

**The Ohio Bar Association  
Environmental Law Committee  
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**ENVIRONMENT MIDWEST: WHERE WE STAND AT THE  
MILLENNIUM**

**I. INTRODUCTION**

As we enter the new millennium, we can look back with quiet satisfaction at all that has been accomplished in the name of environmental protection. Since 1970 --- when Earth Day was born and the EPA was founded --- the accomplishments have been both numerous and great.

The country has seen dramatic improvements in pollution control and pollution prevention. During the 1970s and early 1980s, Congress passed an impressive array of environmental laws that address polluted air and water, pesticides, toxicants, hazardous wastes, and abandoned dumps. Later, Congress amended those laws to deal with new or emerging environmental problems.

During the late 1980s and 1990s, EPA embraced such innovative concepts as the ecosystems approach to environmental management, risk assessment, multimedia enforcement, environmental justice, and --- something that has been a keystone of EPA

policy for some time --- pollution prevention.

Even more importantly, the past three decades have changed fundamentally the way Americans look at their environment. The environmental ethic, with recycling, energy savings, and a multitude of other measures, has become a way of life in the family home, as well as in much of the corporate world. Most Americans have increasingly embraced the idea that a healthy environment and a healthy economy are inseparably bound together. Those who pit the economy against the environment present a false choice.

So where do we stand today? With sound science, tough standards, and fair but consistent enforcement, EPA's report card is quite impressive.

The air, even in our cities, is much cleaner today. Black clouds of factory smoke no longer darken our skies. Our rivers no longer foam with chemical suds, and, like the Cuyahoga River in Cleveland used to do, they no longer catch on fire. In the Midwest alone, EPA invested more than \$12 billion to build or upgrade sewage treatment plants. This has done more to improve water quality than anything else. Despite some long delays and other early setbacks, we have stepped up the cleaning of our land. Under Superfund, for example, more hazardous waste sites have been cleaned up in the past 5 years than during the preceding 15.

More than 50 hazardous chemical pesticides, from aldrin to toxaphene, were banned many

years ago. The EPA ban on DDT was directly responsible for recovery of the bald eagle in the Great Lakes.

The Lakes themselves have made great progress, too. Fish no longer rot by the million on the shores of the Lakes. Lake Erie --- once choking with algae and given up for dead --- made a world-class recovery and has again become a prime fishing spot for walleyed pike.

I have highlighted a number of areas where EPA has played an active role. In some areas, such as annual Toxic Release Inventories, EPA has played the primary role. In others, such as enforcement of the Safe Drinking Water Act or spearheading cleanups of abandoned brownfield sites, States and local governments have the first-line oversight.

Despite years of undeniable environmental progress and billions of dollars wisely spent to protect the environment and safeguard the health of the American people, many challenges lie before us. As we enter the new millennium, EPA Region 5 confronts a number of new issues. In this update, I will touch on issues in several programs: air, water, and land. Lastly, I will briefly describe our progress in dealing with five environmental priorities that we in Region 5 focus on: 1) the reduction of toxicants; 2) the promotion of sustainable urban environments; 3) the protection of people at risk; 4) the cleanup of contaminated sediments; and 5) the protection and restoration of critical ecosystems.

## II. AIR

Last May, the U.S. Court of Appeals for the District of Columbia Circuit ruled that EPA's most recent "8-hour" standard for measuring ozone is unenforceable, forcing the agency to retreat to its earlier "1-hour" standard. That decision halted momentum toward new ozone controls, which rely heavily on NO<sub>x</sub> reductions. EPA has asked the U.S. Supreme Court to grant certiorari in the case.

On March 3, 2000, the same circuit court upheld the heart of EPA's "NO<sub>x</sub>-SIP-Call," drafted by EPA in October 1998 to control transport of pollution from major facilities in 22 states and the District of Columbia across the eastern half of the country. EPA Administrator Carol Browner characterized the ruling as a break in the logjam over how to regulate regional ozone pollution. "The decision means that we again can move forward to bring cleaner, healthier air to more than 138 million people living in the eastern half of the country."

The decision, however, was not an unqualified win for EPA. On the one hand, the court eliminated the applicability of the plan to Wisconsin and parts of Missouri and Georgia. The court held that the record failed to show that facilities in Wisconsin and the areas of Missouri and Georgia contribute to downwind violations of the 1-hour ozone standard. On the other hand, the decision rejected the industry litigants' major legal arguments used to challenge the SIP call; namely, the assertion that EPA failed to undertake a state-specific determination of how much ozone from each upwind state significantly contributes to

pollution in downwind states. The court also rejected arguments that EPA's decision violated past precedents on the issue, improperly considered costs in trying to impose a uniform level of emission control on states covered by the rule, and violated the Regulatory Flexibility Act in promulgating the rule. Both Michigan and Ohio have indicated that they will seek a rehearing *en banc*.

The exact effect of the ruling on the NO<sub>x</sub>-SIP-Call remains to be seen. When must states, such as Ohio, submit new rules? When must sources comply? Even if not part of any long range transport issue, resolution of local pollution issues may require NO<sub>x</sub> reductions. Resolution of those issues may particularly impact large industrial and utility boilers in Ohio and other states. In addition, meeting the old or the new ozone standard may entail looking beyond traditional controls --- i.e., reductions from vehicles and factories — to focusing on smaller, more numerous sources, such as lawn mowers, external coatings and other sources. The states east of the Mississippi River and EPA need dialogue on these issues.

As to air toxics, EPA will both enforce MACT standards for hazardous air pollutants and rely on voluntary prevention and reduction of air toxicants by regulated entities.

Efforts are underway not only toward reform of new source review requirements but also toward better understanding of new source review and prevention of significant deterioration requirements by states and industries. Nonetheless, enforcement of existing

PSD and NSR rules against large sources of criteria air pollutants will expand as EPA identifies new violations.

### III. WATER

#### A. TMDLs (Total Daily Maximum Loads)

Similar to the shift in air to control of smaller, numerous sources, in water there is a shift from control of point to non-point sources. The expanding emphasis on TMDLs (total maximum daily loads) considers all sources that contribute to water quality problems and determines what total load of pollutants the water body can handle and how that waste load should be allocated among point and non-point sources. A TMDL defines the greatest amount of a particular pollutant that can be introduced into a water body without exceeding the water segment's water quality standard. TMDL requirements have been in the Clean Water Act since 1972. EPA is developing national rules, but a big controversy exists concerning regulation of forestry operations, agriculture, and how to assure that non-point sources meet requirements. Both EPA Headquarters and the regions as well as the states shoulder a huge workload in this area.

	TMDLs Needed in 15 years	Water Quality Limited Segments	Number of Segments for which a TMDL is Scheduled to be Completed during 1998-2000	Approval Completed
Nationwide	40,000	21,000	2,000	500
Region 5	5,500	2,000	170	3
Ohio	>881	881*	53	0

\*Ohio has specifically listed 881 segments as impaired on its Clean Water Act Section 303(d) list. Since Ohio has a statewide fish consumption advisory for mercury, all water body segments (about 5000) are technically listed.

On March 30, 2000, a federal judge in San Francisco, for the first time, upheld EPA's longstanding interpretation and practice that EPA and the states have the authority to identify which U.S. water bodies are polluted by runoff from agriculture, timber harvesting, and urban areas — non-point sources of pollution — and to identify the maximum amounts of pollutants that may enter those water bodies. The court found that Congress intended to include non-point source pollution in the Clean Water Act's water quality standards program and noted that non-point source pollution is the dominant water quality problem today in the United States.

### **B. Confined Animal Feeding Operations (CAFOs)**

Regulation of confined animal feeding operations (CAFOs) has created further controversy across the country. Nationwide, there are approximately 450,000 CAFOs, of which about 216,000 are located in Region 5. About 10,000 CAFOs handle over 1000 animal units, with roughly 3,000 of those large CAFOS located in Region 5. For example, Buckeye Egg houses 15,000,000 chickens in three Ohio counties. Historically, EPA has been reluctant to include agricultural sources as part of its formal regulatory programs. The economics of small farms also make regulatory programs more difficult. EPA's current approach focuses on requiring National Pollutant Discharge Elimination System (NPDES) permits for large CAFOs and addressing serious problems at small and medium-sized CAFOs. In Region 5, Illinois, Minnesota, and Wisconsin are implementing some form of a NPDES permitting program for CAFOs. Both Indiana and Ohio are implementing a state, but not a

federal CAFO permit program. Michigan is neither implementing a state nor a federal CAFO permitting program. If they are discharging to surface waters, all CAFOs in the latter three states are doing so without a NPDES permit. CAFOs create water quality, odor and public nuisance (e.g., flies) problems.

Region 5 also is addressing combined sewer and sanitary sewer overflow discharges.

#### **IV. LAND**

##### **A. Superfund**

EPA's Superfund program focuses on construction completions at remedial sites as follows:

	Sites	Completed	Projected 2000	Total
National	1300	670	85	= 755
Regional	270	166	19	= 185

In Region 5, the number of remedial sites at the beginning of the clean up pipeline has declined substantially. Most legal work focuses on cost recovery cases concerning both remedial and removal sites, with the rate of new cost recovery cases declining somewhat, but not significantly. Since 1980, the Region's Superfund program has completed over 400 short-term removal actions, which typically result in removal of piles of drums and cleanup of chemicals spills.

##### **B. RCRA**



Similarly, the top priority of our RCRA program is to seek corrective action at a large universe of sites as follows:

	Universe of Sites	High Priority Sites	Human Health Risk Controls (End of 2000)	Groundwater Controls (End of 2000)
National	5500	1300		
Region 5	1920	284	88	81

Region 5 has four mechanisms by which corrective action is initiated and overseen:

**g Permit authority:** All six Region 5 States are authorized for corrective action through their permitting authorities. The Region and States are working on transition plans to ensure an efficient transfer of responsibility to each State from the Region. The Region provides technical assistance, but retains its corrective action order authority under Section 3008(h) of RCRA.

**g Traditional enforcement orders:** Region 5 continues to issue a number of corrective action orders in appropriate cases. The Region maintains the greatest level of oversight over compliance with enforcement orders.

**g Performance-based consent agreement:** This new, simplified order focuses on the outcome of correction action and generally reduces the Region's oversight over a company's compliance efforts. The Region recently developed and entered into a performance-based consent agreement with a General Motors Corporation facility in Ohio.

**g Voluntary agreement:** The Region exercises minimal oversight over performance under voluntary agreements; although the Region still chooses the remedy and determines when

corrective action is to be completed. The Region is available for technical assistance, as well. Region 5 recently developed this new category of agreement for corrective action in conjunction with Hoover Company also for a facility in Ohio.

The Region also is evaluating how State voluntary clean-up programs could potentially help accomplish the goals of the corrective action program.

### **C. Brownfields**

The Region is looking for as many ways as possible to clean up contaminated land and return it to productive use. Under the Superfund portion of the program many urban brownfield sites have been returned to productive uses. The Region and five of the six states have signed Memoranda of Agreement relating to each state's voluntary cleanup law and program. Many pilot projects have been completed or are underway in those states. Unfortunately, Ohio's current law that authorizes its voluntary action program neither provides for community involvement nor requires adequate state oversight of the cleanups. On a more positive note, however, in January 2000 Ohio EPA submitted to Region 5 a MOA application which the state believes now addresses all of the six, federal baseline criteria for a voluntary cleanup program. The Region has recently negotiated a RCRA-based, voluntary cleanup program agreement with Illinois.

## **V. Regional Environmental Priorities**

### **A. Reduction of Toxicants**

Grounded in the Great Lakes Binational Toxics Strategy, Region 5's first priority is a joint American-Canadian effort to virtually eliminate persistent toxic substances ---especially mercury and PCB's --- in the Great Lakes Basin.

To carry out this strategy for reducing toxicants, EPA relies primarily on pollution prevention and voluntary cooperation. EPA firmly believes that preventing pollution in the first instance is the best way to safeguard the Great Lakes Basin from toxic chemicals in the future. And EPA emphasizes voluntary cooperation. Voluntary agreements benefit all parties and are certainly much cheaper in the long run than protracted court litigation.

Some voluntary agreements recently signed set precedents and are fine examples of what can be accomplished. For example, the American Hospital Association agreed to virtually eliminate mercury from hospital wastes and to cut total wastes by 50 percent by 2006. The Chlorine Institute, on behalf of its members, has promised to cut mercury use by 50 percent by 2005. Three Northwest Indiana iron and steel companies have recently signed a voluntary agreement to inventory mercury in materials, equipment, and waste and to implement mercury reduction plans.

Because of existing mercury and PCB overloads in the Great Lakes and a number of tributaries, however, fish advisories will be an unpleasant but necessary fact of life in the Great Lakes Basin for years to come.

## **B. Sustainable Urban Environments**

Our second regional priority is the promotion of sustainable urban environments. This is meant as an antidote to ever-growing urban sprawl and the resulting increase in pollution. Mentioned above, EPA's brownfields program, started 6 years ago, is an effective tool in this effort. The aim of the brownfields program is simply to:

- \* return contaminated, abandoned urban sites to productive use; and
- \* assure that future development is carried out in a responsible, environmentally sound manner.

In the Great Lakes Basin, brownfields success stories are legion: from a lead-contaminated parking lot redeveloped into a high-rise complex in Chicago to an abandoned factory site turned into a high-tech, hydroponic tomato farm in Buffalo. All told, more than 3,000 urban brownfields properties have been voluntarily cleaned up and redeveloped in EPA Region 5.

To encourage brownfields and other "smart growth" initiatives, EPA will expand its role as coordinator, information clearinghouse, and provider of seed money. To supplement the brownfields program, EPA is developing a Livable Communities Initiative for the year 2001 and beyond. It will serve to more effectively marshal all of EPA's resources in promoting livable communities and other smart-growth projects.

You may wonder: What is a livable community? Basically, it's a community with clean air and clean water, with green spaces, with recreational areas, and open spaces. It is a community that does not totally depend on polluting vehicles. From EPA's viewpoint, it is a

community whose day-to-day life offers significant environmental advantages over the many communities being heedlessly developed today. In short, a livable community is one in which most of us would like to live, work and play.

In cooperation with Purdue University, EPA is preparing a significant new software tool that will help community planners analyze how water quality is impacted by proposed development.

### **C. Protection of People at Risk**

Region 5's third regional priority is the protection of people at risk. It rests on a fundamental truth; namely, that in many instances, children, the elderly, the poor, and minority communities have suffered more than other segments of the population from the ill-effects of environmental pollution. EPA aims to see:

- \* that such people at risk are protected; and
- \* that they have plenty of opportunity to participate in all environmental decisions that affect their lives.

To deal with pollution problems in Environmental Justice communities, EPA Region 5 has taken a number of steps. These include:

- \* the formation of a special Environmental Justice Team;
- \* the development of guidelines for identifying communities in need of special attention;
- \* the establishment of Environmental Justice training programs for State agencies;

- \* the inauguration, at the Taracorp Superfund site in Granite City, Illinois, of a job training program for cleaning up hazardous wastes sites;
- \* the identification and mapping of Environmental Justice communities regionwide, under the Geographic Information System; and
- \* the opening of an Environmental Justice home page on EPA Internet site.

In addition, EPA Region 5 has developed grant-writing tutorial software, especially suitable to Environmental Justice communities. It teaches users how to write high-quality, competitive grant applications.

#### **D. Cleanup of Contaminated Sediments**

The cleanup of contaminated sediments, the Region's fourth priority, presents a triple challenge:

1. To clean up and restore contaminated sediments that pose a clear threat to people and the environment;
2. To prevent new contamination of sediments through pollution prevention, source-control, and soil conservation measures; and
3. To successfully dredge and open up all federal navigation channels and recycle the dredged material for beneficial use.

This daunting challenge is compounded by a large number of identified contaminated-sediment sites in the Great Lakes Basin --- 346 to be exact --- by their large size and complexity, by limited resources, by State and local priorities, by incomplete regulatory

authority, and other factors. While the challenge is great, we are acting to meet that challenge. There are many success stories, including:

- \* The removal of 450,000 cubic yards of PCB-contaminated sediment and soil from the Willow Run Creek in Huron, Michigan;
- \* The removal of 400,000 cubic yards of sediment, contaminated with PCB's and heavy metals, from Newburgh Lake on the Rouge River, also in Michigan.
- \* The removal of 120,000 cubic yards of sediment contaminated with PCB's, heavy metals, and oil at the LTV Steel site in East Chicago, Indiana; and
- \* The isolation of some 570,000 cubic meters of contaminated sediment from the Milwaukee River, at the North Avenue Dam, in Wisconsin.

In Ohio, EPA and the Corps of Engineers are also closely working with a number of other stakeholders from Ashtabula to negotiate an agreement for cleanup of contaminated sediments underlying the Ashtabula River.

Wherever possible, EPA tries to get the responsible parties to voluntarily clean up contaminated sediments. But if voluntary cleanups are not forthcoming, we will not hesitate to use all of the enforcement authorities at our disposal.

To date, contaminated sediments have poisoned some 2,000 miles of shoreline along the Great Lakes. They represent the largest source of toxic chemicals in the Great Lakes food chain. Many fish are unfit to eat and will continue to be so for years to come.

Contaminated sediments also cost the regional economy billions of dollars in lost revenue from commercial and recreational fishing.

### **E. Protection and Restoration of Critical Ecosystems**

During the last 150 years the Midwest has lost almost 98 percent of its prairies, 88 percent of its wetlands, and 70 percent of its forests. This has happened as a result of agricultural expansion, industrial growth and urban sprawl. What relatively few undeveloped areas remain must be protected or restored for our sake, for endangered species and habitats, and for the sake of future generations. Our fifth priority is protecting and restoring these critical ecosystems.

In its enforcement actions, EPA often encourages violating companies to undertake Supplemental Environmental Projects (SEPs) in exchange for a reduced monetary penalty. As a result, a number of SEPs have benefitted critical ecosystems. For example:

- \* In Minnesota, a major oil company deeded 274 acres of threatened native sand prairie to the State, as part of a settlement for numerous environmental violations.
- \* In Indiana, a major steel company turned over to the State 234 acres of high-quality dune and swale habitat, to compensate for the loss of natural resources at a nearby river.
- \* And last August, some 90 acres of wetlands were donated to the State of Illinois by a marina that was found guilty of polluting the environment. Part of those wetlands will be restored, while another part will be turned into a duck-hunting facility for the disabled.



We have also been able to enhance certain ecosystems through various programs under the Clean Water Act. At the Au Sable River in Michigan, for instance, we have cut sediment inputs by more than 600 tons a year. In the Minnesota River Valley, sediment loads from farm runoff have been cut by 25 percent over the past 10 years. That is the equivalent of 13 dump trucks of sediment, at 20 tons each, being kept out of the river every day!

But we seldom act alone. We are always looking for like-minded partners. Thus, EPA is a founding member of the Midwest Natural Resources Managers Group, which consists of 14 federal agencies working in unison to help local communities improve their environment.

The Great Lakes represent a special interest of and a great responsibility for Region 5. North America's most precious natural resource, they hold roughly 20 percent of the world's fresh surface water, by surface area the largest such reservoir on earth. Some 40 million Americans and Canadians depend on the Great Lakes for drinking water, commerce, industry, agriculture, power generation, mining, and recreation.

The importance of the Great Lakes cannot be overstated. The need for their continued protection cannot be denied. Most of our work on the Great Lakes is governed by the American-Canadian Great Lakes Water Quality Agreement of 1972, amended in 1987. Although great progress has been made in cleaning up the Great Lakes, persistent

problems remain. Mainly, these are as follows:

1. The reduction and elimination of toxicants, outlined as our first regional goal, is very much applicable here. The Great Lakes are basically a closed system. Only one percent of their waters flow out into the Atlantic through the St. Lawrence Seaway every year. So a drop of mercury, for instance, can remain in Lake Superior for as long as 190 years!
2. Exotic species, such as the sea lamprey and the zebra mussel, have caused substantial monetary and environmental damage. Zebra mussels have caused millions of dollars in damage by clogging industrial and municipal water intakes, encrusting the hulls of ships, infiltrating their ballast and cooling systems, and outcompeting native mussels and clams.
3. The need to control habitat destruction and prevent urban sprawl, which I mentioned earlier in another context, applies doubly for the Great Lakes. The Wall Street Journal has predicted that the Great Lakes Basin, because of its abundant natural resources, will become the fastest growing economic area in the Nation. Such growth would add burdens to the already fragile Great Lakes ecosystem.

To solve some of these vexing problems in the Great Lakes, we will continue working closely with our Canadian partners, as well as with State, tribal, and local governments. Besides the Binational Toxics Strategy that I mentioned at the outset, and other agreements with the Canada, still more efforts are in place. The development of environmental indicators for the Great Lakes, Lakewide Management Plans, Remedial

Action Plans for cleaning up sediments, and steps taken by the Great Lakes Fishery Commission all move us toward even cleaner Great Lakes in the years to come.

## **VI. CONCLUSION**

In conclusion, our air, water and land in the Midwest are much cleaner than they were 30 years ago. Notwithstanding this considerable progress, we confront new challenges for the next millennium. In Region 5, I have explained our current programs and efforts to reduce toxicants, promote sustainable urban environments, protect people at risk, cleanup contaminated sediments, and protect and restore critical ecosystems. I trust these efforts will lead to an even cleaner environment for ourselves, for Midwest ecosystems, and for future generations. Thank you for inviting me to speak with you today.