STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
[Zahra, P.J., and White and Hoekstra, JJ.]

JENNIFER M. GRANHOLM, Attorney General for the State of Michigan, *ex rel*, Michigan Department of Environmental Quality, Russell Harding, Director of the Michigan Department of Environmental Quality,

Plaintiffs-Appellants,

v

WOODLAND OIL CO., INC., a Michigan corporation, BAY OIL CO., INC., a Michigan corporation, jointly and severally,

Defendants-Appellees.
_____ /

Supreme Court No. 120139

Court of Appeals No. 213707

Ingham County Court No. 97-85844-CE

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

Statement of Basis of Jurisdiction v

Questions Presented for Review vi

Statement of Proceedings and Facts 1

Argument 6

I. The Court of Appeals' decision that the MDEQ's claim for cost recovery was barred by the statute of limitations is wrong as a matter of law. The Court of Appeals ignored both the plain language of Part 201 and its statutory scheme in determining that the statute of limitations had expired. 6

II. The Court of Appeals' decision, holding that MDEQ's cause of action accrued before all the elements of a cost recovery claim were present, is clearly wrong as a matter of law. 19

III. The Court of Appeals' decision is contrary to the intent of Part 201 24

Relief 25

INDEX OF AUTHORITIES

Cases

Page

Attorney General v Woodland Oil Co, Inc,
463 Mich 940; 620 NW2d 850 (2000) 5

Baker v General Motors Corp,
409 Mich 639; 297 NW2d 387 (1980),
aff'd 478 US 621; 106 S Ct 3129 (1986) 9

Cipri v Bellingham Frozen Foods, Inc,
235 Mich App 1; 596 NW2d 620 (1999) 16, 22

City of Port Huron v Amoco Oil Co, Inc,
229 Mich App 616; 583 NW2d 215 (1998) 6, 20, 24

Crawford v School District Number 6,
342 Mich 564; 70 NW2d 789 (1955) 11

Connelly v Paul Ruddy's Equipment Repair & Service Co,
388 Mich 146; 200 NW2d 70 (1972) 20

Farm Bureau Mut Ins Co v Porter & Heckman,
220 Mich App 627; 560 NW2d 367 (1996) 16, 21, 22

Farrington v Total Petroleum,
442 Mich 201; 501 NW2d 76 (1993) 11

Flanders Industries v State of Michigan,
203 Mich App 15; 512 NW2d 328 (1993) 16, 21

Genesco, Inc v Michigan Dep't of Environmental Quality,
250 Mich App 45; 645 NW2d 319 (2002) 16, 21

Grimm v Ford Motor Co,
157 Mich App 633; 403 NW2d 482 (1986) 20

Guitar v Bieniek,
402 Mich 152; 262 NW2d 9 (1978) 9

Kelley v E.I. du Pont de Nemours & Co,
786 F Supp 1268 (ED Mich 1992), *aff'd* 17 F3d 836 (CA 6, 1994) 16, 21

Mascarenas v Union Carbide Corp,
196 Mich App 240; 492 NW2d 512 (1992) 20

Metropolitan Council 23 v Oakland County,
409 Mich 299; 294 NW2d 578 (1980) 8, 11

People v McIntire,
461 Mich 147; 599 NW2d 102 (1999) 8, 9

Cases **Page**

Shields v Shell Oil Co,
237 Mich App 682; 604 NW2d 719 (1999),
rev'd 463 Mich 939; 621 NW2d 215 (2000) 5, 22

Shields v Shell Oil Co,
463 Mich 939; 621 NW2d 215 (2000) 5, 21,22

Smeets v Genesee Co Clerk,
193 Mich App 628; 484 NW2d 770 (1992) 6, 20, 24

Thomas v Process Equipment Corp,
154 Mich App 78; 397 NW2d 224 (1986) 20

Travelers Ins Co v S & H Tire Co,
134 Mich App 214; 351 NW2d 279 (1994) 9

Wechsler v Wayne County Road Comm,
215 Mich App 579; 546 NW2d 690 (1996) 6, 20, 24

Statutes

1990 PA 234 14

1982 PA 307 14

1994 PA 451 14

42 USC 9601 *et seq* 14, 16, 21

42 USC 9601(23) 16

42 USC 9601(24) 16

42 USC 9601(25) 16

MCL 299.601 *et seq*, ... 14, 21

MCL 299.603(j) 14

MCL 324.3101 *et seq* 1

MCL 324.20101 *et seq* 1, 13

MCL 324.20101(1)(m) 16

MCL 324.20101(1)(r) 2

MCL 324.20101(1)(u) 7, 9, 11, 12, 15, 16

MCL 324.20101(1)(cc) 7, 11

MCL 324.20101(1)(ff) 7, 21

MCL 324.20102 ..... 13, 24

MCL 324.20102(f) 17

Statutes **Page**

MCL 324.20114 ..... 9, 17, 19
MCL 324.20114(1) 9, 10, 11, 13
MCL 324.20114(1)(c)-(f) 10
MCL 324.20114(1)(d) 11
MCL 324.20114 (1)(g) and (h)(i) 11, 18
MCL 324.20114(1)(h)(v) 12
MCL 324.20114(8) 17
MCL 324.20118 ..... 13, 14, 15
MCL 324.20118(2) 13, 18, 19, 25
MCL 324.20120a 14, 15, 25
MCL 324.20120b 14, 15, 19, 25
MCL 324.20126(1) 17, 20
MCL 324.20140 ..... 5, 6, 7, 19, 23, 24
MCL 324.20140(1)(a) 4, 5, 7, 15, 23, 25
MCL 324.20140(2) 22
MCL 324.20140(4) 22
MCL 600.5813 18

Rules

1990 AACS R 299.5101 *et seq* 11, 14, 25
1990 AACS R 299.5101(o) 12
1990 AACS R 299.5509(2)(f) and (g) 12
1990 AACS R 299.5601 - 299.5727 15

Statement of Basis of Jurisdiction

Plaintiffs-Appellants, Jennifer M. Granholm, Attorney General of the State of Michigan, *ex rel* Michigan Department of Environmental Quality ("MDEQ") and Russell Harding, Director of the MDEQ (collectively "the State"), timely sought leave to appeal pursuant to MCR 7.302 from the July 27, 2001 unpublished per curiam Opinion of the Court of Appeals and the September 12, 2001 Order of the Court of Appeals denying the State's Motion for Rehearing. By Order dated July 2, 2002 this Court granted leave to appeal from the July 27, 2001 decision of the Court of Appeals. This Court has jurisdiction under MCR 7.301(A)(2).

Questions Presented for Review

I. **Was the Court of Appeals' decision interpreting the term "remedial action" in the statute of limitations for Part 201 of the Natural Resources and Environmental Protection Act wrong as a matter of law because it ignored both the plain language of the statute and the statutory scheme?**

Court of Appeals' Answer: "No."

Trial Court's Answer: "No."

Appellants' Answer: "Yes."

II. **Was the Court of Appeals' decision, determining that a cause of action for cost recovery accrued before the costs had been incurred, wrong as a matter of law?**

Court of Appeals' Answer: "No."

Trial Court's Answer: "No."

Appellants' Answer: "Yes."

III. **Was the Court of Appeals' decision contrary to the intent of Part 201 because it placed the burden of cleanup on the public rather than the parties who caused the contamination?**

Court of Appeals' Answer: "No."

Trial Court's Answer: "No."

Appellants' Answer: "Yes."

Statement of Proceedings and Facts

Plaintiffs-Appellants, Jennifer M. Granholm, Attorney General of the State of Michigan, *ex rel* Michigan Department of Environmental Quality ("MDEQ") and Russell Harding, Director of MDEQ (collectively "the State"), filed a Complaint on April 11, 1997 seeking recovery of response activity costs it had incurred in responding to contamination at the Woodland Oil site (also referred to as the Frankfort Bulk Storage Facility) ("Site"). The Site is located at 10 Day Street in Frankfort, Michigan and is approximately 500 feet from Betsy Lake which is connected to Lake Michigan. The Defendants-Appellees, Woodland Oil, Inc. ("Woodland Oil") and Bay Oil, Inc. ("Bay Oil"), are the owners and/or operators of the Site and are parties responsible for causing a release of hazardous substances. MDEQ filed its claim pursuant to Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.20101 *et seq*. The Complaint also sought fines under Part 31 of the NREPA, MCL 324.3101 *et seq*, for unlawful discharges to the waters of the State of Michigan. This Appeal deals solely with MDEQ's cost recovery claims under Part 201.

The Site was used for many years as a bulk petroleum storage facility. In 1977, Woodland Oil purchased the Site under a land contract from Total Petroleum Co., Inc. and continued to operate the Site as a bulk storage facility through approximately 1987. The products that were stored and sold at the Site were generally gasoline and fuel oil. In approximately February 1987, Bay Oil began its operation of the Site and continued operations as a bulk oil facility until approximately June 1993. Bay Oil continued to conduct other activities at the Site until at least June 1996, when the Site was abandoned. The Site is currently vacant and inactive except for the ongoing response activities being conducted by the MDEQ.

In December 1983, Woodland Oil reported a release of approximately 400 gallons of No. 2 fuel oil at the Site. (App 19a.) MDEQ[1] investigated the Site after the 1983 release to determine if additional response activities were needed to address contamination at the Site. In August of 1984 Mr. Robert Kettner of the MDEQ determined that extensive contamination was still present and needed to be addressed. (App 17a.)

On August 7, 1984, MDEQ requested Woodland Oil to take steps to address the contaminated groundwater and soils at the Site. Woodland Oil undertook a limited investigation of the Site and performed some recovery of free product, as defined by MCL 324.20101(1)(r). Woodland Oil discontinued free product recovery in 1986. No other work was conducted at the Site until September 1989 at which time approximately 2,500 cubic yards of contaminated soils were removed and replaced with clean fill by Defendants-Appellees. The limited nature of the work performed did not fully remove all the contaminated soils from the Site nor did it eliminate the groundwater contamination being caused by discharges from the contaminated soils.

The removal of the contaminated soils that occurred in 1989 was done pursuant to a work plan submitted by Defendants-Appellees to MDEQ. MDEQ approved the Phase I portion of the work plan, for limited soil excavation, so that work could commence immediately. (App 24a.) In March 1991, MDEQ inspected the Site and discovered new releases of contamination that occurred after the original 1983 release. (App 26a.) In June 1991, MDEQ personnel observed that a slop tank was overflowing and contaminating new soils at the Site. The slop tank was placed at the Site in 1989 for the purpose of collecting spills or releases from the filling area.

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[1] Statutory authority, powers, duties, functions, and responsibilities previously vested in the Michigan Department of Natural Resources ("MDNR") pursuant to Part 5 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.501 *et seq,* are now vested in the MDEQ pursuant to Executive Order 1995-18. Correspondence and documents prior to 1995 are from MDNR. For ease of reference "MDEQ" will be used when referring to actions and correspondence from the agency both before and after the transfer of authority.

The contamination in the area of the slop tank was from new releases, distinct from the releases that resulted in the 1989 excavation. (App 53a.) Also, in June 1992, an inspection by the U.S. Environmental Protection Agency noted soil contamination at this site, as well as other violations. (App 30a.) These new releases occurred during Bay Oil's operation of the Site. (App 32a.)

Both Woodland Oil and Bay Oil were notified of their status as liable parties and asked on numerous occasions to take steps to address the contamination at the Site. (App 20a, 21a, 24a, 26a, 28a, 30a, 32a and 35a.) After it became apparent that neither Woodland Oil nor Bay Oil were going to undertake the necessary response activities, MDEQ hired Roy F. Weston, Inc. ("Weston") in 1991 to conduct a remedial investigation to determine the nature and extent of the contamination at the Site.

As a consequence of Weston's investigation in 1991, MDEQ undertook additional interim response activities to remove contaminated soils from the Site in 1992. (App 77a - 91a.) During these additional response activities it became clear that the soil removal was not sufficient to prevent the ongoing groundwater contamination at the Site. (App 130a - 131a.) MDEQ repeatedly requested the Defendants-Appellees to undertake additional response activities at the facility, consistent with their statutory obligations. (App 20a, 21a, 24a, 26a, 28a, 30a, 32a and 35a.) MDEQ employees testified in deposition that the work undertaken by Defendants-Appellees in 1989 did not fully clean up the Site. (App 63a - 64a.) In 1995, again after both Bay Oil and Woodland Oil refused to perform the necessary response activities, MDEQ undertook further work to remove additional contaminated soils. While no further soil removal is anticipated, MDEQ continues to monitor the groundwater at the site and will continue

to do so until it has been determined that the groundwater meets the appropriate clean-up standard. (App 131a.)

MDEQ filed its Complaint on April 11, 1997, seeking recovery of response activity costs. MDEQ filed a First Amended Complaint on July 18, 1997. MDEQ's Complaint and Amended Complaint also sought civil fines under Part 31 of NREPA for unlawful discharges to the waters of the state. All response activity costs sought by MDEQ were incurred after July 1991. (App 35a - 37a.)

On April 3, 1998, Bay Oil filed a Motion for Summary Disposition and a Brief in Support. Woodland Oil joined in the Motion on April 17, 1998. Defendants-Appellees' Motion asserted that MDEQ's claims for response activity costs under Part 201 of NREPA were barred by the statute of limitations, as was MDEQ's claim for civil fines under Part 31. MDEQ filed a response to the Motion for Summary Disposition on April 20, 1998, asserting that its claims were not barred by the statute of limitations. On April 29, 1998 oral argument was heard by the Ingham County Circuit Court and the court took the matter under advisement. (App 172a.)

On June 22, 1998 the Ingham County Circuit Court issued its Opinion & Order granting in part and denying in part Defendants-Appellees' Motion for Summary Disposition. The court held that MDEQ's claims for cost recovery under Part 201 were barred by the statute of limitations set forth in Section 20140(1)(a) of Part 201, MCL 324.20140(1)(a). The Court denied Defendants-Appellees' motion seeking dismissal of claims for civil fines under Part 31 (set forth in Count II of Plaintiffs' Amended Complaint). (App 178a - 188a.)

On July 30, 1998 the Ingham County Circuit Court entered an order dismissing the remaining claims (Count II) contained in the Amended Complaint. (App 190a - 191a.) On August 14, 1998, MDEQ filed a Claim of Appeal in the Court of Appeals. On March 31, 2000

the Court of Appeals affirmed, in part, the dismissal of MDEQ's cost recovery action relying on *Shields v Shell Oil Co*, 237 Mich App 682; 604 NW2d 719 (1999), *rev'd* 463 Mich 939; 621 NW2d 215 (2000). The Court also remanded the matter to the trial court to determine if any releases occurred after July 1, 1991 because such claims would not be barred under *Shields*. See *Attorney General v Woodland Oil Co, Inc*, unpublished memorandum opinion of the Court of Appeals, issued March 31, 2000, Docket No. 213707. (App 192a - 193a.)

On April 20, 2000 the State filed an Application for Leave to Appeal and Motion for Peremptory Reversal with this Court. This Court reversed *Shields* on December 27, 2000. *Shields v Shell Oil Co*, 463 Mich 939; 621 NW2d 215 (2000). On the same day this Court vacated the Court of Appeals March 31, 2000 decision in this case and remanded it for reconsideration in light of the decision in *Shields*. *Attorney General v Woodland Oil Co, Inc*, 463 Mich 940; 620 NW2d 850 (2000). (App 194a.)

On remand, the Court of Appeals again affirmed dismissal of State's cost recovery claims under Part 201. *Attorney General v Woodland Oil Co, Inc*, unpublished per curiam opinion of the Court of Appeals, issued July 27, 2001, Docket No. 213707. (App 195a - 199a.) The Court of Appeals based its decision on an erroneous interpretation of the statute of limitations set forth in Section 20140 of Part 201, MCL 324.20140. The Court of Appeals held that an approved remedial action had begun in 1989, and that the statute of limitations ran six years after the commencement of the remedial action; thus under Section 20140(1)(a), Plaintiffs' claim for cost recovery relating to the remedial action was barred. The Court of Appeals also remanded part of the case to the trial court to determine if additional releases had occurred or contamination existed that were not addressed by the 1989 remedial action plan.

On August 16, 2001 Plaintiffs filed a Motion for Rehearing with the Court of Appeals. That motion was denied on September 12, 2001. (App 200a.) Plaintiffs filed a timely Application for Leave to Appeal with this Court on October 2, 2001. This Court granted the Application on July 2, 2002.

Argument

I. The Court of Appeals' decision that the MDEQ's claim for cost recovery was barred by the statute of limitations is wrong as a matter of law. The Court of Appeals ignored both the plain language of Part 201 and its statutory scheme in determining that the statute of limitations had expired.

The issue to be reviewed by this Court is a question of law: is MDEQ's claim for response activity costs under Part 201 of NREPA barred by the statute of limitation contained in Section 20140 of Part 201 of the NREPA, MCL 324.20140? Therefore, the proper standard of review is *de novo*. *City of Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 624; 583 NW2d 215 (1998); *Wechsler v Wayne County Road Comm*, 215 Mich App 579, 596, n 12; 546 NW2d 690 (1996); *Smeets v Genesee Co Clerk*, 193 Mich App 628, 633; 484 NW2d 770 (1992).

In the case at hand the Michigan Court of Appeals incorrectly interpreted certain definitions set forth in Part 201 and concluded that some of MDEQ's cost recovery claims were barred under the statute of limitations set forth in Section 20140, MCL 324.20140, which states:

> (1) Except as provided in subsections (2) and (3), 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 6 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 subdivision (b).
> > (b) For 1 or more subsequent actions for recovery of response activity costs pursuant to section 20126, at any time during the response activity, if commenced not later than 3 years after the date of completion of all response activity at the facility.

(c) For civil fines under this part, within 3 years after discovery of the violation for which the civil fines are assessed.

(2) For recovery of natural resources damages that accrued prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

(3) For recovery of response activity costs that were incurred prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

(4) Subsection (3) is curative and intended to clarify the original intent of the legislature and applies retroactively.

Defendants-Appellees claimed that the work undertaken in 1989 was a MDEQ-approved remedial action, and therefore the six year statute of limitations, set forth in Section 20140(1)(a), applied and began to run in 1989. The Court of Appeals agreed. It is clear, however, under Part 201, that the work undertaken in 1989 was an interim response activity and therefore, Section 20140(1)(a) does not bar any of MDEQ's claims.

Part 201 contains the following definitions all of which are relevant to the interpretation of Section 20140(1)(a):

> (u) "Interim response activity" means the *cleanup* or *removal* of a released hazardous substance or the taking of other actions, *prior to the implementation of a remedial action*, as may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment. Interim response activity also includes, but is not limited to, measures to limit access, replacement of water supplies, and temporary relocation of people as determined to be necessary by the department. In addition, interim response activity means the taking of other actions as may be necessary to prevent, minimize, or mitigate a threatened release. [MCL 324.20101(1)(u) (emphasis added).]

> (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. [MCL 324.20101(1)(cc).]

> (ff) "Response activity costs" or "costs of response activity" means all costs *incurred* in taking or conducting a response activity, including enforcement costs. [MCL 324.20101(1)(ff) (emphasis added).]

The Court of Appeals, interpreting the definitions of "interim response activity" and "remedial action," concluded as follows:

> In analyzing the plain language of these statutory definitions, we conclude that an "interim response activity" is essentially a quick response to a release, see subsection 20101(bb) (defining "release"), that eliminates a hazard, or a quick response to prevent the hazard from increasing in size and strength before a "remedial action" can take place. In other words, it is a temporary activity until a plan can be developed to implement a remedial action. See *Random House Webster's Unabridged Dictionary, Second Edition* (1998) (defining "interim" as "a temporary or provisional arrangement."). A "remedial action," on the other hand, is essentially a work plan that is designed and implemented to completely eliminate a hazard. Contrary to plaintiffs' analysis, a "final plan" is not needed to give rise to a "remedial action." Rather, the statutes [sic] contemplate a plan to cure the problem.
>
> Applying this reasoning, defendants performed a "remedial action" rather than an "interim response activity" because: (1) in 1989 Woodland Oil had a three- phase "remedial action" plan to remove large amounts of contaminated soil at the site; (2) in 1989 Woodland Oil implemented that plan by removing approximately 2,500 cubic yards of contaminated soil from the site; (3) Woodland Oil disconnected the entire bulk plant and emptied and moved the tanks; and (4) Woodland Oil subsequently reconditioned the tanks and built a new facility. These actions were not a quick response to either eliminate a hazard or prevent the hazard from increasing in size and strength. Indeed, in 1991, two years after Woodland Oil began phase I of the plan, plaintiffs took over and began phase II of the plan and are apparently still working at the site. Moreover, contrary to plaintiffs' assertion, the definition of a "remedial action" is not found in subsection 20118(2). That provision is not a definitional provision; it merely details what a "remedial action" must ultimately accomplish. [App at 198a.]

The Court of Appeals' decision is flawed in several respects. First, it replaced or amended the statutory definition of interim response activities with its own definition. This clearly violates the well-established rules of statutory construction. It is a fundamental precept that statutes must be applied as written unless the statute is ambiguous or unclear. *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999) and *Metropolitan Council 23 v Oakland County*, 409 Mich 299, 318; 294 NW2d 578 (1980). It is also impermissible for a Court to broaden or narrow the construction of a statute to vary from the clearly expressed language

enacted by the Legislature. *McIntire,* at 153; *Guitar v Bieniek,* 402 Mich 152, 158; 262 NW2d 9 (1978). Further, effect must be given, if possible, to every word, sentence and section of a statute and no provision should be treated as surplusage or rendered a nullity. *McIntire*, at 156 n 3. *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980), *aff'd* 478 US 621; 106 S Ct 3129 (1986). *Travelers Ins Co v S & H Tire Co*, 134 Mich App 214, 225; 351 NW2d 279 (1994).

Nothing in the definition of interim response activity leads to the conclusion that it is a "*temporary* activity until a plan can be developed." In fact, the definition itself leads to the opposite conclusion. Neither "cleanup" nor "removal" are temporary measures. Furthermore, replacement of water supplies is clearly not temporary nor is it done without a plan. In numerous sites across the state, municipal water supplies have been extended or created in response to contamination. These measures are neither temporary nor necessarily quick. The sole temporal limitation in the definition of interim response activity is simply that such actions are taken "prior to the implementation of a remedial action." MCL 324.20101(1)(u). No further limitation on either the speed or scope of "interim response activity" is specified.

The Court of Appeals by its ruling has, in effect, amended the definition of "interim response activity" to include a speed component that was not included by the Legislature when it enacted Part 201. If the Legislature had intended to limit "interim response activity" to "quick" and "immediate" actions, as an element to differentiate an interim response activity from a remedial action, it would have expressly done so.

For example, in MCL 324.20114, the Legislature specified various affirmative obligations of liable owners and operators of facilities. MCL 324.20114(1) reads as follows:

> Except as provided in subsection (4), an owner or operator of property who has knowledge that the property is a facility and who is liable under section 20126 shall do all of the following:
> (a) Determine the nature and extent of a release at the facility.
> (b) Report the release to the department within 24 hours after obtaining knowledge of the release. The requirements of this subdivision shall apply to reportable quantities of hazardous substances established pursuant to 40 C.F.R. 302.4 and 302.6 (1989), unless the department establishes through rules alternate or additional reportable quantities as necessary to protect the public health, safety, or welfare, or the environment.
> (c) *Immediately* stop or prevent the release at the source.
> (d) *Immediately implement source control* or *removal measures* to remove or contain hazardous substances that are released after the effective date of the 1995 amendments to this section if those measures are technically practical, cost effective, and provide protection to the environment. At a facility where hazardous substances are released after the effective date of the 1995 amendments to this section, and those hazardous substances have not affected groundwater but are likely to, groundwater contamination shall be prevented if it can be prevented by measures that are technically practical, cost effective, and provide protection to the environment.
> (e) *Immediately* identify and *eliminate* any threat of fire or explosion or any direct contact hazards.
> (f) *Immediately initiate removal* of a hazardous substance that is in a liquid phase, that is not dissolved in water, and that has been released.
> (g) Diligently pursue response activities necessary to achieve the cleanup criteria specified in this part and the rules promulgated under this part. For a period of 2 years after the effective date of the 1995 amendments to this section, fines and penalties shall not be imposed under this part for a violation of this subdivision.
> (h) Upon written request by the department, take the following actions:
>
> > (i) *Provide a plan for and undertake interim response activities.*
> > (ii) Provide a plan for and undertake evaluation activities.
> > (iii) Take any other response activity determined by the department to be technically sound and necessary to protect the public health, safety, welfare, or the environment.
> > (iv) *Submit to the department for approval a remedial action plan that, when implemented, will achieve the cleanup criteria specified in this part and the rules promulgated under this part.*
> > (v) Implement an approved remedial action plan in accordance with a schedule approved by the department pursuant to this part. [MCL 324.20114(1) (emphasis added).]

This section differentiates between certain interim response activities that must be performed "immediately," MCL 324.20114(1)(c)-(f), and other response activities, including other interim response activities, that are not subject to this speed or timing requirement, MCL 324.20114

(1)(g) and (h)(i). Since the Legislature did not impose such a speed limitation in the general definition of "interim response activity," the Court of Appeals should not have done so here. See *Farrington v Total Petroleum*, 442 Mich 201, 210; 501 NW2d 76 (1993). ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.")

A second basic flaw in the Court of Appeals' analysis is that it narrowly focused only on the definitions of "interim response activity" and "remedial action" in Sections 20101(1)(u) and 20101(1)(cc) and failed to consider other relevant statutory provisions of Part 201 and its associated administrative rules, 1990 AACS R 299.5101 *et seq*, as a whole. (1990 AACS R 299.5101 - 299.5727 is set forth at App 206a - 229a.) See, *e.g.*, *Crawford v School District Number 6*, 342 Mich 564, 568; 70 NW2d 789 (1955) ("[The Legislature's] intention is to be drawn from an examination of the language itself, the subject matter under consideration, and the scope and purpose of the act."); *Metropolitan Council 23*, 409 Mich at 318 ("More often, however, an act must be construed as a whole, and the particular effect to be attached to any word, clause or provision determined from the context of the whole act, the nature of the treated subject matter, and the purpose and intention of the body that promulgated the act.")

The Court of Appeals' analysis fails to consider other provisions of Part 201 and its administrative rules, which indicate that "interim response activities" may include extensive, long duration activities, such as the soil and tank removal activities commenced by Woodland Oil in 1989, and they are not limited to quick or temporary activities. As noted above, MCL 324.20114(1) requires liable parties to perform certain response activities. These include, *inter alia*, "immediately implement[ing] some control or removal measures to remove a certain hazardous substance . . . .," MCL 324.20114(1)(d). Under the statutory scheme of Part 201, such

source control or removal measures are clearly included within the universe of "interim response activities" and distinct from remedial action required under, for example, MCL 324.20114(1)(h)(v).

The Part 201 administrative rules that were promulgated in July, 1990, shortly before the enactment of the current statutory definitions of "interim response activity" and "remedial action" in Part 201, even more clearly demonstrate that the Legislature intended "interim response activity" to include, among other things, source control measures such as the contaminated soil and tank removal that Woodland Oil commenced in 1989. Those rules defined "interim response activity" virtually identically to MCL 324.20101(1)(u). See 1990 AACS R 299.5101(o). (App 206a.) Additionally, Rule 501(2) shows that source control measures are "interim response activities" and provides:

> To minimize impacts on the public health and the environment from hazardous substances, *source control*, abatement, *or other interim response* activities shall be undertaken when it is feasible and prudent, consistent with the provisions of R 299.5509. [1990 AACS R 299.5501(2) (emphasis added) (App at 214a).]

As can be seen, Rule 509(2) expressly provides that "interim response activities may include, . . . removal of contaminated soils . . . [and] removal of . . . tanks and or other bulk storage containers." 1990 AACS R 299.5509(2)(f) and (g). (App at 215a.) Thus, contrary to the Court of Appeals' interpretation, it is clear that interim response activities are not limited to quick responses or temporary measures and may include precisely the same kind of action initiated by Defendants-Appellees in 1989.

While the general definitions of remedial action and interim response activity are similar, they are separate and distinct activities under Part 201. The distinction between these two activities cannot be discerned solely from their general definitions. Rather, these two terms, that are both categories of response activities, must be read in the context of Part 201 as a whole and

its implementing rules. While the Court of Appeals is technically correct in stating that Section 20118 of NREPA is not part of the definition of a remedial action, App 198a, this does not mean that it can be ignored when trying to understand the relationship between a "remedial action" and an "interim response activity" for purposes of Part 201. The Court must look to the whole statutory and regulatory scheme.

The Legislature's intent in enacting Part 201 of NREPA was two-fold: protecting the public and environment through response activities and requiring that the cost of cleaning up contaminated sites be borne by those responsible and not the state, MCL 324.20102. Part 201 created a framework for accomplishing these purposes by *inter alia* providing general definitions of various response activities in MCL 324.20101, affirmatively requiring owners and operators of facilities to perform various response activities identified in MCL 324.20114(1), and also, in MCL 324.20118(2), providing minimum requirements that a response activity must meet for it to be considered a remedial action under the statute. MCL 324.20118 states, in part:

> (1) The department may take response activity or approve of response activity proposed by a person that is consistent with this part and the rules promulgated under this part relating to the selection and implementation of response activity that the department concludes is necessary and appropriate to protect the public health, safety, or welfare, or the environment.
> (2) *Remedial action* undertaken under subsection (1) at a minimum *shall accomplish all of the following*:
> (a) Assure the protection of the public health, safety, and welfare, and the environment.
> (b) Except as otherwise provided in subsections (5) and (6), *attain a degree of cleanup and control of hazardous substances that complies with all applicable or relevant and appropriate requirements, rules, criteria, limitations, and standards of state and federal environmental law.*
> (c) Except as otherwise provided in subsections (5) and (6), *be consistent with any cleanup criteria incorporated in rules promulgated under this part.* [Emphasis added.]

If a response activity does not meet the minimum requirements set forth in MCL 324.20118(2), it is not and cannot be considered a remedial action under Part 201 of NREPA for any purpose,

including commencing the running of the statute of limitations. The Court of Appeals failed to consider the minimum requirements of a remedial action in its decision.

It is also important to recognize that any work approved by MDEQ in 1989 could not have met the requirements of a remedial action under Part 201, because not all the necessary criteria for a remedial action had yet been established. In fact the term "remedial action" was not even a part of the statutory scheme that was in place in 1989. The Michigan Environmental Response Act ("MERA"), MCL 299.601 *et seq*, 1982 PA 307, was the predecessor to Part 201 and the term remedial action was not contained in the statute until 1991. (1982 PA 307, App 201a.) In 1989 the various levels of cleanup that a response activity must attain to be a remedial action had not yet been promulgated. Rules were first promulgated in 1990. (See R 299.5101 through R 299.5727, effective July 12, 1990, App 206a - 229a). The 1990 rules were the first time the criteria for a remedial action were delineated.

MERA was substantially revised in 1990, effective July 1, 1991. 1990 PA 234. The 1990 revisions were modeled after the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC 9601 *et seq.* In 1994, MERA was recodified as Part 201 of the NREPA. 1994 PA 451. Part 201 was again amended in 1996 and the requirements for a remedial action are now set forth in MCL 324.20118, 324.20120a, and 324.20120b.

What occurred in 1989 at the Woodland Oil Site was a "response activity" under the then existing statute, 1982 PA 307, Section 3(j)[2], or at best, an "interim response activity" as now defined in Part 201. The activities did not constitute a remedial action. Contrary to the Court of

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[2] 1982 PA 307 § 3(j) stated: ""Response activity" means an activity necessary to protect the public health, safety, welfare, and the environment, and includes but is not limited to, evaluation, cleanup, removal, containment, isolation, treatment, monitoring, maintenance, replacement of water supplies, and temporary relocation of people as determined to be necessary by the governor or the governor's designee." [MCL 299.603(j).]

Appeals' July 27, 2001 Opinion, in 1989 MDEQ did not and could not have selected or approved a remedial action that was consistent with Part 201.

The fact ignored by both the Court of Appeals and the trial court is that MDEQ only approved a portion of the plan that was submitted by Defendants-Appellees. (App 24a.) The portion of the plan approved only dealt with removal of certain soils. It did not meet the requirements of MCL 324.20118, 324.20120a or 324.20120b or the requirements of a remedial action under the rules. See R 299.5601 through 299.5727. (App 218a - 229a.) Even the Court of Appeals recognized that a remedial action "is essentially a work plan that is designed and implemented to completely eliminate a hazard . . . . The statutes [sic] contemplates a plan to cure the problem." (App 198a.) MDEQ's partial approval of the plan, and Defendants-Appellees' implementation of a partial plan clearly did not cure the problem, or completely eliminate a hazard.

The portion of the plan approved by MDEQ was not enough to "cure the problem." The plan submitted included two additional phases of work. MDEQ staff testified that the work approved and undertaken by Defendants-Appellees did not fully clean up the Site. (App 63a - 64a.) MDEQ repeatedly asked Defendants-Appellees to undertake additional work, consistent with the statute. (App 20a, 21a, 24a, 26a, 28a, 30a, 32a and 35a.) Thus, a remedial action, even as defined by the Court of Appeals was never "approved" by the MDEQ, and the statute of limitations under MCL 324.20140(1)(a) could not have run. It is clear that Phase 1 was a removal of contaminated soil "prior to the implementation of a remedial action," and as such it falls squarely into the definition of interim response activity. See MCL 324.20101(1)(u).

The Court of Appeals' analysis of the distinction between "interim response activity" and "remedial action" under Part 201 is also at odds with the interpretation of the closely parallel

provisions of CERCLA, 42 USC 9601 *et seq*, upon which Part 201 was modeled. Both Michigan and Federal Courts have recognized that because of the similarity between CERCLA and Part 201, cases construing CERCLA may be relied upon in construing Part 201. See generally, *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 50; 645 NW2d 319 (2002); *Kelley v E.I. du Pont de Nemours & Co*, 786 F Supp 1268, 1280 (ED Mich 1992), *aff'd* 17 F3d 836 (CA 6, 1994); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 5; 596 NW2d 620 (1999); *Farm Bureau Mut Ins Co v Porter & Heckman*, 220 Mich App 627, 637; 560 NW2d 367 (1996); and *Flanders Industries v State of Michigan*, 203 Mich App 15, 21; 512 NW2d 328 (1993).

CERCLA, like Part 201, provides for "response" activities, a term of art which under the statutory definition in 42 USC 9601(25) is comprised of two distinct categories: "remedial action" as defined in 42 USC 9601(24) and "removal" action as defined in 42 USC 9601(23). The definitions of "remedial action" in CERCLA and Part 201 are quite similar. "Removal," as defined in CERCLA, closely corresponds to "interim response activity," as defined in MCL 324.20101(1)(u) and "evaluation" as defined in MCL 324.20101(1)(m). It is well established that "removal" actions under CERCLA may include extensive, relatively long duration clean-up activities, such as the 1989 soil and tank removal at issue here. See, *e.g. Kelley v E.I du Pont de Nemours & Co, supra*, 786 F Supp at 1276-1279 and 17 F 3d at 838-844 (excavation and disposal of more than 1,100 drums and 3,800 cubic yards of soil and related investigations performed over a 21 month period held a single "removal" action for statute of limitation purpose).

In the courts below, Defendants-Appellees asserted that MDEQ was essentially advocating that there was no statute of limitations for costs associated with interim response

activities. This is not MDEQ's position. Under the statute it is clear that the statute of limitations requires a claim to be brought within six years after initiation of physical on-site construction activities for the remedial action selected or approved by the MDEQ. This does not mean there is no statute of limitations. It simply means that the statute of limitations does not begin to run until a remedial action has been selected or approved by the MDEQ and on site construction has begun. Contrary to the arguments raised by Defendants-Appellees below, this does not mean that MDEQ has exclusive control over when and if the statute of limitations runs.

Only a defined set of parties is liable for response activity costs. Under Part 201, in order for a party to be liable, it must cause a release, be the generator or transporter of a hazardous substance at a facility, or fail to undertake a baseline environmental assessment when purchasing a facility. See MCL 324.20126(1). It is clear that the intent of Part 201 is to require liable parties to undertake clean up actions, including remedial actions. See MCL 324.20102(f) and MCL 324.20114. Under Part 201, MDEQ has six months to approve a remedial action plan. MCL 324.20114(8) states:

> Any request for approval of a [remedial action] plan shall be granted or denied within 6 months of submittal of the information necessary or required for the department to make its decision. If the department does not approve the plan, the reasons for the denial shall be provided by the department in writing with a complete and specific statement of the conditions or requirements necessary to obtain approval. The department may not add additional items to this statement after it has been issued. Failure of the department to act within the specified time period shall result in the request being considered approved. The time frame for decision may be extended by the mutual consent of the department and the person submitting the plan.

Therefore, under the statute, a liable party is in direct control of when the clock starts ticking on the statute of limitations. A liable party need only submit an approvable plan for a remedial action. MDEQ is required to grant or deny the plan within six months. Pursuant to MCL

324.20114(8), if MDEQ denies approval, the reasons for denial must be stated. The liable party can cure and resubmit the remedial action plan, starting the six-month review period.

Thus, a liable party, undertaking its statutory obligations to both diligently pursue response activities under MCL 324.20114(1)(g) and fully remediate a site of environmental contamination, has control over the statute of limitations by simply submitting an approvable remedial action plan and then undertaking the approved work. It is not solely within the MDEQ's discretion to determine if and when the statute of limitations will run.[3]

The Court of Appeals' determination, that the soil and tank removal activities that began in 1989 constituted "remedial action" rather than "interim response activity" under Part 201, is wrong as a matter of law. The Court of Appeals' interpretation of these terms is not supported by the plain language of the statute. It also conflicts with the apparent intent of the Legislature, as reflected in Part 201 as a whole, and the use of those and related terms in the Part 201 administrative rules and corresponding federal statute at the time the relevant provisions of Part 201 were enacted in 1990. It is clear, based on the record, that the portion of the plan approved by MDEQ did not meet the requirement of a remedial action under Part 201 nor was it approval of a plan that cured the problem.

Under Part 201 there is a difference between "interim response activities" and "remedial actions." A remedial action must meet certain statutory requirements to both comply with Part 201 and to receive approval of the MDEQ. MCL 324.20118(2) makes it clear that a remedial

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[3] Even if this Court were to conclude that Part 201 failed to include a statute of limitations for response activities that were not remedial actions, the more appropriate result would be to defer to the Revised Judicature Act ("RJA"), rather than invent new definitions for terms already defined under Part 201. Pursuant to MCL 600.5813 of the RJA, a six-year statute of limitations would apply from the date the cause of action accrued. In the context of a cost recovery action, a cause of action does not accrue until the costs are incurred. See Argument II, *infra*. In the case at hand MDEQ is seeking costs incurred after July 1, 1991. MDEQ filed its Complaint on April 11, 1997, within the six-year time frame specified in Section 600.5813 of the RJA.

action must comply with *all* relevant clean up criteria. A limited soil removal, such as the one undertaken by Defendants in 1989, does not address nor even consider all relevant criteria. It did not consider, let alone address, groundwater contamination. MDEQ does not dispute that it approved a plan for soil removal and that soil removal is a clean-up activity, but soil removal alone is not a remedial action. It does not address all relevant criteria, thus is not and cannot be a remedial action under MCL 324.20118(2).

Interim response activities are often undertaken before a remedial action plan is approved or implemented. It is an efficient way to address immediate concerns and threats at a site of environmental contamination. MDEQ has addressed the immediate concerns at this site through a series of interim response activities. Contrary to Bay Oil's assertions, contamination at this site has not been fully addressed. A remedial action plan has not been submitted, approved or selected by MDEQ. There is still a groundwater contamination problem that is being monitored by MDEQ. Among other things, no deed restrictions have been placed on the property, nor has a financial assurance mechanism been provided; thus a complete remedial action plan has not been submitted, approved or selected by MDEQ in accordance with MCL 324.20120b(3) and (4). Consistent with the intent of Part 201 and Defendants' statutory obligations, including MCL 324.20114, Defendants could submit a remedial action plan for approval, and thereby control the start of the statute of limitations.

II. The Court of Appeals' decision, holding that MDEQ's cause of action accrued before all the elements of a cost recovery claim were present, is wrong as a matter of law.

The issue to be reviewed by this Court is a question of law: is MDEQ's claim for response activity costs under Part 201 of NREPA barred by the statute of limitation contained in

Section 20140 of NREPA, MCL 324.20140? Therefore, the proper standard of review is *de novo*. *City of Port Huron v Amoco Oil Co, Inc; Wechsler; Smeets.*

The Court of Appeals held that MDEQ's claim for recovery of response activity cost incurred in 1991 accrued in 1989, *before MDEQ had even incurred the costs.* A claim cannot accrue until all of its elements are present. See *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972); *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 244; 492 NW2d 512 (1992); *Thomas v Process Equipment Corp*, 154 Mich App 78, 87; 397 NW2d 224 (1986); *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986). It is clear from the language and statutory scheme of Part 201 that incurring costs is an essential element of a cost recovery claim. Thus, a claim for response activity costs cannot accrue until the costs a plaintiff is seeking to recover have been incurred.

Section 20126(1) of NREPA identifies persons who are liable under Part 201. MCL 324.20126(1). Section 20126a(1) describes the scope of liability for persons who are liable under Part 201:

> (1) Except as provided in section 20126(2), a person who is liable under section 20126 is jointly and severally liable for all of the following:
>
> (a) *All costs* of response activity lawfully *incurred* by the state relating to the selection and implementation of response activity under this part.
>
> (b) Any other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this part. [MCL 324.20126(a)(1) (emphasis added).]

According to the plain language of these sections, a person listed in Section 20126(1) shall be liable for costs of response activity *incurred*.

The definition of response activity costs also leads to the conclusion that costs must be incurred before a claim accrues. "Response activity costs" is defined under Section 324.20101(1)(ff), as follows:

> "Response activity costs" or "costs of response activity" means all costs *incurred* in taking or conducting a response activity, including enforcement costs. [MCL 324.20101(1)(ff) (emphasis added).]

Costs "incurred" is within the very definition of response activity costs. It is therefore an essential part of a claim for response activity costs. Consequently, the costs a party is seeking to recover must be incurred before a claim for recovery of those costs can accrue.

Established case law interpreting the MERA, MCL 299.601 *et seq*, the predecessor to Part 201, and CERCLA, the federal statute that Part 201 is modeled after, also support the position that the costs a party seeks to recover must be incurred before the claim accrues. As set forth above, numerous cases have held that MERA and Part 201 should be interpreted in light of CERCLA and the cases that interpret CERCLA. See generally, *Genesco, Inc v Michigan Dep't of Environmental Quality; Kelley v E.I. du Pont de Nemours & Co*; *Cipri v Bellingham Frozen Foods, Inc*; *Farm Bureau Mut Ins Co v Porter & Heckman*; and *Flanders Industries v State of Michigan*.

The fact that these statutes are not identical in all respects does not preclude the courts from comparing relevant portions of the statutes. Although under Part 201 the definition of a liable party is more narrow in scope than the definition of a liable or responsible party under CERCLA, both statutes require essentially the same elements to establish a claim. "Like its federal counterpart [CERCLA], the MERA imposes liability where there has been (1) a release of a hazardous substance, (2) at a facility, (3) *causing plaintiff to incur response costs*, and (4)

defendant is a responsible party." *Cipri*, 235 Mich App at 5; *citing Farm Bureau Mut Ins Co*, 220 Mich App at 637, 639-641 (emphasis added).

This Court made it clear in *Shields v Shell Oil Co,* 463 Mich 939; 621 NW2d 215 (2000), that the incurrance of response activity costs was necessary for accrual of a claim for a recovery of response activity costs. In *Shields v Shell Oil Co*, 237 Mich App 682; 604 NW2d (1999), *rev'd* 463 Mich 939; 621 NW2d 215 (2000), the Court of Appeals held that a cause of action for cost recovery accrued when the contamination was discovered. The Court of Appeals interpreted Section 324.20140(2) which reads as follows:

> For recovery of response activity costs and natural resources damages that *accrued* prior to the effective date of this section, the limitation period for filing actions under this act shall be 3 years from that effective date. [MCL 324.20140(2), prior to amendment by PA 254 of 2000 (emphasis added).]

Due to the erroneous interpretation of the statute of limitations by the Court of Appeals, the Legislature amended Section 324.20140(2). The amended statute of limitations is set forth on pages 6 - 7 of this Brief. The amendment was intended to clarify that a cause of action did not accrue until costs were incurred. See MCL 324.20140(4). This Court granted a Motion for Peremptory Reversal in *Shields* and stated:

> In lieu of granting leave to appeal, the motion for peremptory reversal of the October 1, 1999, decision of the Court of Appeals is granted, and the June 2, 1997, order of the Oakland Circuit Court is vacated. Under either the former or amended version of MCL 324.20140; MSA 13A.20140, it is clear that only actions for recovery of response activity costs *incurred* before July 1, 1991, were subject to the July 1, 1994, limitation period. The matter is remanded to the Oakland Circuit Court for further proceedings. Jurisdiction is not retained. [463 Mich 939 (emphasis in the original).]

Thus, it is evident that this Court understood that the plaintiff must incur costs before its cause of action for cost recovery can accrue.

In the case at hand, the Court of Appeals has once again held that a cause of action for cost recovery can accrue before the costs the State is seeking to recover have been incurred. This

is clearly inconsistent with this Court's decision in *Shields* and with the statutory scheme. Under the Court of Appeals decision, MDEQ would be required to bring a cost recovery action within six years after a liable party initiated any activity that wasn't "quick" or "temporary," even if the MDEQ had not yet incurred costs. The facts of this case are not unusual. A liable party will often undertake some initial response activity in response to a release but fail to fully remediate or undertake an approvable remedial action as required by Part 201. (App 66a.) MDEQ is then left with taking over the cleanup. Depending on priorities, workload, and available funding, MDEQ's actions may happen immediately or the facility may be added to the list of facilities that need to be addressed at a later date.

It is nonsensical to require MDEQ to sue before it has incurred costs merely because the liable party has abandoned the work. This would require the courts to entertain claims even though the MDEQ had not incurred costs and may never incur costs. It could result in the statute of limitation running before a claim had ever accrued or before costs were incurred. This clearly was not the intent of the Legislature. The statute of limitations should not be interpreted to bar a cost recovery action because the liable party was able to piecemeal the work and drag out response activities.

MDEQ's Amended Complaint only sought costs incurred after July 1, 1991. (App 35a - 37a.). It is clear under both the original and amended versions of MCL 324.20140 that any costs incurred prior to July 1, 1991, the effective date of the statute, are barred. But claims for costs incurred after July 1, 1991 are not barred. No remedial action within the meaning of Part 201 has been selected or approved, thus Section 20140(1)(a) does not bar MDEQ's cost recovery action.

III. The Court of Appeals' decision is contrary to the intent of Part 201.

The issue to be reviewed by this Court is a question of law: is MDEQ's claim for response activity costs under Part 201 of NREPA barred by the statute of limitation contained in Section 20140 of NREPA, MCL 324.20140? Therefore, the proper standard of review is *de novo*. *City of Port Huron v Amoco Oil Co, Inc; Wechsler; Smeets.*

As set forth above, the clear intent of the Legislature in enacting Part 201 was to place the burdens associated with historical contamination on those who caused or contributed to the problem. This intent is evident from the statute itself:

> The legislature hereby finds and declares:
>
> * * *
>
> (d) That there is a need for additional administrative and judicial remedies to supplement existing statutory and common law remedies.
> (e) *That the responsibility for the cost of response activities* pertaining to a release or threat of release and repairing injury, destruction, or loss to natural resources caused by a release or threat of release *should not be placed upon the public* except when funds cannot be collected from, or a response activity cannot be undertaken by, a person liable under this part.
> (f) *That liability for response activities* to address environmental contamination *should be imposed upon those persons who are responsible for the environmental contamination.*
>
> * * *
>
> (h) That this part is intended to provide remedies for facilities posing any threat to the public health, safety, or welfare, or to the environment, regardless of whether the release or threat of release of a hazardous substance occurred before or after October 13, 1982, the effective date of the former environmental response act, Act No. 307 of the Public Acts of 1982, and for this purpose this part shall be given retroactive application. However, criminal and civil penalties provided in this part shall apply to violations of this part that occur after July 1, 1991.
>
> * * *
>
> [MCL 324.20102 (emphasis added).]

The Court of Appeals' decision in the case at hand directly contradicts this legislative intent by placing the burden of cleanup costs on the State, when a liable party has failed to meet its

statutory obligations to fully remediate a site of environmental contamination in a timely fashion. This Court should not allow the intent of the statute to be defeated by an erroneous interpretation of the statute of limitations contained in Part 201.

Relief

For the reasons set forth above, Plaintiffs respectfully request that this Court reverse the decision of the Court of Appeals and hold that the statute of limitations for response activity costs under MCL 324.20140(1)(a) does not begin to run until initiation of on-site construction of a remedial action selected or approved by the MDEQ, and that a response activity is not a remedial action unless it meets the statutory requirements of Part 201, as set forth in MCL 324.20118(2), 324.20120a and 324.20120b and the requirements of the Part 201 Rules, R 299.5101 - 299.5727.

Respectfully submitted,

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