

STATE OF MICHIGAN  
IN THE SUPREME COURT

**Appeal from the Court of Appeals**  
**Patrick M. Meter, PJ, and Kristen Frank Kelly and Karen Fort-Hood, JJ.**

GARY HENRY and ALL OTHERS SIMILARLY  
SITUATED,

Plaintiffs-Appellees

Supreme Court No.: 136298

Court of Appeals No.: 266433

V

THE DOW CHEMICAL COMPANY,

Defendants-Appellants

Saginaw County Circuit Court  
L.C. No.: 03-47775-NZ

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**BRIEF *AMICUS CURIAE* ON BEHALF OF SCIENCE AND ENVIRONMENTAL  
HEALTH NETWORK, ECOLOGY CENTER, LONE TREE COUNCIL, MICHIGAN  
LEAGUE OF CONSERVATION VOTERS, MICHIGAN ENVIRONMENTAL COUNCIL  
and GREAT LAKES ENVIRONMENTAL LAW CENTER**

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TABLE OF CONTENTS

	<u>PAGE</u>
INDEX OF AUTHORITIES.....	iii
STATEMENT OF BASIS OF JURISDICTION.....	iv
STATEMENT OF QUESTIONS PRESENTED .....	v
STATEMENT OF FACTS .....	1
INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION.....	2
 ARGUMENT	
I. THE SAGINAW COUNTY CIRCUIT COURT CORRECTLY CERTIFIED THE CLASS OF PROPERTY OWNERS IN THE PRESENT CASE .....	3
II BOTH THE FEDERAL COURTS, UNDER THE “RIGOROUS ANALYSIS” STANDARD, AND STATE COURTS, UNDER SIMILARLY WORDED STANDARDS, HAVE CERTIFIED CLASS ACTIONS IN SITUATIONS SIMILAR TO THE ONE FACING THE FLOOD PLAIN PROPERTY OWNERS HEREIN.....	6
III. CLASS ACTIONS SUCH AS THE ONE CERTIFIED HEREIN ARE AN IMPORTANT PART OF THE EFFORT TO PRESERVE THE ENVIRONMENT FROM POLLUTION.....	9
CONCLUSION.....	13

**INDEX OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Brenner v Marathon Oil</i> , 222 Mich App 128, 565 NW2d 1 (1997).....	5
<i>Carter v Monsanto Co</i> , 2008 WL 1693652 (W Va Cir Ct, Putnam County, 2008) .....	8
<i>City of Detroit v Detroit United Railway</i> , 226 Mich 354; 197 NW 697 (1924).....	10
<i>Cook v. Rockwell International Corp</i> , 151 FRD 378 (D Colo, 1993).....	9
<i>Dix v American Bankers Life Assurance Co</i> , 429 Mich 410; 415 NW2d 206 (1987).....	11
<i>Henry v Dow Chemical</i> , 473 Mich 63; 701 NW2d 684(2005) .....	4, 5
<i>LeClercq v. Lockformer Co</i> , No. 0007164, 2001 WL 199840 (ND III, Feb. 28, 2001).....	9
<i>Mejdrech v. Lockformer Co</i> , No. 0106107, 2002 WL 1838141, at *6 (ND III, Aug. 12, 2002), <i>aff'd</i> <i>sub nom. Mejdrech v. Met-Coil Systems Corp</i> , 319 F3d 910 (7 <sup>th</sup> Cir, 2003).....	7
<i>Muniz v. Rexnord Corp</i> , No. 04-2405, 2005 WL 1243428 (ND 111, Feb. 10, 2005).....	8
<i>Olden v. LaFarge Corp</i> , 383 F3d 495 (6 <sup>th</sup> Cir 2004).....	7
<i>Sterling v Velsicol Chemical Corp</i> , 855 F2d 1188 (6 <sup>th</sup> Cir 1988).....	6
<i>West Virginia ex rel Chemtall, Inc v Madden</i> , 216 W Va 443; 607 SE2d 772 (2004).....	8
 <b><u>OTHER</u></b>	
Fed R Civ P 23 .....	3
MCR 3.501.....	3
MCR 7.306(D) .....	iv
Peters and Parker, <i>The History, Law and Future of Class Actions in Michigan</i> , 44 Wayne L Rev 135 (1998).....	10

**STATEMENT OF BASIS OF JURISDICTION**

This Court granted Defendant's Application for Leave to Appeal by order dated November 5, 2008. Accordingly, this Court has jurisdiction over the matter. Furthermore, pursuant to MCR 7.306(D), the instant brief is being filed within 21 days of the brief of Appellee, rendering it timely.

**STATEMENT OF QUESTIONS PRESENTED**

I. DID THE SAGINAW COUNTY CIRCUIT COURT CORRECTLY CERTIFY THE CLASS OF PROPERTY OWNERS IN THE PRESENT CASE?

Amicus answers, "Yes"

II HAVE BOTH THE FEDERAL COURTS, UNDER THE "RIGOROUS ANALYSIS" STANDARD, AND STATE COURTS, UNDER SIMILARLY WORDED STANDARDS, CERTIFIED CLASS ACTIONS IN SITUATIONS SIMILAR TO THE ONE FACING THE FLOOD PLAIN PROPERTY OWNERS HEREIN?

Amicus answers, "Yes"

III. ARE CLASS ACTIONS SUCH AS THE ONE CERTIFIED HEREIN AN IMPORTANT PART OF THE EFFORT TO PRESERVE THE ENVIRONMENT FROM POLLUTION?

Amicus answers, "Yes"

## STATEMENT OF FACTS

Amicus Curiae accept the Statement of Facts set out in Plaintiff-Appellee's Brief on Appeal.

### INTEREST OF *AMICUS CURIAE*

**The Science and Environmental Health Network** engages communities and governments in the effective application of science to protect and restore public and ecosystem health. The Network encourages the practice of science in the public interest and the accurate interpretation of scientific information, identifies information, ethical concepts and logic that have the potential to provoke essential change, and helps communities, organizations and governments develop and implement sound environmental policies.

**The Ecology Center** is a membership based, nonprofit environmental organization based in Ann Arbor, Michigan, after the country's first Earth Day in 1970. The Ecology Center is now a regional leader that works for a safe and healthy environment where people live, work and play. The Ecology Center works at the local, state and national levels for clean production, healthy communities, environmental justice, and a sustainable future.

**Lone Tree Council** is a Michigan non-profit charitable corporation based in Bay City with members across the state, including members residing, owning property, and enjoying recreation in the city of Midland, Midland County, and the Tittabawassee River floodplain. The Lone Tree Council has existed for more than a quarter century, and is devoted to clean water, clean air, the preservation of Michigan's natural resources, and environmental justice for the citizens of our watershed.

**The Michigan League of Conservation Voters** is a non-partisan political organization that works to elect and hold accountable public officials who will champion a healthy and vital Michigan by preserving and protecting our air, land and water.

**The Michigan Environmental Council (MEC)** provides a collective voice for the environment at the local, state and federal levels. Working with our 70 member groups and their collective membership of nearly 200,000 residents, MEC is addressing the primary assaults on Michigan's environment; promoting alternatives to urban blight and suburban sprawl; advocating a sustainable environment and economy; protecting Michigan's water legacy; promoting cleaner energy; and working to diminish environmental impacts on children's health.

**The Great Lakes Environmental Law Center** was founded to protect the world's greatest freshwater resource and the communities that depend on it. Based in Detroit, the Great Lakes Environmental Law Center has a board and staff of dedicated and innovative environmental attorneys to address our most pressing environmental challenges. The Great Lakes Environmental Law Center was also founded on the idea that law students can and must play a significant role in shaping the future of environmental law.

### **INTRODUCTION**

*Amicus Curiae* bring this brief before this honorable court for one purpose: To ask this Court to recognize the critical importance of class action litigation, as part of the overarching legal response in preserving and protecting Michigan's environment. Michigan has a long history of class action practice, both under the common law, and under procedures codified in the Court Rules. The class action certified by the Saginaw County Circuit Court, and was affirmed by the Michigan Court of Appeals, in the instant case, is an appropriate and proper use of the class action device. *Amicus* recognizes that not every case presents facts of the sort that would allow a class action to

proceed under the laws of the state (MCR 3.501 *et seq*) or in Federal Court (Fed R Civ Pro 23). However, the instant matter involves specific and particular actions by Defendant, which caused a harmful, long-lasting chemical to be introduced into the 100 year flood plain of the Tittabawassee River. Those actions have caused a similar damage to property owners within the flood plain.

In reaching the conclusion that this matter was certifiable as a class action, the Circuit Court held an extensive two day hearing, and made all the necessary findings such as would allow the instant class of property owners to be certified. The arguments made in the lower courts, and repeated in the briefs before this Court against that certification by the polluter herein, Dow Chemical, would, in effect, prevent any environmental wrongdoing from being the subject of a class action in the state of Michigan. In fact, both traditional Michigan analysis, and the “rigorous analysis” set out in analogous Federal cases, has permitted class actions such as the instant one to be certified. In the guise of seeking a “clarification” of class action certification under MCR 3.501, defendant seeks to put a permanent end to them.

This Court should not allow defendant’s argument to prevail. This brief will briefly touch upon the propriety of the Circuit Court’s actions in certifying the class (Section I, *infra*), and upon the fact that this class is properly certified under both Michigan class action precedent and under the Federal rule of “rigorous analysis”. (Section II, *infra*). Most importantly, however, this brief will focus on the need for the class action mechanism to be available under Michigan law, supplementing both regulatory oversight and individual cases, so as to provide a necessary deterrent to pollution that can occur so casually, yet have such devastating effects. (Section III, *infra*).

## ARGUMENT

### **I. THE SAGINAW COUNTY CIRCUIT COURT CORRECTLY CERTIFIED THE CLASS OF PROPERTY OWNERS IN THE PRESENT CASE**

There can be no doubt that the trial court had authoritative material showing the extent to which Dow had polluted the Tittabawassee flood plain during the existence of its plant there. This excerpt from the appeal brief of Plaintiff-Appellee demonstrates such, with appropriate citations to record materials viewed and relied upon by the trial court in reaching its decision:

Dow has maintained a plant on the banks of the Tittabawassee River in Midland, Michigan for over a century. The plant has produced a host of products, including, to name only a few, styrene, butadiene, picric acid, mustard gas, Saran Wrap, Styrofoam, Agent Orange, and various pesticides including Chlorpyrifos, Dursban and 2, 4, 5-trichlorophenol. *Henry[v Dow Chemical]*, 473 Mich at 69 [473 Mich 63; 701 NW2d 684(2005)]; Exhibits to Dow's Application for Leave to Appeal, Tab 6, Michigan Department of Community Health Pilot Exposure Investigation – Health Consultation, July 8, 2005; Tab 1, Third Amended Class Action Complaint and Jury Demand ("Third Amended Complaint"), para.10.

According to published reports from the MDEQ, Dow's operations in Midland have harmed the local environment. In 2000, General Motors Corporation was testing soil samples in an area near the Tittabawassee River and the Saginaw River when it discovered the presence of dioxin, a hazardous chemical proven to cause a variety of health problems such as cancer, liver disease, and birth defects. Tab 3, Declaration of Andrew W. Hogarth ("Hogarth AO), para. 4; Third Amended Complaint, para. 136. By Spring 2001, the MDEQ had confirmed the presence of dioxin in the soil of the Tittabawassee flood plain at levels that substantially exceed Michigan's cleanup standard of 90 parts per trillion (ppt) for direct residential contact. In fact, the MDEQ found as much as 7,300 ppt of dioxin in the flood plain. The MDEQ's testing further revealed that Dow is the principal source of the dioxin in the Tittabawassee flood plain. *Henry*, 473 Mich at 69, 105-06; Hogarth Aff, para. 13; Ex. B, PHs' Brief to Ct App, Plaintiffs' Appendix of MDEQ Website Materials, Volume I of H, Tab 13, Michigan Department of Environmental Quality, Remediation and Redevelopment Division, *Final Report, Phase II Tittabawassee Saginaw River Dioxin Flood Plain Sampling Study*, June 2003, ("DEQ Final Phase II Report, June 2003") p. 42; Third Amended Complaint, paras. 3, 11, 137, 139, 143.

"Dioxin" is the term used to identify a number of similar toxic chemicals. Dioxin is a known human carcinogen. Exposure to dioxin can cause cancer, liver disease, birth defects, miscarriages, and reproductive damage, as well as other illnesses. Children are more significantly affected by dioxin than adults. Dioxin does not break down easily. Once dioxin is released into the environment, it stays in the environment for an extremely long time. When dioxin gets into a person's body, it stays indefinitely in a person's blood and body fat. Because dioxin

stays in the body for a long time, the adverse effects of dioxin exposure may not be immediate. *Henry*, 473 Mich at 106; DEQ Final Phase II Report, June 2003, p. 42; Tab 4, MDEQ "Dioxins Fact Sheet;" Third Amended Complaint, paras. 118-21, 124-35, 140. A pilot study of the Tittabawassee River flood plain community conducted by the Michigan Department of Community Health found that fifty to eighty percent of the people tested have dioxin levels that put them in the 75<sup>th</sup> to the 95<sup>th</sup> percentile compared to the national average for their age and gender. *Henry*, 473 Mich at 106-07; ATSDR Pilot Investigation, July 8, 2005, p. 7 *et seq.*

As set forth in the sworn statement of Andrew W. Hogarth (attached hereto at Tab 3), the chief of remediation and redevelopment for the MDEQ, the MDEQ's involvement with dioxin in the property in the flood plain began with an investigation, called Phase I, which found a pervasive distribution of dioxin contaminated soil on flood plain properties. To more clearly define the geographic area impacted by this pervasive distribution of dioxin and to allow the MDEQ to communicate with affected residents and property owners, the MDEQ hired a survey firm to prepare a flood plain map and developed the estimated 100-year flood plain contour of the Tittabawassee River. *See Hogarth Aff*, paras. 1-17; *Per Curiam Order of Court of Appeals* at 11-12. {*Brief of Plaintiff-Appellee* at 10-12}.

It is similarly undisputed that the trial court held a two day hearing on whether to certify a class consisting of the property owners within that 100-year flood plain. At the close of this hearing, the trial court issued a written opinion which set out the factual and legal reasoning behind its decision to certify the class. Significantly, after complimenting the attorneys on their submissions, and restating the definition of the proposed class, the trial court stated:

Due to the limited case law in Michigan addressing certification of class action lawsuits, the Court can refer to Federal case law that interprets the Federal rules on class certification. *Brenner versus Marathon Oil*, 222 Mich App 128, at page 133, [565 NW2d 1], 1997 decision of the Michigan Court of Appeals. (Tscpt at p6).

Then, the court, noting that the merits of the case are not to be addressed, correctly placed the burden of proving that the class should be certified upon the plaintiff, and analyzed each prerequisite as to whether plaintiff class had met its burden. Specifically, as to whether "questions of law or fact predominate over questions affecting only individual members", the court found:

All of the Plaintiffs' claims are based on the allegation that the Defendant polluted the Tittabawassee River, causing damage to the Plaintiffs in the form of reduced value of their home and property. Therefore, the alleged negligence of the Defendant, if any, as to the cause of the alleged pollution is common to all potential Plaintiffs. Equally, any questions of law would be common to the entire class. Although the question of damages may be individualized, the mere fact that damages may have to be computed individually is not enough to defeat a class action. As the Court stated in *Sterling versus Velsicol Chemical Corporation*, 855 Fed 2d 1188, at page 1197, a decision of the Sixth Circuit Court of Appeals, 1988, and I quote from that case:

“No matter how individualized the issues of damage may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual members of the class remaining after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.” And the Court cites two other federal cases that support their decision.

Therefore, this Court finds that there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members. (Id at 8-9).

The approach of the trial court is in fully supported by the factual record. It is fully supported by the law, both Michigan and Federal. The class, as defined by the trial court, was properly certified.

**II BOTH THE FEDERAL COURTS, UNDER THE “RIGOROUS ANALYSIS” STANDARD, AND STATE COURTS, UNDER SIMILARLY WORDED STANDARDS, HAVE CERTIFIED CLASS ACTIONS IN SITUATIONS SIMILAR TO THE ONE FACING THE FLOOD PLAIN PROPERTY OWNERS HEREIN**

No matter what standard this Court decides to adopt, it is clear that there have been class actions that were properly certified, involving situations akin to the one presented by the Tittabawassee flood plain property owners. The trial court herein made the correct decision, given the facts before it, whether one uses prior Michigan law, or the “rigorous standard” of Federal law.

Certainly, as concerns Michigan, the Sixth Circuit is the most relevant Federal Circuit. The

Sixth Circuit recently upheld the certification of an environmental class action in *Olden v. LaFarge Corp*, 383 F3d 495 (6<sup>th</sup> Cir 2004). At issue in *Olden* was the trial court's class certification decision in an environmental pollution case that included negligence and nuisance claims under Michigan law brought on behalf of a class of 3,600 property owners seeking to recover damages for interference with the use and enjoyment of their property and diminution in the market value of this property caused by defendant's emission of hazardous toxins from its plant. *Id.* at 496-98, 508-10. The defendant argued that common issues did not predominate because individual issues related to establishing causation would overwhelm the case because toxins were dispersed to properties in varying concentrations and allegedly caused widely varying property damages. *Id.* at 508. The court rejected defendant's argument and determined that both negligence and nuisance claims were properly available under Michigan law for the entire class, based on generalized proof, including the "significant harm" component of a nuisance claim under Michigan law. *Id.* at 508-09 & n.5. The court further stated that once liability has been established, defendant would be able to contest "the degree of harm" in the damages phase, and that, in any event, it was "premature" to address defendant's merits-based arguments at the class certification stage. *Id.* Thus, the Sixth Circuit, faced with the decision similar to the one now facing this court, and bound by law to apply the "rigorous analysis" demanded under Fed R Civ P 23, resoundingly affirmed the certification of a class of property owners seeking the kinds of damages sought by the instant class, for similar instances of pollution.

Holdings from other recent environmental pollution cases arising under similar facts also clearly support the trial court's conclusion that common factual and legal issues predominate in this case. For example, in *Mejdrech v. Lockformer Co*, No. 0106107, 2002 WL 1838141, at \*6 (ND Ill, Aug. 12, 2002), *aff'd sub nom. Mejdrech v. Met-Coil Systems Corp*, 319 F3d 910 (7<sup>th</sup> Cir, 2003), the trial court certified a class of homeowners in Lisle, Illinois (a town outside Chicago). A

factory in Lisle had a storage tank which allowed TCE, a noxious solvent, to seep into the soil and groundwater beneath the class members' homes, causing loss of property value. The Federal appellate court upheld the certification, noting that the class was geographically compact, and that the common question of the cause and extent of the pollution was straightforward and amenable to a class wide solution.

Another recent example, from a state court, is the decision in *Carter v Monsanto Co*, 2008 WL 1693652 (W Va Cir Ct, Putnam County, 2008). The class in *Carter* was defined as those real property owners within the 100-year flood plains of various creeks in Putnam County, West Virginia. The defendant, Monsanto Company, had polluted the creeks with a highly toxic chemical contaminant known as “2, 3, 7, 8-TCDD”, which was a principal component in the defoliant known as Agent Orange. The class sought damages for diminution in the value of their property. The court certified the class, finding common issues of fact predominated, under a mode of analysis known as “thorough analysis”, which is quite similar to the “rigorous analysis” employed by the Federal courts. *See, eg, West Virginia ex rel Chemtall, Inc v Madden*, 216 W Va 443; 607 SE2d 772 (2004). Ultimately, the court was satisfied that the pivotal issue – whether and to what extent toxins from Monsanto subsequently migrated into the class area – was amenable to class wide resolution. The fact that the extent of contamination and the amount of diminution of property value differed from class member to class member was held not to preclude class certification. *Id* at \*13.

To similar effect is *Muniz v. Rexnord Corp*, No. 04-2405, 2005 WL 1243428, at \*4 (ND 111, Feb. 10, 2005), in which the court held that the predominance requirement was satisfied in a case where Plaintiffs alleged that the Defendants engaged in a single course of conduct, disposal of hazardous chemicals, so as to create a common nucleus of facts for the class, which

outweighed the existence of some individualized questions, so as not to prevent class certification. See also, *LeClercq v. Lockformer Co*, No. 0007164, 2001 WL 199840, at \*5-7 (ND III, Feb. 28, 2001) ("Plaintiffs have alleged that Defendants have engaged in a common course of conduct over the years that has contaminated the water source that the putative class members use. It is the same conduct that allegedly caused the injury to all of the Plaintiffs. .. In this case, the common issues predominate."); *Cook v. Rockwell International Corp*, 151 FRD 378, 388-89 (D Colo, 1993) ("[P]laintiffs have demonstrated that this case presents many common issues of law and fact, including. . whether defendants exercised reasonable care to prevent the release of hazardous radioactive and nonradioactive materials from Rocky Flats; what materials were released, in what quantities; what caused the releases; what precautions to avoid emissions were taken; whether the geographic dispersion of the releases in the surrounding area was reasonably foreseeable; and whether defendants engaged in intentional, reckless, willful, or wanton conduct. These common issues represent the core of plaintiffs' action against defendants . . . . Therefore, I find that, as concerns the property class, a common nucleus of operative facts exists and that the common questions of law and fact predominate over those issues requiring individualized proof").

Thus, the trial court acted well within its discretion when it decided to follow this body of established case law and hold that Plaintiffs had met their burden of proving that common issues of fact and law predominate over questions affecting only individual members.

**III. CLASS ACTIONS SUCH AS THE ONE CERTIFIED HEREIN ARE AN IMPORTANT PART OF THE EFFORT TO PRESERVE THE ENVIRONMENT FROM POLLUTION**

Class actions are a significant part of an overarching regulatory scheme, all parts of which are needed in order to provide an adequate deterrent against would-be polluters who

would disregard the long term need to preserve the environment, in favor of a short term convenience regarding the disposition of toxic materials. Indeed, class actions are needed to protect the public's health and the environment by allowing people with similar injuries to join together for more efficient and cost-effective adjudication of cases arising from the actions of a single polluter.

As in *Mejdrech, supra*, the principal defendant objection to class certification herein, reduced to its essence, is one based on a general distaste for the class action device. Such general distaste has never been the policy of Michigan, and must not be permitted to be made policy by this Court.

Michigan has long recognized the benefit and utility of the class action device in allowing groups to efficiently and economically raise questions of common concern in a more focused fashion than achievable in individual cases. Peters and Parker, *The History, Law and Future of Class Actions in Michigan*, 44 Wayne L Rev 135 (1998). The first Michigan class action case, *City of Detroit v Detroit United Railway*, 226 Mich 354; 197 NW 697 (1924), traces the history of the class action device back to American courts of equity and, before that, to the English courts of chancery. *Id* at fn 11. After outlining the teachings of *City of Detroit*, at 141-144, the authors conclude:

In this one beautifully reasoned 1924 opinion, the Michigan Supreme Court established the equitable and legal foundation upon which subsequent class actions in Michigan have been built. The class concepts embodied in this decision, including the concepts of "virtual representation", "necessity", "practical convenience", and the "convenient administration of justice" are invoked to this day as tools available for courts to "prevent a failure of justice." *Id* at 144, referencing *City of Detroit, supra*, at 371.

These concepts and policies continued to the present era, in which class action procedure

is governed by court rules rather than by equitable doctrine. Still, the concepts were invoked as underlying the class action device in *Dix v American Bankers Life Assurance Co*, 429 Mich 410, 418-19; 415 NW2d 206 (1987). There, in reversing a circuit court's denial of class certification, the Supreme Court stated:

The "convenient administration of justice" criterion does not preclude the maintenance of a class action where the individual claims differ slightly with regards to such specifics as the time, place and exact nature of the injury. Almost all claims will involve disparate issues of law and fact to some degree. The relevant concern here is whether the issues are so disparate as to make a class action unmanageable.

Regulatory agencies alone cannot do the entire job necessary to deter polluters. Remove the class action device from groups of property owners, such as those herein, and the result will be more expensive cleanups, slower cleanups, and increased liability for individual property owners whose property may be contaminated. Residents may actually lose the ability to force polluters to pay.

Damage to the environment is not always drastic. It does not always occur in dramatic fashion, with immediately noticeable results. Furthermore, the damage to each individual property owner in an affected area might not, in and of itself, be sufficient to support individual litigation, given the enormous cost of preparing and submitting the science. However, the overall damage to a geographic area of property owners can be immense. More importantly, the damage to society is immeasurable.

This enormous damage inflicted upon the property owners, and upon Michigan as a whole, will be felt most acutely in situations involving long-lasting toxic substances such as dioxin. While some areas of uncertainty remain, there is widespread scientific consensus that dioxin is toxic in tiny amounts, and that any additional exposure to dioxin increases our risks.

An overwhelming number of scientific studies that demonstrate that dioxin is a serious health hazard.

For these reasons, class actions, such as the instant matter, are an effective way of ensuring that property owners whose lands have become blighted by the presence of dioxin (or other long-lasting toxins) due to the acts or omissions of polluters. State courts, unlike the federal courts, have a sound understanding of evolving local law and the open dockets to resolve conflicts in the efficient manner necessary to protect our society from polluters. It would be a grievous error to withhold the class action device from property owners, and instead demand that each individual case proceed one by one, when the common harm befalling them arose from a common source. To unduly tighten the threshold at which a class can be certified would impair these landowners' ability to protect and vindicate their interests, and would overburden the justice system for no logical reason.

### **CONCLUSION**

The instant class action was properly certified. Similar classes have been certified in cases involving damage to property values caused by polluters in both state and federal courts. To rule as defendants argue would strike a crushing blow to the rights of property owners to hold polluters accountable, and would result in a significant reduction of safeguards protecting our environment from polluters. This Court should affirm the Court of Appeals, and uphold the Circuit Court's certification of the class of property owners within the flood plain area of the Tittabawassee River. If this Court issues any overarching class action analysis in support of such decision, it must be carefully crafted so as not to impair the rights of property owners to hold

polluters accountable, and must not create a legal environment which fails to deter those who would carelessly or intentionally pollute the natural beauty and splendor of our state.

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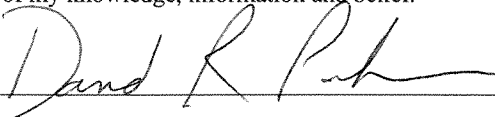
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**PROOF OF SERVICE**

The undersigned certifies that on February 16, 2009, two copies of the foregoing Motion to File Amicus Brief, Affidavit in Support, Notice of Hearing and Proposed Amicus Brief was served upon the attorneys of record for the parties in the above-entitled cause of action, and that a copy was served upon all known attorneys of record for other amicus curiae, at their business locations as disclosed by the pleadings of record herein, via the following:

U.S. Mail                       Hand Delivery  
 Facsimile                       Overnight Mail

I declare under penalty of perjury that the above statement is true to the best of my knowledge, information and belief.

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