STATE OF MICHIGAN

COURT OF APPEALS

THE PROPERTY OWNERS' RIGHTS ASSOCIATION (PORA),

Plaintiff-Appellant,

v

CENTERLINE OF CALHOUN COUNTY, INC.,

Defendant-Appellee.

UNPUBLISHED
February 6, 1998

No. 198305
Calhoun Circuit Court
LC No. 96-000645 CZ

Before: White, P.J., and Cavanagh and Reilly, JJ.

PER CURIAM.

Plaintiff Property Owners' Rights Association (PORA) appeals as of right the dismissal of its complaint brought under the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701 *et seq*.; MSA 13A.1701 *et seq*.,[1] and the award of taxable costs to defendant. We affirm.

Defendant, formerly known as the Battle Creek Gun Club, purchased a 154-acre parcel in Convis Township, Calhoun County and planned to construct a shooting complex called "Centerline." Before the complex was completed, plaintiff filed a complaint for injunctive relief and motion for temporary restraining order, alleging that defendant's operation of the shooting range would violate MEPA, because the lead (Pb) found in gun shot would pollute and/or impair the environment.[2] Shooting began at Centerline in June 1996, including trap, skeet, and sporting clay shooting, as well as archery. Defendant's plans also provided for a rifle and pistol range. Following a bench trial held over two days in June and July 1996, the court found that plaintiff failed to prove by a preponderance of the evidence that Centerline's operation was likely to pollute or impair the environment. The trial court entered orders dismissing plaintiff's case on the merits and awarding defendant taxable costs in the amount of $5,474.50. This appeal ensued.

I

Plaintiff first argues that the trial court erred in finding that dispersal of tons of lead on defendant's shooting complex was not likely to pollute or impair the environment in violation of

MEPA. This Court reviews actions brought under MEPA de novo. *Trout Unlimited, Muskegon-White River Chapter v City of White Cloud (After Remand)*, 209 Mich App 452, 456; 532 NW2d 192 (1995). However, a trial court's findings of facts should not be overturned unless they are clearly erroneous or unless this Court is convinced that it would have reached a different result. *Id*.

Under MEPA, the attorney general or any person or entity may seek equitable or declaratory relief to protect the air, water, and other natural resources from pollution, impairment or destruction. MCL 324.1701(1); MSA 13A.1701(1). To sustain a MEPA claim, the plaintiff must make a prima facie showing that the conduct of the defendant has polluted, impaired or destroyed, or is likely to pollute, impair or destroy, the air, water, or other natural resources. MCL 324.1703(1); MSA 13A.1703(1). *Wortelboer v Benzie Co*, 212 Mich App 208, 220; 537 NW2d 603 (1995). In order to determine whether a plaintiff has established a prima facie case, the court must consider whether the effect of the activity on the environment has risen or will rise to the level of an impairment or destruction of a natural resource so as to constitute an environmental risk and justify the court's injunction. *Id*.; *Dafter Sanitary Landfill v Superior Sanitation Service, Inc*, 198 Mich App 499, 504; 499 NW2d 383 (1993). Once a prima facie case has been established, the defendant may rebut the prima facie showing by submission of evidence to the contrary. MCL 324.1703(1); MSA 13A.1703(1).

Plaintiff's case relied largely on the testimony of its expert, William Henderson, a geologist with expertise in environmental contamination and site assessment. Henderson testified that lead is a pollutant whose levels in air, water and food are regulated by the state and federal government. He testified that if lead is introduced into the environment and reacts with the soil or water, causing lead levels to exceed Michigan Department of Environmental Quality criteria, the site would be considered polluted. Henderson testified that he visited the shooting stations and shot fall areas of the shooting complex and concluded that lead shot was going to collect in certain low lying areas of the site. Henderson believed that water would also collect in those low lying areas, which would increase the potential for oxidation and leaching. However, Henderson testified that lead oxidizing in the environment is dependent on a few major conditions, like the pH of the soil, reactions with other chemicals present in the soil, and the water saturation within the soil, and that he did not take any soil samples at Centerline to determine whether such conditions existed, because he did not realize he had authority to do so.

Henderson also inspected one shot-fall area located on the side of a hill, which he believed was near a wetland area. He testified that when a shot fall area is located on a slope, surface erosion or runoff could also cause movement of lead-contaminated sediment into a nearby wetland area. Based on the water log from one of the properties adjacent to Centerline, Henderson had a general concern that the water table was fairly high and, thus, the lead was more likely to leach into the water supply. Henderson testified that lead could also get into a powder form that could be transported by the wind.

At the conclusion of the first day of trial, plaintiff's counsel stated that he understood that defendant had taken soil samples the previous weekend, that he had not seen the data, and that it may be necessary to continue his examination of Henderson. When trial resumed about six weeks later, plaintiff's counsel did not further examine Henderson, other than on re-direct.

Henderson testified on cross-examination:

Q: Mr. Henderson, is it your testimony that lead shot collected in certain areas on the site could pollute the environment?

A: They have the possibility to do that.

Q: What do you base that conclusion on?

A: There would certainly have to be some environmental conditions to be present. If lead is introduced into the environment and reacts with the soil or water in the environment, and those levels exceed the state criteria, then they would pollute the environment.

Q: Is it your testimony that that will be the situation at Centerline?

A: I think that you would need further information to make a statement such as you have where you said it will be. I think it's a possibility or a likelihood that it could occur.

* * *

Q: Mr. Henderson, you are a geologist, you have been qualified as an expert in geology. Will in your opinion lead leach at Centerline?

A: I will state again, I gave you specific parameters or tests that can be conducted that will assist you in determining whether lead will leach, or if the potential is there, and I have not conducted any testing or evaluation of that to tell you specifically whether it will leach at this particular site or if it will be more favorable to leach at a specific location on this particular site . . .

Following Henderson's testimony, plaintiff rested and defendant moved for involuntary dismissal of plaintiff's claim for failure to present a prima facie case of a MEPA violation. The trial court denied defendant's motion and permitted plaintiff to reopen its proofs. Plaintiff then read into evidence various responses of defendant to discovery.

Defendant presented testimony that Centerline was built pursuant to nineteen local, state and federal permits and that the Department of Natural Resources had assisted defendant in determining that the site was viable and determined that none of the shot fall zones were located in wetlands. The township issued defendant a special use permit that restricted hours of operation to three days a week and precluded the use of fully automatic weapons. Defendant's president testified that, assuming that Centerline reaches a membership of 400, sixteen tons of shot would be dropped a year. He testified that the lead on the site would be reclaimed after sixty tons of shot had been dropped, and that twenty percent of it would not be recoverable.

Defendant's expert in soil chemistry, Dr. Stephen Boyd, testified that lead is considered to be the least mobile heavy metal in soils, is very unlikely to leach in soils, and that lead shot, owing to its high density, is unlikely to erode substantially. Dr. Boyd opined that lead shot is unlikely to impair the environment, including ground water and drinking water, because lead shot, being big particles, would "stay put" because there are not big channels or holes within the soil for them to migrate. Dr. Boyd further testified that lead compounds are very immobile because they bind tenaciously to soil components such as clays, oxides, and soil organic matter, and also because they form very insoluble precipitates, which means they do not dissolve in water. Dr. Boyd testified that lead could, to the extent that the lead metal weathers or oxidizes into lead compounds, become mixed with the soil and be present in dust, but that the level of vegetation on the site would diminish greatly the likelihood of such dust migrating. Dr. Boyd testified that the reclamation process described above was a good idea and would minimize the likelihood of environmental threat.

Plaintiff argues that pollution occurs when the substance enters the environment, i.e., when the lead shot falls on the land, and that in determining whether a prima facie case has been established under MEPA, there is no threshold requirement for the amount or degree of pollution or impairment caused by a toxic substance. Plaintiff argues that it need not show certain harm, but only need show probable harm.[3]

Assuming that plaintiff need only establish probable harm to the environment, we nonetheless conclude that the trial court did not err in concluding that plaintiff failed to make such a showing. Henderson did not conduct site-specific tests and testified that there was only a possibility that the lead contamination of the soil and water resources in and around the complex could reach unacceptable levels. Assuming plaintiff presented a prima facie case, the contrary testimony of defendant's expert, Dr. Boyd, was sufficient to rebut plaintiff's showing.

We conclude that the trial court did not err in determining that plaintiff failed to prove by a preponderance of the evidence that defendant was likely to pollute or impair the environment.[4]

II

Plaintiff next argues that the trial court abused its discretion in taxing costs against plaintiff in the amount of $5,474.50,[5] fifty dollars of which were awarded as "nominal attorney fees." Plaintiff argues that the award of costs to defendant is contrary to public policy because plaintiff raised a novel public issue and the award will have a severe chilling effect on future citizen actions to protect the environment.

This Court reviews the trial court's award of costs under MEPA for abuse of discretion. *Dafter Twp v Reid*, 131 Mich App 283, 289; 345 NW2d 689 (1983). MEPA provides that "costs may be apportioned to the parties if the interest of justice requires." MCL 324.1703(3); MSA 13A.1701(3). Although this Court frequently refuses to award costs in cases involving public questions, a trial court's award of such costs is not per se an abuse of discretion. *Village Green v Board of Water*, 145 Mich App 379, 395; 377 NW2d 401 (1985). In *Taxpayers v Highway Dep't*, 70 Mich App 385, 389; 245 NW2d 761 (1976), this Court noted that all suits under MEPA inevitably involve public questions and that the policy of Michigan's appellate courts to deny costs in public question cases

is superseded by MEPA's provision allowing costs to be apportioned if justice requires. We are unable to conclude, and plaintiff has cited no authority which supports, that the trial court abused its discretion in awarding defendant costs under the circumstances presented here.[6]

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly

[1] The prior MEPA statute, MCL 691.1201 *et seq*; MSA 14.528(201) *et seq*., was repealed by the Legislature and recodified in 1994 in the same, or substantially the same form, within the larger framework of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.1701 *et seq*.; MSA 13A.1701 *et seq*.

[2] Plaintiff's complaint also alleged that the range would be in violation of the Wetland Protection Act ("WPA"), MCL 324.30301 *et seq*.; MSA 13A.30301 *et seq.*, because lead would be disseminated directly or indirectly onto adjacent wetland areas. Plaintiff's WPA claim was dismissed at the beginning of the bench trial, with plaintiff's counsel noting that he had no objection to the dismissal of the count provided that "it's clearly understood that the scope of this [order of dismissal] is to the wetlands count and the application of the Wetlands Protection Act and that it in no way limits our ability to argue under MEPA that wetlands are an element of the environment that require protection."

[3] Plaintiff's argument is supported by *Ray v Mason Cty Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975) (noting that in order to find a prima facie case of pollution, the trial judge must find that the defendant's conduct has, or is likely to pollute, impair or destroy the air, water or other natural resources, and that such a showing is not restricted to actual environmental degradation but also encompasses probable damage to the environment); *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105, 109; 280 NW2d 883 (1979) (probable impairment of Great Lakes trout population establishes prima facie case); and see also ICLE, *Michigan Environmental Law Deskbook*, §§ 2.17 - 2.24, pp 2-12 to 2-19.

[4] Plaintiff also argues that defendant was in violation of certain provisions of the environmental remediation and hazardous waste portions of the Natural Resources Environmental Protection Act, MCL 324.101 *et seq*.; MSA 13A.101 *et seq*., and that those violations constitute "per se" violations of MEPA. Plaintiff did not litigate this claim below, therefore it is not preserved. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

[5] Defendant submitted a bill of costs for $10,287.78. Plaintiff objected and the trial court ultimately entered an order taxing costs in the amount of $5,474.50, which included attorney fees of $50, a trial fee of $30, a lay witness fee of $27.40, an expert witness fee for Dr. Boyd of $3,712.50, and an expert

witness fee for Richard Moore of $1,655. Plaintiff filed a motion for reconsideration on the issue of costs, which the trial court denied.

[6] Plaintiff failed to cite any authority, and we are aware of none, for its argument that costs should be denied defendant because the Michigan United Conservation Clubs paid the defense costs in this case. We thus decline to address this argument, *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995), beyond noting that plaintiff did not rebut that defendant pays dues to MUCC in return for services such as those provided in this litigation.