JUDICIAL ALTERATION OF ADMINISTRATIVE WATER POLLUTION STANDARDS

There is a movement in environmental law to make administrative agencies more accountable for their decisions, more responsive to the complaints of the individual citizen and conservationist groups. The Michigan Environmental Protection Act of 1970 (EPA)[1] reflects that movement by allowing Michigan citizens to initiate environmental law enforcement through the judicial system.[2] (Previously, citizens had to rely solely on complaints to administrative agencies.) The Act is unique, however, in the degree of control and type of intervention it permits courts to exercise over decisions made by Michigan's administrative agencies.

A recent decision, *Lakeland Property Owners Association v. Northfield Township*,[3] was the first EPA case in which a Michigan circuit court utilized the broad relief powers granted it under the Act[4] to rewrite pollution standards fixed by a state environmental agency.[5] In *Lakeland*, defendant township was piping inadequately treated sewage into a river upstream from plaintiffs. Plaintiffs challenged this operation of defendant's water treatment plant, presenting evidence that the receiving waters were polluted and would remain so despite compliance with the State's Water Resources Commission (WRC) standards.[6] Plaintiffs also contested a proposed enlargement of the

1. MICH. STAT. ANN. §§ 14.528(201)-(207) (Supp. 1973).

2. MICH. STAT. ANN. § 14.528(202) (Supp. 1973).

3. 3 ERC 1893 (Mich. Cir. Ct. 1971).

4. MICH. STAT. ANN. § 14.528(202) (Supp. 1973) states:

(2) In granting relief provided by subsection (1) where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

(a) Determine the validity, applicability and reasonableness of the standard.

(b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

5. The Water Resources Commission involved in this case is given primary responsibility for regulating effluent levels in State waters. MICH. STAT. ANN. §§ 3.521-3.532 (1969). Section 3.522 provides in part: "The commission shall... have control of the pollution of . . . waters of the state . . . which are or may be affected by waste disposal of municipalities . . . ."

6. 3 ERC at 1896-7.

treatment plant and sought a restraining order against any expansion.[7]

The trial judge ruled that effluent standards even more restrictive than those set by the WRC were required if pollution was to be prevented,[8] and that by authority of EPA section 2(2)(a) & (b), he could direct the WRC to adopt a different pollution standard. The court then specified a new standard to be adopted by the WRC and met by defendant before it could expand its plant.[9] The court summarily rejected defendant's assertion that EPA section 2(2) was an unconstitutional delegation of legislative power, granting courts too much control over administrative agency decisions.[10]

The United States Constitution contains no specific provision that the three kinds of governmental power, executive, legislative and judicial, must be kept separate, but the Supreme Court in 1881 felt strict separation was essential to our system of government.[11] Since then, concern for adequate checks and balances has replaced insistence

7. *Id.* at 1895-96.

8. When suit was filed, defendant sought a remand to the WRC, alleging that plaintiffs could challenge the WRC's standards only by appeal to that Commission. The court denied this motion, citing the discretionary power given it under the EPA. MICH. STAT. ANN. § 14.528(202)(1) (Supp. 1973) states: "[A]ny person . . . or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief . . . ." MICH. STAT. ANN. § 14.528(204)(2) (Supp. 1973) states: "If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings . . . ."

Defendant then returned to the WRC, which issued a revised and more stringent order after a rehearing that was boycotted by plaintiffs. Amended Final Order of Determination, Water Resources Commission Proceedings Against the Township of Northfield for Abatement of Pollution of the Horseshoe Drain and the Huron River, No. 1478 (March 18, 1971). The revised order was placed in evidence at the trial, but the judge held that even compliance with the new standards was not satisfactory.

9. 3 ERC at 1902. The court's new standards made only two minor quantitative changes in the WRC order and added two additional requirements that were relatively insignificant. Amended Final Order of Determination, Water Resources Commission Proceedings Against the Township of Northfield for Abatement of Pollution of the Horseshoe Drain and the Huron River, No. 1478 (March 18, 1971).

10. 3 ERC at 1901.

11. Kilborn v. Thompson, 103 U.S. 168, 190-91 (1881); *see* Parker v. Kennedy, 212 F. Supp. 594 (S.D.N.Y. 1963); Louisville Provision Co. v. Glenn, 18 F. Supp. 423 (W.D. Ky. 1937); People v. Commonwealth Edison Co., 367 Ill. 260, 11 N.E.2d 408 (1937).

on strict separation,[12] with the result that legislative and adjudicatory power,[13] as well as executive functions,[14] may be conferred upon administrative agencies. There has been more reluctance to allow the delegation of non-judicial powers, especially legislative powers, to the courts,[15] but the doctrine of separation of powers is rarely invoked to prevent such delegation, because of the difficulty of drawing the line between judicial and legislative responsibility. A presumption of constitutionality is generally afforded any delegation of power by the legislature,[16] so courts tend to characterize most delegations as consistent with judicial responsibility.

Michigan initially favored a strict separation of powers.[17] The State constitution[18] was held to preclude the legislature from delegating its lawmaking powers to another body.[19] Increasingly, however, Michigan courts have resorted to characterizing a delegated power as something other than the authority to make, alter or repeal law,[20]

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12. K. DAVIS, ADMINISTRATIVE LAW TEXT 24-25 (3d ed. 1972) [hereinafter cited as DAVIS].

13. Reconstruction Fin. Corp. v. Bankers Trust Co., 318 U.S. 163 (1943); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).

14. Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935). Such powers were believed necessary if the agencies were to serve as adjuncts through which the legislature, ill-suited for handling masses of detail, could implement its policies.

15. Buback v. Romney, 380 Mich. 209, 156 N.W.2d 549 (1968); Goethal v. Board of Supervisors, 361 Mich. 104, 104 N.W.2d 794 (1960) (any attempt to vest courts with legislative authority is invalid); Johnson v. Kramer Bros. Freight Lines, Inc., 357 Mich. 254, 98 N.W.2d 586 (1959) (in absence of constitutional provisions to the contrary, legislature may not confer non-judicial powers on the judiciary); Cicotte v. Damron, 345 Mich. 528, 77 N.W.2d 139 (1956) (judicial usurpation of functions of an administrative body is forbidden by the constitution).

16. State v. Watts, 186 N.W.2d 611 (Iowa 1971); State v. Stenhoek, 182 N.W.2d 377 (Iowa 1970); *see* Annot., 79 L.Ed. 474, 484-87 (1935).

17. Dearborn Township v. Dail, 334 Mich. 673, 55 N.W.2d 201 (1952).

18. MICH. CONST. art. IV, § 1 directs that "The legislative power of the State of Michigan is vested in a senate and a house of representatives." This was interpreted as confiding the exclusive authority to make, alter, or repeal laws to the legislature. Harsha v. City of Detroit, 261 Mich. 586, 246 N.W. 849 (1933).

19. O'Brien v. State Highway Comm'r, 375 Mich. 545, 134 N.W.2d 700 (1965); Chemical Bank & Trust Co. v. Oakland County, 264 Mich. 673, 251 N.W. 395 (1933); King v. Concordia Fire Ins. Co., 140 Mich. 258, 103 N.W. 616 (1905).

20. If a delegated power can be characterized as involving the interpretation or implementation of legislative policy, it is recognized to be within the legitimate scope of judicial power. Buback v. Romney, 380 Mich. 209, 156 N.W.2d 549 (1968); Johnson v. Kramer Bros. Freight Lines, Inc., 357 Mich. 254, 98 N.W.2d 586 (1959).

the traditional designation of a legislative power. This practice is consistent with the presumption of constitutionality adopted by the State's courts.[21]

Two doctrines are employed in Michigan to prevent undue or untimely judicial infringement upon the administrative realm: the primary jurisdiction doctrine, which governs whether a court or agency should make the initial decision in a particular case, and the doctrine of exhaustion, which governs the timing of judicial review.

The primary jurisdiction doctrine[22] provides that where agencies have been created by the legislature to regulate a subject matter at issue, court action should be postponed until that agency renders a decision on the issue.[23] Judicial appraisal of the need or lack of need to resort to administrative judgment or fact-finding often determines whether the doctrine is applicable.[24]

According to the exhaustion doctrine, courts should not ordinarily review factual decisions of administrative bodies until an aggrieved party has first pursued all available administrative review.[25] Before exhaustion is required, a remedy must be obtainable from the administrative agency.[26] In addition, the rule is not imposed if exhaustion would be a waste of time,[27] *e.g.*, when the agency has ruled on the issue and is unlikely to change its mind.

In *Lakeland,* the primary jurisdiction doctrine was satisfied because the administrative agency responsible for resolving the issue

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21. People v. Victor, 287 Mich. 506, 283 N.W. 666 (1939); People v. Bandy, 35 Mich. App. 53, 192 N.W.2d 115 (1971).

22. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 19.01-09 (1958); Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations,* 65 YALE L.J. 315 (1956); Jaffe, *Primary Jurisdiction,* 77 HARV. L. REV. 1037 (1964).

23. Far East Conference v. United States, 342 U.S. 570, 574 (1952). *See also* United States v. Western Pac. R.R., 352 U.S. 59 (1956).

24. DAVIS 381.

25. United States v. Collins, 339 F. Supp. 767 (W.D. Mich. 1972). Although the doctrine is mentioned approvingly in court opinions, exceptions to its application are frequently found. DAVIS 382-92.

26. Trever v. City of Sterling Heights, 37 Mich. App. 594, 195 N.W.2d 91 (1972); Schwall v. City of Dearborn, 31 Mich. App. 169, 187 N.W.2d 543 (1971). *See also* Trojan v. Township of Taylor, 352 Mich. 636, 639, 91 N.W.2d 9 (1958); Welfare Employees Union v. Civil Serv. Comm'n, 28 Mich. App. 343, 348-49, 184 N.W.2d 247, 249-50 (1970).

27. Welfare Employees Union v. Civil Serv. Comm'n, 28 Mich. App. 343, 348-49, 184 N.W.2d 247, 249-50 (1970).

had rendered its decision prior to judicial involvement. Court action preceded exhaustion of all administrative remedies, however, since no appeal was made of the WRC order of determination.[28] Plaintiffs argued that the exhaustion doctrine did not apply because they had not been parties to the original proceedings before the WRC. Certainly, though, they were free to intervene in the original WRC action and make themselves parties.[29] Thus, the issue arises whether a plaintiff can skirt the exhaustion doctrine by refusing to participate in the original administrative proceedings relevant to his complaint. The judge in *Lakeland* avoided this issue by taking original jurisdiction of Lakeland's complaint as authorized by the EPA, rather than taking judicial review of the administrative agency's decision.[30]

In *Lakeland,* once the regulatory agency's standards were found to be deficient, the court proceeded to set what it felt were better standards instead of remanding the case to the agency for new standards. That action was consistent with the court's statutory authority under EPA section 2 (b), but the wisdom of courts undertaking to set quantitative standards is questionable, as is the constitutionality of delegating such authority to the courts.

With respect to the wisdom of setting quantitative standards, there is certainly more and more pressure on courts to intervene in the administrative process. Some persons suggest that the nature of environmental rights, *i.e.,* the irrevocability of their breach, justifies broader and deeper court review.[31] Skepticism that present institutions can effectively balance opposing priorities prevails, and active judicial involvement is seen as the only means of effecting any significant change in agency policy decisions.[32] While more involvement

28. An agency may order a rehearing in a contested case on its own motion or on request of a party. MICH. STAT. ANN. § 3.560(187) (Supp. 1973).

29. The Administrative Procedure Act's notice provisions are designed to try to insure that any person likely to be affected by a ruling shall be allowed the chance to participate. MICH. STAT. ANN. § 3.560(141), (142) (Supp. 1973).

30. MICH. STAT. ANN. § 14.528(202) (Supp. 1973). The judge declared that his action was not judicial review, because plaintiffs were not appealing the WRC order but were attacking the future conduct of Northfield that would be based on that order.

31. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law,* 70 COLUM. L. REV. 612, 643 (1970). *But cf.* Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality,* 17 U.C.L.A.L. REV. 1070, 1077 (1970).

32. Note, *Michigan Environmental Protection Act of* 1970, 4 J.L. REFORM 121, 121-122 (1970); *see* Sive, *supra* note 31, at 615, 650; Comment, *Private*

may be necessary and appropriate, *Lakeland* suggests care should be taken as to the extent of judicial involvement.[33] Courts do not have the resources nor the time to conduct the fact-finding and technical evaluation necessary to set quantitative standards.[34] This conclusion was reached by the Supreme Court when, taking note of the complex scientific issues inherent in so much environmental litigation, the Court expressed concern about the potential drain on court resources and the difficulties of fact-finding, and suggested that courts not take too much of such fact-finding upon themselves.[35]

As for the constitutionality of delegating the power to set quantitative standards, the defense in *Lakeland* argued that section 2(b) of the EPA was an unconstitutional delegation of legislative power.[36] Another Michigan circuit court in *Roberts v. Michigan*,[37] an earlier EPA case, accepted that argument. That court concluded that under section 2(b) it was "being called upon to make law [a legislative power that cannot be delegated] when, after determining the standards to be deficient (in relation to pollution arising from the use of

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Remedies for Water Pollution, 70 COLUM. L. REV. 734, 735, 752 (1970). The Michigan Environmental Protection Act was drawn in response to the apparent inability of Michigan environmentalists to obtain adequate relief from administrative agencies. Note, *Michigan Environmental Protection Act*, 4 J.L. REFORM 358, 360 (1970).

33. David Sive suggests that most important questions in environmental cases call more for the skill of judges than of administrative agencies. Sive, *supra* note 31, at 629-630. He may be right about policy issues like the relative social value of jeopardized resources and the balance of economic and social interests but the setting of quantitative standards necessary to implement public policy presents greater problems of competency. Perhaps Professor Davis has the best answer when he proposes that the degree of judicial review should vary according to the scientific complexity of the question and the comparative qualifications of the agency and the courts. The more technical an issue, the better it would be for the court to defer to the agency's superior ability to determine proper quantitative standards. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.09, at 241 (1958).

34. One might argue that administrative agencies should serve as investigative adjuncts for the judiciary in these cases, but that was not the legislative intent. *See* Note, *Michigan Environmental Protection Act*, 4 J.L. REFORM 358, 365-66 (1970).

35. "The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic." Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 504 (1971).

36. 3 ERC at 1900.

37. 2 ERC 1612 (Mich. Cir. Ct. 1971), *aff'd on other grounds*, —Mich. App.—, 206 N.W.2d 466 (1973).

motor vehicles), it is then to 'direct the adoption of a standard approved and specified by the court.' "[38]

Plaintiff in *Roberts,* concerned about the adequacy of Michigan's auto air pollution regulations, had sued the Secretary of State, alleging that the Secretary violated the EPA by granting licenses to operate polluting vehicles. Plaintiff sought to have the licensing and operating of all motor vehicles enjoined until adequate standards were established and enforced. The judge refused to grant the requested relief sought under EPA section 2, and held that section 2 was an unconstitutional delegation of power, because the power to make, alter, amend, and repeal laws was nondelegable to the courts.[39]

Initially, *Roberts* and *Lakeland* would seem to be in conflict, in that one says the legislature can delegate to the judiciary the power to set new standards, and the other says the legislature can not.[40] The cases may be reconciled, however, because the issue in Roberts revolved around automotive pollution standards set by statute, whereas *Lakeland* involved standards set by an administrative agency. The EPA section 2 (2) empowers a trial court to rewrite pollution standards *"fixed by rule or otherwise, by an instrumentality or agency of the state* or a political subdivision thereof."[41] "Or otherwise," when read under the rule of *ejusdem generis,*[42] suggests standards fixed by regulation, order, resolution, etc., but not those fixed by statute or a constitution. On that basis, the language of section 2 (2) would not authorize the changing of standards fixed by a statute, and the *Roberts* decision not to grant relief would be correct. The result in *Roberts* is thereby reconciled with *Lakeland,* because courts by the language in section 2 (2) are empowered to change administrative standards.[43]

38. *Id.* at 1614.

39. *Id.*

40. The *Lakeland* court did not try to resolve the conflict. Instead it stated that *Roberts* was not controlling since the holding had been restricted to the question of pollution from motor vehicles, and that any dispute between the circuits would have to be decided on the appellate level. 3 ERC at 1901.

41. Note 4 *supra* (emphasis added).

42. The "ejusdem generis" rule is that where general words follow an enumeration by words with a specific meaning, such general words are to be construed as applying only to the same general class as those specifically mentioned. BLACK'S LAW DICTIONARY 608 (rev. 4th ed. 1968).

43. Professor Joseph Sax, the drafter of the model proposals for the EPA, lends support to this analysis. In a recent article, he states that § 2 was not directed to standards set by the legislature. Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report,* 70 MICH. L. REV. 1004, 1064 (1972).

Although the results in *Lakeland* and *Roberts* may be rendered consistent by statutory construction, that does not resolve the issue of whether empowering courts to change administrative standards is an unconstitutional delegation of legislative power. Since *Roberts* involves changing legislative standards, the constitutional question might not be resolved on appeal; the case can be decided on the basis that section 2 (b) does not apply.[44] *Lakeland,* however, is not presently on appeal, so the constitutional question it presents may not be encountered by higher Michigan courts for some time.

To date no appellate decision has ruled on the constitutionality of the Michigan Environmental Protection Act of 1970.[45] It seems likely, however, that section 2 will be upheld. First, it is the constitutionally declared public policy of Michigan to protect the environment from pollution,[46] and any statute founded on that policy will be favored by a strong presumption of constitutionality. Second, it is acknowledged that the determination and implementation of legislative policy is an appropriate function of the courts. Since the legislature has decided that having the power to change administrative standards is a tool required by courts to implement legislative policy, it will be difficult for the courts to refuse to respect that decision.[47] Nevertheless, courts in future cases will probably be far more reluctant than the *Lakeland* court to direct an administrative agency to adopt specific quantitative standards.

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44. The Court of Appeals of Michigan did in fact avoid the constitutional question. There being other grounds for decision, the court held it was an error for the trial court to decide the constitutionality of the Environmental Protection Act of 1970. Roberts v. Michigan, —Mich. App.—, 206 N.W.2d 466, 467-68 (1973). No mention was made of the *Lakeland* decision.

45. Every significant issue raised by the EPA remains unresolved by appellate courts. Sax & Conner, *supra* note 43, at 1007.

46. MICH. CONST. art. IV, § 52.

47. *See* Note, *The Constitutional Question: Vagueness and Delegation of Powers,* 4 J.L. REFORM 397, 408-412 (1970).