

3 Key Environmental Issues Facing Michigan

By Juan Carlos Rodriguez

Law360 (March 20, 2023, 2:36 PM EDT) -- Michigan's century-long status as an industrial hub has led to contaminated lands across the state, presenting environmental attorneys with a diverse set of issues as regulators seek to protect remaining wilderness from new development and ensure communities have access to safe drinking water after the disaster in Flint.

The Great Lakes State must contend with a host of environmental problems, including pollution from per- and polyfluoroalkyl substances, or PFAS; hazards presented by contaminants migrating from underground into structures; and environmental justice issues including lead in drinking water pipes.

And environmental attorneys must keep up with changing business practices as industries transition from older, dirtier operations to newer and hopefully cleaner ones, along with savvy regulators who have been monitoring industry for decades, according to AnnMarie Sanford, a Troy-based member at Dickinson Wright PLLC.

"Michigan is different than some other states because we've had such a long history of manufacturing and industries, and the issues that we deal with are a little bit different," Sanford said. "Because of that long history, Michigan also has a very mature environmental regulatory program."

Here are three of the most pressing environmental issues in Michigan:

Forever Chemicals

PFAS, a family of hundreds of individual substances, are often called "forever chemicals" because of their tendency to persist for a long time in the human body and environment. They have been used for decades, and it's only in recent years that scientists have begun to understand the risks they pose to people, including decreased fertility, high blood pressure in pregnant women, developmental effects or delays in children, and an increased risk for some cancers.

The U.S. Environmental Protection Agency has proposed treating two widely used PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, which could cause chaos at the state's many Superfund sites, said Matthew Eugster, a Grand Rapids-based partner at Varnum LLP.

"If and when PFAS is added to the hazardous substance list at a federal level, that's going to open the door for EPA and or [the Michigan Department of Environment, Great Lakes and Energy] to require

additional remedial, additional investigation or remedial measures at those Superfund sites," Eugster said.

"I anticipate that all those parties that were liable back in the '70s and '80s and '90s are going to get letters out of the blue asking them to contribute to the [new PFAS] response costs," he added.

Tammy Helminski, a Grand Rapids-based partner at Barnes & Thornburg LLP, said aside from the CERCLA issue, the EGLE has been doing its own research into PFAS and noted the state has already set PFAS standards for drinking water, which the EPA recently proposed at the federal level. But she said there are still a lot of unanswered questions.

"What do you do about PFAS in soil?" Helminski said. "What are we going to do about it if it's in our stormwater? What are we going to do about it if we are finding it in another media? We simply don't have good, readily available options to deal with that."

Vapor Intrusion

One of the newer risk factors developers in Michigan must contend with is vapor intrusion, which occurs when hazardous substances such as gasoline and solvents migrate from below the ground into structures. The vapors can come from any number of pollutants and can even originate off-site.

The EPA in 2017 deemed vapor intrusion a hazard that can qualify sites for Superfund status, presenting a similar situation as that for PFAS in that new regulatory regimes can complicate remediation and development processes.

"As we work towards remediating sites, what does closure look like today, and how can we ensure that what we think closure means today is what somebody's going to think closure looks like 20 years from now?" Helminski asked. "We have a great brownfields program, and we have some great sites that have really great success stories. But working through the everyday diligence process with folks, this continues to be a question."

Sanford said redevelopment projects in Detroit, in particular, are facing vapor intrusion issues from pollutants such as mercury.

"It's a big impediment to development," she said. "When you are finding mercury everywhere and then have to do an assessment for vapor intrusion, it gets very costly. And it's not clear what the risk actually is."

She said vapor-intrusion issues often come up when "new industry" businesses move into "old industry" properties. She added that in years past, less was known about pollutants that entered the land at sites, and that as time passed, businesses and regulators have endeavored to improve their environmental stewardship either through eliminating the use of more toxic substances or controlling them more strictly.

Eugster said Michigan state law treats vapor intrusion as a due care obligation, so any owner or operator at a site must make sure the site is safe for whatever development is going in.

"Over the last two or three years, most due-care issues that have arisen relate to vapor intrusion relating to a lot of old gas stations, dry cleaning sites or chlorinated solvent use by industrial facilities,"

he said. "And those vapor intrusion concerns often seem to be driving the bus, which is a real challenge for Michigan attorneys right now."

Environmental Justice

Flint leapt into headlines in 2014 when city emergency managers, appointed by former Gov. Rick Snyder to assist the majority-Black and financially struggling city, switched drinking water sources from Lake Huron to the Flint River in an effort to save money. But they failed to properly treat the more corrosive water, which scratched lead pipes along its way into residents' homes, poisoning many of them, including children.

Since then, state regulators have acted to replace lead water lines, and the EPA has enacted new regulation at the federal level — but problems persist. Residents of Benton Harbor, another majority-Black city, were subjected to lead contamination that exceeded safe drinking standards between 2018 and 2021.

Nick Leonard, executive director of the Detroit-based Great Lakes Environmental Law Center, said Michigan's lead and copper rule is one of the most stringent in the nation at this point, while emphasizing more work needs to be done.

"We're still paying close attention to and working on lead and copper rule compliance and how the rule can be further revised to achieve the ultimate goal of making sure that communities in Michigan aren't being exposed to high levels of lead in their drinking water," Leonard said.

Another environmental justice issue is hazardous waste storage and treatment, he said, adding that communities of color are disproportionately the locations of commercial hazardous waste facilities in the state and more needs to be done to make sure their concerns are represented in permitting decisions.

In one instance, the Great Lakes Environmental Law Center a few years ago filed a civil rights complaint, which is still pending, regarding a proposed expansion of a hazardous waste storage and treatment facility on the east side of Detroit.

In addition to the disproportionality claim, the complaint alleges the state didn't properly identify and conduct outreach to limited-English-proficient people in making their licensing decision.

According to Leonard, the group is in the final stages of negotiation to reach a settlement in the civil rights case.

"We are looking for changes to state laws, regulations and policies to address these issues," he said.

--Editing by Philip Shea.