

COURT OF CLAIMS  
FOR THE STATE OF MICHIGAN

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**PETER BORMUTH,**

Civil No: 15-205-MZ

Plaintiff,

Judicial Officer: Hon. Cynthia D. Stephens

V

**MICHIGAN DEPARTMENT OF TRANSPORTATION  
& KIRK T. STEUDLE, DIRECTOR**

Defendants.

**PLAINTIFF'S COMPLAINT**

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**Peter Bormuth, Plaintiff**

**David Brickey**

**In Pro Per**

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## **PLAINTIFF'S COMPLAINT**

### **INTRODUCTION**

- 1) On June 22, 2015 the Plaintiff was driving on US 127 by the I 94 intersection and saw an Orange Road truck spraying herbicide on the roadsides.
- 2) The Plaintiff subsequently learned that this MDOT truck was authorized to spray herbicides containing 2,4-dichlorophenoxyacetic acid (known as 2, 4-D), Sulfometuron Methyl, Metsulfuron methyl, Imazapic, Aminopyralid, Imazapyr, Isopropylamine salt of Imazapyr, Glyphosate, Indaziflam, Aminocyclopyrachlor, Triclopyr, Triclopyr-2-butoxyethyl ester, Fluroxypyr, and Dicamba on our roadsides, individually or in combination.
- 3) The adjuvants Polyacrylamide, Polysaccharidepolymers, Poly-1-p-Menthene, Nonionic, Ammonium sulfate, Methylated seed oil blend and emulsifiers, Limonene, Methylated vegetable oil, and Alkyl Hydroxypoly Oxyethylene are also used.
- 4) 2, 4-D and Glyphosate were the two active ingredients in Agent Orange.

### **PARTIES**

- 5) Defendant Michigan Department of Transportation (hereafter MDOT) is the State Governmental Agency responsible for Michigan's 9,669-mile state highway system, comprising of all M, I, and US routes.
- 6) Defendant Kirk T. Steudle is Director of the Michigan Department of Transportation.
- 7) Plaintiff Peter Bormuth is a Pagan Druid, avid canoeist, and amateur naturalist.

## JURISDICTION

- 8) There is some question as to jurisdiction. On the surface, MCL 600.6419 has transferred jurisdiction to the Court of Claims.
- 9) However, this action is brought under MCL 324.1701 (1).
- 10) MCL 324.1701 (1) was the Legislatures response to a Constitutional mandate. [See Mich. Const. Art. 4, §52].
- 11) MCL 324.1701 provides for cases to be filed in the Circuit Court of jurisdiction.
- 12) The Supreme Court has stated that legislation that substantially changes NREPA violates Art. 4, §52. (See *State Highway Comm'n v. Vanderkloot*, 392 Mich 159, 194; 220 NW2d 416 (1974) (Levin, J., concurring) (“This language [mandatory legislative duty] also suggests that repeal or significant alteration of EPA by the Legislature would violate art 4, § 52”).
- 13) A primary purpose of NREPA, was that the NREPA should: *"permit courts to develop a common law of environmental quality, much as courts have developed a right to privacy."* (Press Release, Representative Thomas J. Anderson *Michigan Passes Landmark Environmental Law*, 2 July 1970).
- 14) The Court of Claims does not even have a CE case type designation for environmental cases and cannot possibly fulfil this primary function.
- 15) Fair notice is normally required before changes to a law. The Legislature failed to mention NREPA in passing MCL 600.6419 and failed to republish MCL 324.1701(1) as required by Article 4, § 25 of the Michigan Constitution. (*"No law shall be revised, altered or amended*

*by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length”).*

16) In *Ray v. Mason Co. Drain Comm’r*, 393 Mich 294 NW2d 883 (1975) the Supreme Court held that NREPA provides private individuals and other legal entities with standing to maintain actions in the Circuit Courts for declaratory and other equitable relief.

17) In *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993) the Michigan Supreme Court stated that *"it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority."* The Court explained in *People v Mitchell*, 428 Mich 364; 408 NW2d 798 (1987) at 370, that if a Court finds that a Michigan Supreme Court decision is no longer viable, it may state its disagreement with the case, but it is bound to follow it nonetheless.

18) The Plaintiff leaves it to the discretion of this Honorable Court to determine whether jurisdiction is proper.<sup>1</sup>

## **STATEMENT OF FACTS**

19) On June 22, 2015 the Plaintiff was driving on US 127 by the I94 intersection and saw an Orange Road truck spraying herbicide on the roadsides.

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<sup>1</sup> On July 2, 2015 the Plaintiff filed a complaint similar to the instant case in Circuit Court in Jackson County (4<sup>th</sup> Judicial District) under MCL 324.1701(1). The case was assigned to Hon. Judge John G. McBain. On July 23, 2015 Defendants made a motion for summary disposition claiming lack of subject matter jurisdiction under MCL 600.6419. At a hearing on August 20, 2015, the Court granted the defendant’s motion without prejudice. The order was filed and entered on the same date.

- 20) The Plaintiff had an agreement with Michael Overton, Administrator of Jackson County, that Jackson County would not use herbicide on the roadsides of Jackson County.
- 21) The Plaintiff contacted Administrator Overton by e-mail on 6-22-15 and asked if the roadside spray truck the Plaintiff had seen was a County truck and requested the trade names of any herbicide or growth inhibitor that was being sprayed.
- 22) Administrator Overton responded by e-mail on June 22, 2015 and informed the Plaintiff that Jackson County does not have a roadside spray program (though many county's do) and that the Plaintiff must have seen a MDOT truck.
- 23) On June 23, 2015 the Plaintiff replied to Administrator Overton by e-mail and requested that he contact MDOT and find out what herbicides or growth inhibitors were being used.
- 24) On June 24, 2015 Administrator Overton provided the Plaintiff with the MDOT Public Notice of their herbicide roadside spray program for the University Region comprising Clinton, Eaton, Hillsdale, Ingham, Jackson, Lenawee, Livingston, Monroe, Shiawassee, and Washtenaw Counties. (see Exhibit #1 – MDOT Public Notice)
- 25) MDOT claims this Public Notice published per Regulation 637 Act No. 451, Public Acts of 1994, as amended, gives MDOT the authority to spray herbicides containing 2,4-dichlorophenoxyacetic acid (known as 2, 4-D), Sulfometuron Methyl, Metsulfuron methyl, Imazapic, Aminopyralid, Imazapyr, Isopropylamine salt of Imazapyr, Glyphosate, Indaziflam, Aminocyclopyrachlor, Triclopyr, Triclopyr-2-butoxyethyl ester, Fluroxypyr, and Dicamba on our roadsides, individually or in combination.
- 26) MDOT claims this Public Notice published per Regulation 637 Act No. 451, Public Acts of 1994, as amended, gives MDOT the authority to mix and spray adjuvants

Polyacrylamide, Polysaccharidepolymers, Poly-1-p-Menthene, Nonionic, Ammonium sulfate, Methylated seed oil blend and emulsifiers, Limonene, Methylated vegetable oil, and Alkyl Hydroxypoly Oxyethylene on our roadsides, individually or in combination.

27) The MDOT authorized product **Roundup Pro Concentrate** contains the active ingredient Glyphosate which was found to be "probably carcinogenic to humans" by WHO's International Agency for Research on Cancer (IARC) in March of 2015. Glyphosate was one of two active ingredients in Agent Orange.

28) The MDOT authorized product **Oust Extra** contains the active ingredients Sulfometuron methyl and Metsulfuron. Methyl Sulfometuron methyl is slightly toxic to freshwater fish. While the compound may not present a significant threat to adult aquatic organisms, the embryo hatch stage of fathead minnow may be at particular risk from the presence of the compound at a low concentration of 0.71 mg/l. And thousands of tree kills caused by Metsulfuron methyl have been documented In Australia.

29) The MDOT authorized product **Plateau** contains the active ingredient Imazapic which is slightly toxic to fish, including rainbow trout and bluegill sunfish. Due to its persistence and mobility, imazapic has a moderate potential for ground water contamination.

30) The MDOT authorized product **Milestone** contains the active ingredient Aminopyralid which degrades very slowly with a total system half life of 462 to 990 days in water and 31.5 to 533.2 days in soil. Because of its environmental persistence, Aminopyralid use was suspended by the British Government in 2008.

- 31) The MDOT authorized product **Escort XP** contains the active ingredient Metsulfuron Methyl which can exist in the soil for more than 14 months and migrate more than 40cm. Thousands tree kills caused by Metsulfuron methyl have been documented in Australia.
- 32) The MDOT authorized product **Arsenal Powerline** contains the active ingredient Imazapyr which can cause severe irreversible eye damage. The half life of Imazapyr in soils ranges from 30 to 150 days. Adverse effects found in laboratory animals after chronic exposure to Imazapyr include the following: fluid accumulation in the lungs of female mice, kidney cysts in male mice, abnormal blood formation in the spleen of female rats, an increase in the number of brain and thyroid cancers in male rats, and an increase in the number of tumors and cancers of the adrenal gland in female rats.
- 33) The MDOT authorized product **Habitat** contains Isopropylamine salt of Imazapyr is a potential ground water contaminant. Imazapyr can cause severe irreversible eye damage. The half life of Imazapyr in soils ranges from 30 to 150 days. Adverse effects found in laboratory animals after chronic exposure to imazapyr include the following: fluid accumulation in the lungs of female mice, kidney cysts in male mice, abnormal blood formation in the spleen of female rats, an increase in the number of brain and thyroid cancers in male rats, and an increase in the number of tumors and cancers of the adrenal gland in female rats.
- 34) The MDOT authorized product **Rodeo** contains the active ingredient Glyphosate which was found to be "probably carcinogenic to humans" by WHO's International Agency for Research on Cancer (IARC) in March of 2015. Glyphosate was one of two active ingredients in Agent Orange.

- 35) The MDOT authorized product **AquaPro** contains the active ingredient Glyphosate which was found to be "probably carcinogenic to humans" by WHO's International Agency for Research on Cancer (IARC) in March of 2015. Glyphosate was one of two active ingredients in Agent Orange.
- 36) The MDOT authorized product **Polaris** contains the active ingredient Isopropylamine salt of Imazapyr which is a potential ground water contaminant. Imazapyr can cause severe irreversible eye damage. The half life of Imazapyr in soils ranges from 30 to 150 days. Adverse effects found in laboratory animals after chronic exposure to imazapyr include the following: fluid accumulation in the lungs of female mice, kidney cysts in male mice, abnormal blood formation in the spleen of female rats, an increase in the number of brain and thyroid cancers in male rats, and an increase in the number of tumors and cancers of the adrenal gland in female rats.
- 37) The MDOT authorized product **Esplanade 200 SC** contains the active ingredient Indaziflam which targets the nervous system in animal studies on rats and dogs. Degenerative neuropathology of the brain, spinal cord and sciatic nerve was reported in dogs following both subchronic and chronic oral exposure.
- 38) The MDOT authorized product **Perspective** contains the active ingredient Aminocyclopyrachlor which damages certain species of evergreen trees, particularly Norway spruce and white pine. On August 11<sup>th</sup>, 2011 the herbicide Aminocyclopyrachlor was banned from sale, use and distribution by the EPA. The Plaintiff is not sure why this product is still on the market.

- 39) The MDOT authorized product **Weedestroy AM-40** contains the active ingredient 2,4-dichlorophenoxyacetic acid, known as 2,4-D which has been classified as "possibly carcinogenic to humans" by WHO's International Agency for Research on Cancer (IARC) in 2015. 2,4-dichlorophenoxyacetic acid was the other active ingredient in Agent Orange.
- 40) The MDOT authorized product **Garlon 3A** contains the active ingredient Triclopyr which is slightly toxic to ducks and quail. There was a significant increase in breast tumors in female rats and mice fed Triclopyr. Triclopyr is highly toxic to several species of fish, including bluegill. Triclopyr is highly toxic to several species of water insects. Triclopyr causes injury to conifers at high application rates.
- 41) The MDOT authorized product **Garlon 4 Ultra** containing the active ingredient Triclopyr-2-butoxyethyl ester is moderately to highly toxic to fresh water fish.
- 42) The MDOT authorized product **Vista XRT** contains the active ingredient Fluroxypyr which irritates the eyes of rabbits in minuet doses. It is slightly toxic to all small mammals. Fluroxypyr is slightly toxic to the bluegill sunfish and highly toxic to the eastern oyster.
- 43) The MDOT authorized product **Momentum FX2** contains the active ingredients 2, 4-Dichlorophenoxyacetic Acid, Triclopyr and Fluroxypyr. 2,4-dichlorophenoxyacetic acid, known as 2,4-D has been classified as "possibly carcinogenic to humans" by WHO's International Agency for Research on Cancer (IARC) in 2015. Triclopyr is slightly toxic to ducks and quail. There was a significant increase in breast tumors in female rats and mice fed Triclopyr. Triclopyr is highly toxic to several species of fish, including bluegill. Triclopyr is highly toxic to several species of water insects. Triclopyr causes injury to conifers at high application rates. Fluroxypyr irritates the eyes of rabbits in minuet doses. It is slightly toxic

to all small mammals. Fluroxypyr is slightly toxic to the bluegill sunfish and highly toxic to the eastern oyster.

44) The MDOT authorized product **E-2** contains the active ingredients 2, 4-Dichlorophenoxyacetic Acid, Fluroxypyr, and Dicamba. 2,4-dichlorophenoxyacetic acid, known as 2,4-D has been classified as "possibly carcinogenic to humans" by WHO's International Agency for Research on Cancer (IARC) in 2015. Fluroxypyr irritates the eyes of rabbits in minuet doses. It is slightly toxic to all small mammals. Fluroxypyr is slightly toxic to the bluegill sunfish and highly toxic to the eastern oyster. Dicamba is moderately toxic by ingestion and slightly toxic by inhalation or dermal exposure. Dicamba is very irritating and corrosive and can cause severe and permanent damage to the eyes. Dicamba is highly mobile in the soil and may contaminate groundwater. **E-2** is listed as very toxic to aquatic life.

45) The MDOT approved product **41-A** contains the active ingredients Polyacrylamide and Polysaccharides polymers. **41-A** contains trace levels of acrylamide which is known to the State of California to cause cancer and birth defects or other reproductive harm.

46) The MDOT approved product **Nu-Film-IR** contains the active ingredient Poly-1-p-Menthene. **Nu-Film-IR** is not for aquatic use. It is not to be applied directly to water, or near areas where surface water is present.

47) The MDOT approved product **Improve** is a non-ionic surfactants. Studies have shown that non-ionic surfactants do not consistently improve the enzymatic hydrolysis of pure cellulose.

- 48) The MDOT approved product **Condition** contains the active ingredient Ammonium sulfate which is slightly irritating to eyes, skin, and respiratory systems.
- 49) The MDOT approved product **Sunset MSO** contains a Methylated seed oil blend and emulsifiers). Methylated Seed Oil is harmful if inhaled or absorbed through skin. Concentrate Methylated Seed Oil contains ethoxylated ingredients. Ethoxylates are formed by reactions of ethylene oxide. In the manufacturing process, some unreacted ethylene oxide as well as the contaminant 1,4-dioxane can become part of the final formulation. Both of these chemicals are considered likely human carcinogens.
- 50) The MDOT approved product **Cygnnet Plus** contains the active ingredients Limonene, Methylated Vegetable Oil, and Alkyl Hydroxypoly Oxyethylene. Limonene and its oxidation products are skin and respiratory irritants, and limonene-1,2-oxide (formed by aerial oxidation) is a known skin sensitizer. The solubilizer in **Cygnnet Plus**, nonylphenol polyethoxylate, has been linked to estrogenic effects in wildlife, including fish and amphibians. **Cygnnet Plus** contains ethoxylated ingredients. Ethoxylates are formed by reactions of ethylene oxide. In the manufacturing process, some unreacted ethylene oxide as well as the contaminant 1,4-dioxane can become part of the final formulation. Both of these chemicals are considered likely human carcinogens. Methylated Vegetable Oil is harmful if inhaled or absorbed through skin.

## **CLAIM FOR RELIEF**

**Multiple Violations of the Michigan Environmental Protection Act (NREPA) MCL 324.17**

51) Paragraphs 1 through 50 are incorporated as if fully set forth here.

52) The **Michigan Constitution, Article IV, S 52** states that: *“The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interests of the health, safety, and general welfare of the people. The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment and destruction.”* The State Courts are compelled to uphold and advance this constitutional provision.

53) The **Michigan Environmental Protection Act (NREPA) MCL 324.17** clearly states that *“Any person (or the Attorney General) may bring an action for declaratory or injunctive relief against any person for the protection of the air, water, and other natural resources and the public trust from pollution, impairment, or destruction.”* **MCL 324.1701 (1)**. This cause of action is brought under statute **MCL 324.17**.

54) The Plaintiff, Peter Bormuth, bringing this action *“must establish a prima facie case that the conduct of the defendants has polluted, impaired, or destroyed air, water, or other natural resources or is likely to do so.”* **MCL 324.1703**

55) In deciding whether the Plaintiff has proved his case, the Court must make detailed findings of fact, both to properly evaluate the claim and to allow the decision to be used as a benchmark for future decisions on similar issues. This later notion is referred to as developing a *“common law of environmental quality”*. See **Ray v. Mason Co. Drain Comm’r, 393 Mich 294 NW2d 883 (1975)**; also see **City of Jackson v. Thompson-McCully Co, 239 Mich App 482 608 NW2d 531 (2000)**.

56) The standard of review for MEPA cases requires the Court to conduct an independent de nova review of the issues and the Court may not defer to a regulatory agency's determination. See **West Michigan Environmental Action Council v. Natural Resources Comm'n, 405 Mich 741 275 Nw2d 538 (1979)**.

57) As a canoeist and fisherman who paddles the navigable waters of the State of Michigan over 200 days a year, including the Grand River which crosses US 127 in Jackson County, Brills Lake which borders Interstate I 94 in Jackson County, Sherman Lake which borders I 94 in Jackson County, Notten Lake which borders I 94 in Jackson County, the Raisin River which borders M 50 in Jackson County, and the Kalamazoo River which crosses M 60 in Jackson County, the Plaintiff has standing to bring this suit. In **National Wildlife Federation v. Cleveland Cliffs Iron Co, 684 NW2d 800 (2004)**, the Court found *"Injury can include the loss of recreational or other activities such as bird watching, canoeing, hiking, or farming when the opportunity to engage in those activities would be irreparably harmed by the challenged conduct."*

58) On April 27, 2015 the Plaintiff was returning from filing a brief in Federal Court (Eastern District of Michigan) in Detroit travelling west bound on I 94 when he suffered a flat tire in the vicinity of the old Cedar Knoll Rest Home. Not having a spare, the Plaintiff walked alongside the highway to Sargent Road and was potentially exposed to these dangerous chemicals sprayed by MDOT.

59) The Plaintiff gets his drinking water from a public well in a Park near Brooklyn Michigan that directly borders M 50. Several of these pesticides (herbicides) are known to migrate and contaminate water putting the Plaintiff's water supply at risk.

## **PRAYER FOR RELIEF**

60) Paragraphs 1 through 59 are incorporated as if fully set forth here.

61) The Plaintiff requests an immediate injunction from the Court halting this MDOT Roadside spray program in the University Region.

62) There is no need for a bond since the Defendants can use mechanical means (mowing) to maintain the roadsides on which they now use these toxic chemical sprays.

63) The Plaintiff further requests any other relief the Court deems just and proper.

Respectfully submitted,

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Dated: September 11, 2015