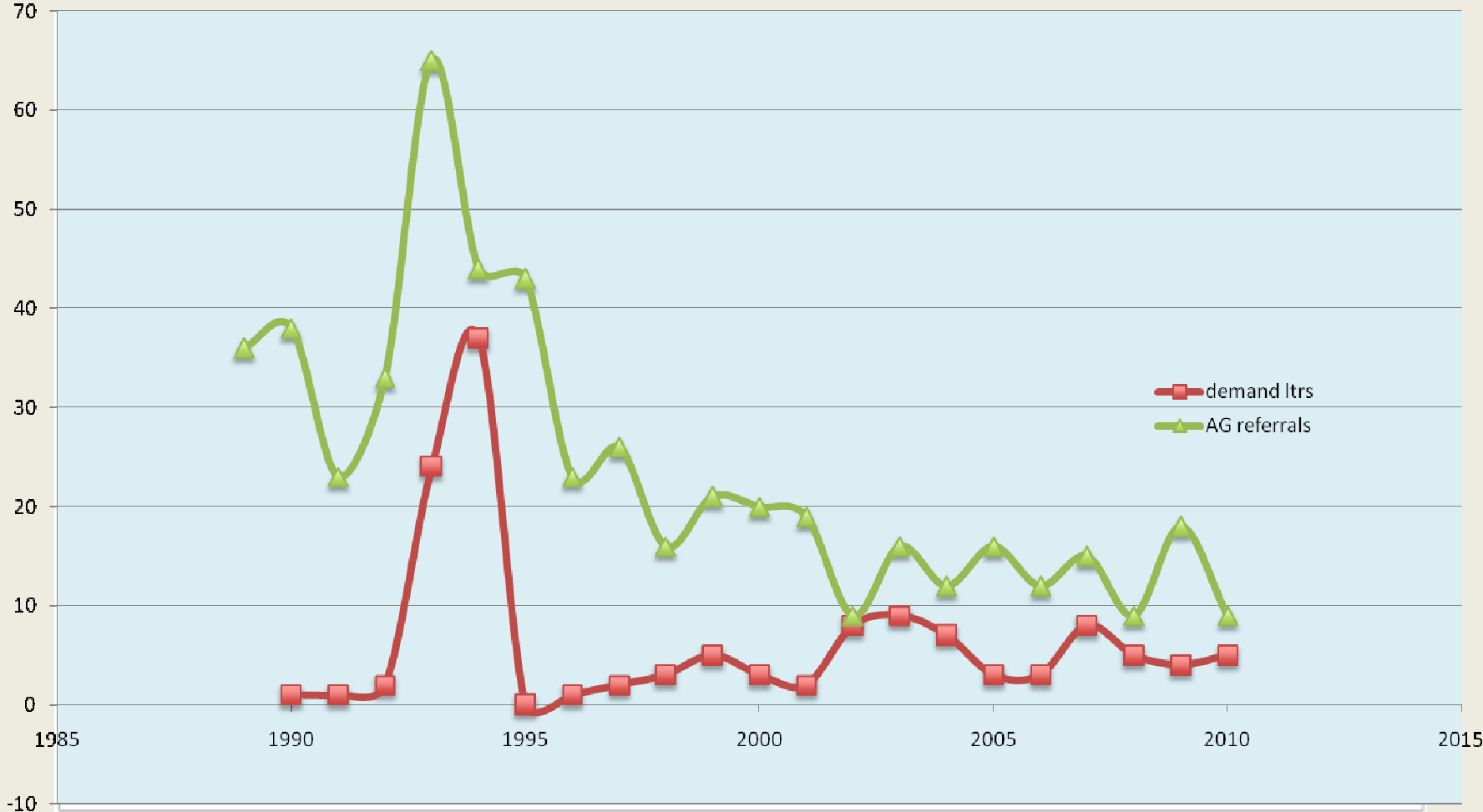


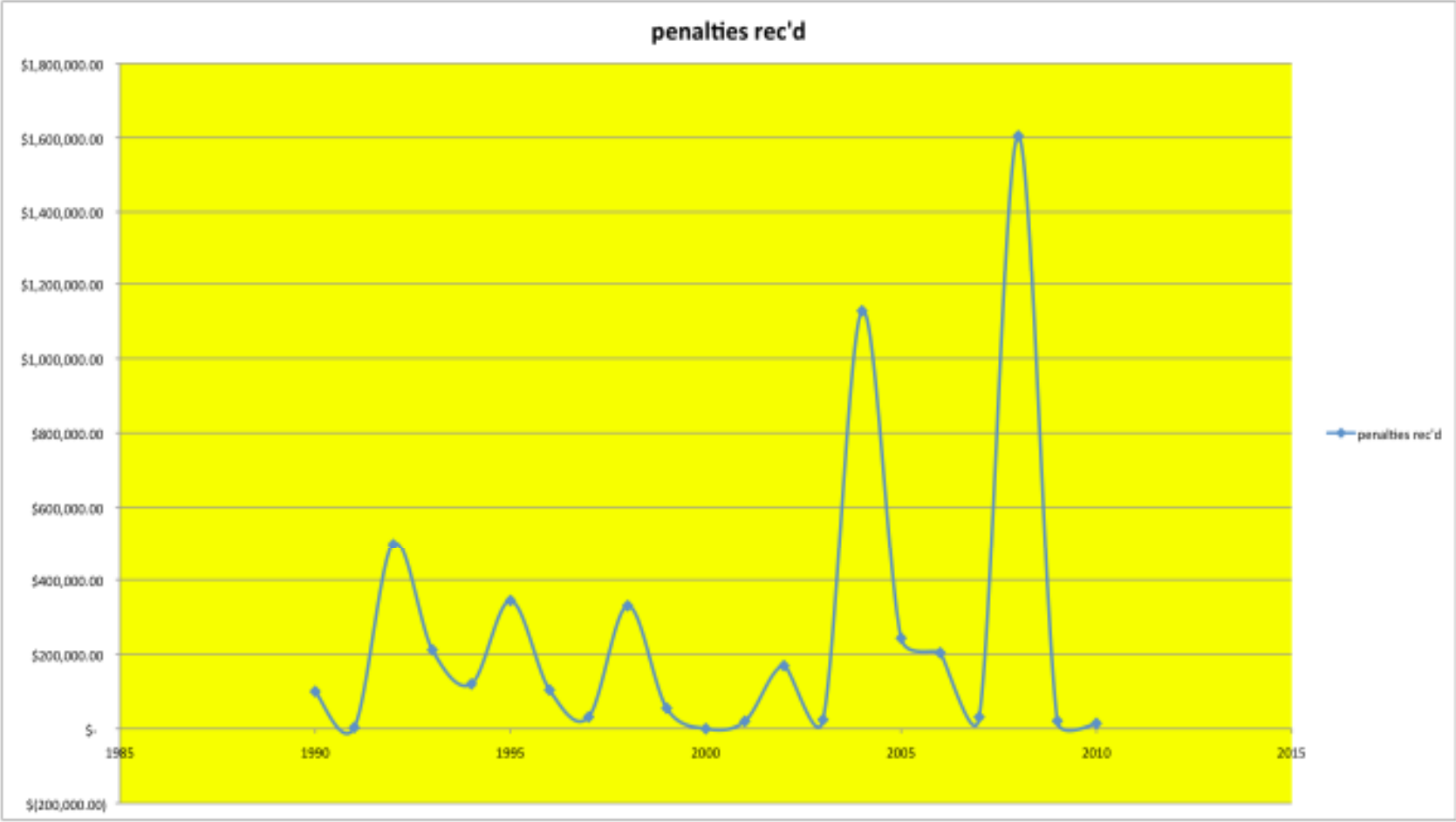
Enforcement, Cost Recovery, and Legal  
Compulsion in the 2010 Part 201  
Amendments

James P. Enright  
Enright Law Firm PLLC  
January 19, 2011

# RD Demand Letters and AG referrals FY90-FY10



# RD Penalties Received FY90 – FY10



# Site Entry

“Provide reasonable cooperation, assistance, and access to the persons that are authorized to conduct response activities at the facility, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of a complete or partial response activity at the facility.”

“Nothing in this subdivision shall be interpreted to provide any right of access not expressly authorized by law, including access authorized pursuant to a warrant or a court order, or to preclude access allowed pursuant to a voluntary agreement.”

Section 20107a (1)(d)

However, Section 20135a still exists, without amendment.

# Additional Due Care Duties

“Comply with any land-use or resource use restrictions established on or relied on in connection with the response activities at the facility.”

Section 20107a(1)(e)

“Not impede the effectiveness or integrity of any land-use or resource use restriction employed at the facility in connection with response activities.”

Section 20107a(1)(f)

# Changes in Downgradient Migration Notices

## Section 20114(1)(b)(ii)

Standard is “reason to believe” - this term is not explained in statute. See Rule R522.

Formerly, the property owners to be notified were those “affected by” the migration. Now, it is those properties where the hazardous substances “are present.”

Rule 522 was not rescinded.

# “Trust but Verify”

Signed affidavit to be submitted with a no further action report stating that the information is complete and true to the best of the person's knowledge.

Section 20114c(5)

Felony penalties for a person who “misrepresents his or her qualifications under section 20114d or 20114e.”

Section 20139(2)(d)

Sections 20114d or 20114e deal with no further action reports and the response activity review panel, respectively.

## Legal Aspects of the Response Activity Review Panel Process (Section 20114e)

- Available to a person who submitted a response activity plan or no further action report, and has a technical or scientific dispute, including disputes regarding assessment of risk and venting groundwater.
- Petition to Director – Director may schedule negotiation, or dispute goes to a five-member review panel, which makes a recommendation to the Director based on the majority of its votes cast.

- Director to schedule a meeting of the panel within 45 days after receiving the initial petition – Panel's recommendation to be made within 45 days after hearing the dispute - Director to issue a final written decision within 60 days after receiving written notice of the panel's recommendation - final decision is subject to judicial review under Revised Judicature Act Section 631, generally requiring a petition to the circuit court within 21 days of the decision.
- This is not a contested case.

## Changes in Response Cost Recovery Provisions

To be recoverable, cost of response activity formerly had to be “necessary.” That term has been deleted.

Formerly, to be recoverable, response costs had to be “incurred reasonably consistent with rules” - now they must be “reasonably incurred under the circumstances.”

Section 20126a(1)(b)

# Liability Exemptions

1. Lessee exemption: terms of exemption are clarified by referring to “the leased property” – and exemption’s validity is reaffirmed.

Section 20126(3)(j)

2. New exemption for “wind energy conversion system” activities - covers persons engaged in use of property for setting, constructing, operating, removing such a system or any of its components.

Section 20126(3)(k)

# Safeguards for Remedy Shortfalls

A person “may” be liable for:

- a subsequent release not addressed in a no further action report if the person is otherwise liable for the release;
- environmental contamination not addressed in a no further action report if the person is otherwise liable;
- liability for additional response activities associated with changing land-use or resource use restrictions, or monitoring; and
- additional activities needed to meet performance objectives, if those stated in the no further action report were insufficient.

Section 20126(4)(e)

## How the Amendments Affect Case Law: Failure to Make Required Disclosure Can Void a Lease

A contract which transfers control over a facility without the requisite disclosure of contamination is against public policy and is therefore void. In this case, the parties' lease was void as against public policy.

1031 Lapeer LLC v Rice (2010)

*The key provision (Section 20116) was not affected by the amendments.*

## How the Amendments Affect Case Law: Response Activity Review Panel Now Allows Pre- Enforcement Review

Under the NREPA, generally a state court does not have jurisdiction to review challenges to a response activity selected or approved by the DEQ or to review an administrative order, but it has jurisdiction over an action challenging a response activity selected or approved by the DEQ under a particular statutory provision if the action is filed after the completion of the response activity.

Cairns v East Lansing (2007)

*New Section 20114e (response activity review panel), with the possibility of RJA 631 review, counters the pre-amendment case law and pre-amendment statute on this.*

## How the Amendments Affect Case Law: Joint and Several Liability, and Shifting the Burden of Proof

Under the NREPA, once a party is found liable under the act, he is jointly and severally liable for all response activities at the facility. A person shown to be prima facie liable has the burden to show that he was not actually liable for the contamination at issue.

Department of Environmental Quality v Waterous Co (2008)

*The 2010 amendments made a substantial change in this, with Section 20126(6) now deleting the shifting burden of proof between the department and the defendant, and stating that the department has the burden of proof.*