357	360
TVS	mg/l	180	210	131
Total Phosphorous	mg/l	5.2	6.2	3.9
Inorganic Phos.	mg/l	1.2	1.0	1.5
Fecal Coliform	*	3330	5170	161
Fecal Streptococci	*	336	505	49
Arsenic	ug/l	83	91	69
Cadmium	ug/l	32	28	41
Total Chromium	ug/l	94	79	129
Copper	ug/l	165	129	218
Iron	ug/l	2470	2550	2270
Lead	ug/l	252	166	447
Mercury	ug/l	39	34	45
Nickel	ug/l	361	455	139
Silver	ug/l	34	33	38
Zinc	ug/l	335	222	555
Chlorides	mg/l	63	74	44
Oil and Grease	mg/l	132	154	94
PCB	ug/l	13.4	17.4	2.4
Phenols	ug/l	15	14	17
TKN	mg/l	10.0	6.3	17.6

* 1000 organisms/100ml

Giffels/Black & Veatch. 1980. Quantity and quality of combined sewer overflows. Volume II. City of Detroit, Water and Sewerage Dept., Detroit, Michigan.

Data collected in 1979.

A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

24.264 Declaratory judgment as to validity or applicability of rule. [MSA 3.560(164)]

Sec. 64. Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

CHAPTER 4. PROCEDURES IN CONTESTED CASES

24.271 Contested cases; time and notice of hearings. [MSA 3.560(171)]

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved.

Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

24.272 Defaults, written answers, evidence, argument, cross-examination. [MSA 3.560(172)]

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

24.273 Subpoenas; issuance; revocation. [MSA 3.560(173)]

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

24.274 Oaths; depositions; disclosure of agency records. [MSA 3,560(174)]

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other

evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

24.275 Evidence; admissibility, objections, submission in written form. [MSA 3.560(175)]

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

24.276 Evidence to be entered on record; documentary evidence. [MSA 3.560(176)]

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

24.277 Official notice of facts; evaluation of evidence.

[MSA 3.560(177)]

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

24.278 Stipulations; disposition of cases, methods. [MSA 3.560(178)]

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

24.279 Presiding officers; designation; disqualification, inability.

[MSA 3.560(179)]

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

24.280 Presiding officer; powers. [MSA 3.560(180)]

Sec. 80. A presiding officer may:

- (a) Administer oaths and affirmations.
- (b) Sign and issue subpoenas in the name of the agency, requiring

attendance and giving of testimony by witnesses and the production of books, papers and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

24.281 Proposals for decision; contents. [MSA 3.560(181)]

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

24.282 Communications by agency staff; limitations; exceptions. [MSA 3.560(182)]

Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency

member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

24.285 Final decisions and orders. [MSA 3.560(185)]

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact which would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. **A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence.** A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

24.286 Official records of hearings. [MSA 3.560(186)]

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

- (a) Notices, pleadings, motions and intermediate rulings.
- (b) Questions and offers of proof, objections and rulings thereon.
- (c) Evidence presented.
- (d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.
- (e) Proposed findings and exceptions.
- (f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who