

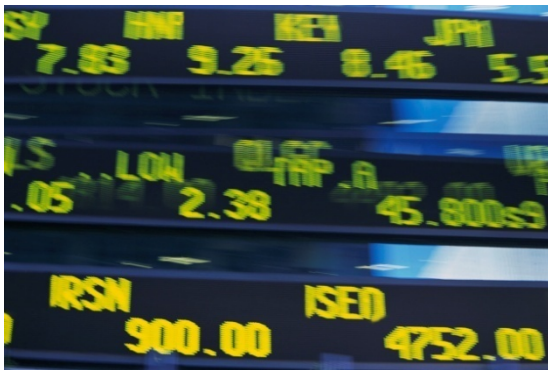
# THE POOL CUE

Volume XIV, Issue 4 November 2008

## MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

### MCRCSIP MISSION STATEMENT

"The Mission of the Michigan County Road Commission Self-Insurance Pool is to administer a self-insurance program and to assist members with risk management efforts."



### SAFE HARBORS FOR VOLATILE TIMES

Fred Haring  
MCRCSIP Administrator

The investment and financial markets have been difficult this year, and particularly in September and now in October. I wanted to share with you some of the information provided to us by Merrill Lynch:

- According to Merrill Lynch economists, the U.S. economy is incredibly resilient and adaptable, and we've weathered all different crises and challenging environments. Financial history has also demonstrated that investors who see opportunity in volatility are the most likely to prosper over the long term.
- Over the last 50 years, every period of financial market volatility has provided a signal that leadership and growth stories within the financial markets are changing. Based on the insights from our firm's research analysts and strategists, they indicate that investors should not expect the credit-driven stories of the past 5 to 10 years, like emerging economies, to resume their leadership. They believe the new leaders are likely to come from defensive, cash-flow stable sectors such as consumer staples and health care, as well as developed markets.
- Stay the course and do not panic. A long term, well diversified investment plan can still achieve its goals in times like these. Look at the big picture and don't let short-term events or emotions guide your investment strategy. We encourage our clients to be disciplined and level-headed to assure them that long-term investment strategies are the safest way to weather the storm.
- Stay diversified. Remember the important tenants of rebalancing. Rebalancing is a discipline of selling stronger performance assets and reinvesting in assets whose prices have been weak, but may be attractively priced and poised for a rebound. This is a discipline that guides our clients to sell winners and reinvest opportunistically.
- Investment strategies should match your tolerance for risk and personal time horizons. Each investor's portfolio should fit into a place that fits their makeup and how they think about risk versus return. In order to help you weather challenging markets, we focus on wealth preservation and risk-reduction strategies.
- Focus on overall results - not just segments of portfolios - as a means to demonstrate the benefits of a diversified approach. It is important to be diversified in terms of strategies and sizes of stocks - not just types of stock.

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## HERBICIDE APPLICATION REQUIREMENTS

Mike Phillips  
MCRC SIP Senior Loss Control Representative

The use of herbicides by a County Road Commission may be considered for a variety of reasons, but before a Member decides to use a herbicide, they should be familiar with the often complex issues involved.

It is safe to assume that most people enjoy trees and wildflowers, and there can be no argument with the valuable service that vegetation provides in renewing the atmosphere, but it can often be difficult to strike a balance between the needs of the motoring public and nature. Though certain groups have tried to argue that controlling vegetative growth is morally wrong due to the harm done to the ecosystem, the fact remains that the right-of-way is not a suitable habitat for animal or plant species.

To maintain safe travel for the motorists, certain actions must be taken to maintain sight distances at intersections, to keep signs visible, and to preserve concrete, asphalt, and wood structures. Controlling vegetation in the right of way is generally done through the use of a herbicide or through mechanical means such as tree trimming and removal, mowing, or string trimming. There are advantages to each approach, but what will be focused upon here is the safe use of herbicides.

The Department of Agriculture is the primary agency that is involved with the application of pesticides and herbicides. If a product is purchased in a **ready to use** form and does not have to be mixed or loaded, then an applicator certification is not required. However, if the material is mixed or transferred from its original container, then the employee applying the material must be certified by the Department of Agriculture. Since Member Road Commissions are not in the business of applying pesticides/herbicides for others, they are not required to obtain a business license to apply pesticides/herbicides for their own use. The certifications are obtained through the Department of Agriculture. For more information on certifications and regulations for use, go to [www.michigan.gov/mda](http://www.michigan.gov/mda) and click on the Pesticides tab.

The Department of Environmental Quality isn't generally involved with the application of pesticides/herbicides. If the material is being applied to vegetation in or near water, even standing water in a ditch, then it is required that the Road Commission first get a permit from the DEQ to do so. If a spill or uncontrolled release of these substances occurs, then the DEQ must be notified under the Pollution Emergency Alert System (PEAS) at 1-800-292-4706.

Employees applying pesticides and herbicides are protected by the Michigan Occupational Safety and Health Administration. Under MIOSHA Part 92: Hazard Communication, or the "Michigan Right to Know Standard", all employees working with chemicals must be trained prior to beginning work activities, or whenever a change in the chemical or work duties takes place. This training must include how to use Material Safety Data Sheets (MSDS) and any specialized procedures recommended by the manufacturer in the MSDS for safe handling and use.

A copy of the MSDS for the pesticide/herbicide being used must be available to employees. As long as the employee reports to a centralized facility, even if that is only a sub-garage, then the MSDS is *not required* to remain on site but may be located at that centralized facility. But it's probably not a bad idea to keep a copy of the MSDS on site or in the Forman's vehicle just in case a problem arises.

MIOSHA Part 33: Personal Protective Equipment requires that written hazard assessments for PPE be made for pesticide/herbicide applications. Generally, safety glasses would be required, but depending on the amount of overspray, face shields may also be required. Gloves appropriate to the type of material being used would be required. Again, depending whether or not it is an excessively windy day or if the application process is overly exuberant, body protection such as a tyvek suit may be required.

Special consideration must be given to respiratory hazards. Employees should be familiar with the signs and symptoms of overexposure to the material being used. For the majority of Road Commission activities involving a pesticide or herbicide, a respirator would not be required since pesticides/herbicides are used only periodically and in areas of good, natural ventilation. However, the only way to be absolutely certain that an employee is not being over exposed is to conduct air quality analysis. This is not as daunting a task as it may seem. Many safety consulting firms offer these services, and MIOSHA CET may also be willing to facilitate air samples free of charge. If your employees are going to be exposed to pesticides/herbicides on a regular basis, then it would be a good idea to have this testing done. If a respirator is used, make sure that it is the right type of respirator for the job. A dust mask does not remove the hazardous substances found in herbicides.

The Pool has had little experience in cases of this nature, but as organic agriculture rises in popularity, it is a reasonable expectation that an increased number of liability cases may result. According to our Claims Administrator, there is exposure to liability if a causal connection between the application of the pesticide/herbicide and either property damage or bodily injury can be made. The Pool is currently involved in just such a case. Unfortunately, all that we can do for the moment is wait and see.

The vast majority of pesticides/herbicides used today pose few hazards to human life and health when applied properly. Notification of the intent to spray may be beneficial in avoiding public outcry. Some Road Commissions currently allow homeowners to decline having the vegetation sprayed in front of their property. In agricultural locations there may be more tolerance for the use of pesticides/herbicides, but not if crop damage

results. As with so many other issues, good public relations can solve a lot of problems before they arise.

The choice to use herbicides remains at the discretion of the Member Road Commission with jurisdiction over the location. Provided that rules and regulations set forth by the Department of Agriculture, the Department of Environmental Quality, and the Michigan Occupational Safety and Health Administration are met, these materials can be used safely and effectively and are a good option in controlling vegetation in the right of way.



### WINTER SNOW PLOWING SAFETY TIPS

- Snowplow operators should be trained in the standard operating procedures of your organization's winter maintenance program.
- Trucks and equipment must be road worthy and ready to meet the needs of winter maintenance.
- Drivers should be well rested. All drivers should be made aware of the causes and symptoms of driver fatigue and how to prevent it.
- Employees should be routinely reminded about the importance of drug avoidance to include the use of certain prescription and over the counter drugs. If drivers are called to plow snow soon after consuming alcohol, they must understand the consequences.

MCRCSIP has a safety training presentation available to help augment your own safety training efforts. Please refer to the snowplow safety video, "Snow Removal Techniques – Plowing Tips from the Pros" that should be a part of your in-house training library.

If you have any questions, please contact Mike Shultz, MCRCSIP Director of Loss Control/Training – 616-866-3168 or [mshultz@mcrsip.org](mailto:mshultz@mcrsip.org).





## TRAILS AND TRIBULATIONS

Mark D. Jahnke  
Specialty Claims Services, Inc.

November is here and another Michigan winter is on the doorstep, a winter predicted to be "frigid, wet, wild and snowy" by the Farmer's Almanac. Above average snowfall is predicted with below average temperatures translating into a "numbing" forecast!

If the Farmer's Almanac forecast holds true to its claimed 80 to 85% accuracy rate, road commission drivers will need to work harder than ever this winter keeping the roadways clear of ice and snow for Michigan motorists. Along with the challenges posed to a snowplow driver by a snowier-than-usual winter come the additional challenges that are posed by snowmobiles that will assuredly be operated on, across and near the roadways and shoulders that our drivers are trying to maintain. If a collision occurs between a snowmobile and a snowplow on the road or shoulder causing injury to the snowmobiler, can he or she sue the road commission and/or the driver of the snowplow? The answer is "Yes"! Will the lawsuit be successful? The answer is "Maybe"!

One of the main defenses to a claim from a snowmobiler against a road commission and/or its driver is derived from a Michigan statute, MCL324.82119(1)(d) which states that the driver of a snowmobile involved in a collision "shall be considered *prima facie* negligent". *Prima facie* is a Latin expression meaning "on its face" or "at first look". In layman's terms, the statute creates a *presumption* of negligence on

the part of the snowmobile driver when he or she collides with a motor vehicle, including a snowplow, but it is a *rebuttable* presumption. If sufficient contradictory evidence is produced by the snowmobile driver, he or she could successfully refute a *prima facie* negligence case.

Another of our main defenses is provided by MCL324.82124(3) which states that road commissions "are immune from tort liability for injuries or damages sustained by any person *arising in any way* out of the operation or use of a snowmobile" on a county road or county right-of-way. However, the immunity provided by this statute is negated if *gross negligence* can be proven which is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Gross negligence is undoubtedly a more difficult burden of proof for a plaintiff, but it is generally fact-driven, and courts will often let a jury decide the gross negligence issue. Like any question posed to a jury, you can't predict the outcome of jury deliberations with any certainty.

The *prima facie* and governmental immunity defenses outlined above are significant hurdles for a snowmobile driver to overcome if he or she chooses to sue a road commission and/or its driver for injuries sustained in a collision with a road commission vehicle. However, the statutes *do not* provide a guarantee of a successful defense should a lawsuit arise from such a collision. And, no matter whether we succeed in securing a dismissal of the lawsuit in court or need to proceed to a jury trial, the costs associated with defending these lawsuits are significant!

With Old Man Winter chomping at the bit and ready to make his annual appearance in Michigan, the anticipated "frigid, wet, wild and snowy" weather will not only cause our snowplows to be out on the roads on a more frequent basis, it will also provide additional opportunity for the operation of snowmobiles in areas common to where our snowplows will be operated. Please caution your drivers to be on the lookout for snowmobiles while plowing the roads and to *expect the unexpected!* Your drivers, your road commission and the Pool will *all* be better off if we can make it through the "numbing" winter of 2008-09 with no incidents of road commission equipment tangling with snowmobiles!



## DRUG and ALCOHOL TESTING CHANGES

Wendy S. Hardt  
Michael R. Kluck & Associates

The Federal Motor Carrier Safety Administration has adopted certain changes to the direct observation testing procedure in the Drug and Alcohol Testing Regulations, effective August 25, 2008, as follows:

1. New direct observation procedures will require the observer to check for devices designed to beat the drug test when an employee is subject to an observed collection.
2. Employees having observed collections must be instructed to raise clothing, just above the navel; lower clothing to mid-thigh; then turn around to show the same gender observers they do not have prosthetic devices for beating the tests. If no device is detected, the employee is permitted to return clothing to its proper observed-collection position. Then the observed collection will take place.

The following new situations resulting in “refusals to test” are also noted in the regulations, i.e. when:

- a. An employee admits to the collector that he or she adulterated or substituted their specimen.
- b. The employee behaves in a confrontational way that disrupts the collection process.
- c. The employee fails to follow the observer’s instructions to raise and lower their clothing and to turn around to permit the observer

to determine if the employee has a prosthetic or other device that could be used to interfere with the collection process.

- d. The employee possesses or wears a prosthetic or other device that could be used to interfere with the collection process.
- e. The employee refuses to wash his or her hands – after being directed to do so.

The FMCSA is also seeking to require, rather than permit, observed collections for all return-to-duty and follow-up drug tests. However, this decision was met with some resistance. Therefore the FMCSA has delayed implementation of that portion of the regulatory change until November 1, 2008 to allow an additional 30 days for receiving comments on it.

The specific reasons the FMCSA has given for the regulatory change requiring collection of return-to-duty and follow-up tests under direct observation is that those individuals, having already tested positive, are more likely to alter or substitute the specimen provided in their return-to-duty or follow-up test. It should be noted that, if the requirement for direct observation of collection of return-to-duty and follow-up tests goes into effect November 1<sup>st</sup>, as planned, this will be a significant change for those drivers affected. Some driver education should be provided, to help avoid refusal to test situations involving those employees who might otherwise balk at the direct observation.

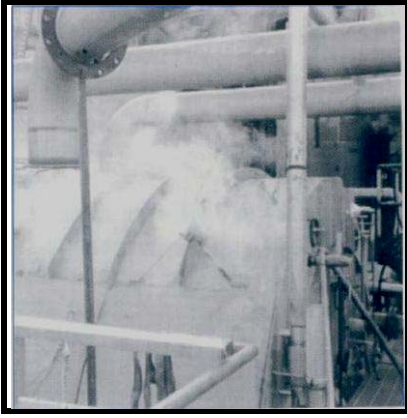
## MICROSOFT HAS IDENTIFIED A NEW SECURITY HOLE IN WINDOWS

Nick Wells  
MCRCSIP Information Systems Manager

Microsoft has identified a new security hole in all versions of Windows and has given it a “Critical” rating. It is highly recommended that everyone update their computers by visiting [www.windowsupdate.com](http://www.windowsupdate.com) as soon as possible.

For more information, visit:  
<http://support.microsoft.com/kb/958644>.

To paraphrase Microsoft: a security issue has been identified that could allow a remote attacker to compromise your Microsoft Windows-based computer and gain control over it.



## HEATING BOILER START-UP CHECKLIST

Hartford Steam Boiler  
Inspection & Insurance Co.

Every year at this time, several thousand heating boilers begin a journey which will eventually take them to the "heating boiler graveyard". The leading cause of heating boiler failures is "low water". The trouble often starts with a leak which probably will not appear dramatic; it could be simply a damp spot or puddle on the floor.

If the boiler's safety devices are working properly, the small leak will cause problems over time which will require repair. If the safety devices are not working properly, serious problems are imminent because "low water" in a boiler is like an engine without oil. A failure will undoubtedly occur; it is only a matter of time. The following tips will help you avoid the most common heating boiler problems by means of strategic maintenance:

- ☐ Have a competent service firm disassemble the low water cut-off and make-up water feeding devices. All parts should be thoroughly cleaned and reconditioned as required, then tested before the boiler is put into regular service. While in service the cut-off should be tested once a week.
- ☐ Burner equipment should be cleaned and adjusted to give maximum efficiency. This can save fuel dollars.
- ☐ The boiler heating surfaces, firebox, ash pit, casing and ducts should be cleaned of all deposits. Dirty internal surfaces not only waste fuel and dollars, but also can lead to the burning, bulging, cracking, corrosion and even explosion of the boiler.

- ☐ The safety/relief valve should be tested for freedom of operation. This is of primary importance. The boiler must not be fired if the safety/relief valves are inoperative and otherwise defective. These valves should be tested once a month while in service.
- ☐ If the boiler is of a type designed to permit cleaning of the water spaces, this should be done, and, where necessary, a suitable chemical treatment should be used to minimize new build-up of scale and to prevent corrosion.
- ☐ All pressure and temperature controls and gauges should be checked for satisfactory operation and adjusted or replaced as necessary.
- ☐ The water level gauge glass must be cleaned to indicate the proper water level at all times.
- ☐ Any leaking pipes or fittings located on the boiler or anywhere throughout the heating system should be repaired or replaced to prevent a loss of water.
- ☐ Water lines exposed to freezing temperatures should be insulated to prevent freeze-up. Steam and condensate return lines should be insulated to prevent unnecessary heat loss. Such action will reduce fuel bills and eventually more than pay for itself.
- ☐ All mechanical equipment, such as fans and pumps, should be checked for smooth operation and proper lubrication.
- ☐ A suitable record of boiler operation should be established and maintained throughout the season. Call Hartford Steam Boiler Inspection and Insurance Co.; they can help!
- ☐ The boiler room should be kept dry and clean.



**Celebrating 25 Years!**  
**1984 - 2009**



## **ROAD COMMISSION AUTHORITY TO VACATE ROADS QUESTIONED**

**Robert W. Parker, Esq.  
Smith Haughey Rice & Roegge**

A pending Circuit Court case considers whether judicial review is appropriate for decisions by County Road Commissioners to vacate or relocate county roads.

In that case, the plaintiffs challenged the Road Commission's approval of a proposal to relocate an existing county road. That portion of the road in question ran through property that was used as a campground. Ten to 15 years ago, the owner of the campground had sold former campground lots to individuals as residential lots, and there are now three homes in the midst of the campground. The homes in the campground were accessed via a county road, which ran between campsites and a lake. The road to the plaintiffs' home site was scenic and beautiful. However, there was also evidence that the narrow road, which was only 14 feet wide at one point, presented safety concerns for children at the immediately adjoining campground sites. Citing the safety concerns, the Road Commission approved a proposal by the campground owner to relocate a portion of the road to a new location, away from the lake, allowing the road to be widened to Road Commission standards and to no longer run immediately adjacent to campsites.

The plaintiffs challenged the decision. They appealed the decision of the Road Commission to relocate the road to the Circuit Court. They also

asserted easement theories against both the campground owner and the Road Commission.

As to the appeal filed by the plaintiffs, the Road Commission has asserted that there is no right of appeal from such a determination. The Road Commission argued that such decisions are legislative functions of the Road Commission, as opposed to administrative or judicial functions, and thus are not subject to judicial review. The governing statute, MCL 224.18(3), states that County Road Commissions have the absolute ability to abandon or discontinue a public road. There are few reported Appellate Court decisions challenging a Road Commission's decision to abandon jurisdiction of a road. Most dealt with property owners left without access. No decisions are truly on point as far as property owners left with access to the public road system, even if that access was less scenic or perhaps less convenient.

The Circuit Court Judge denied the Road Commission's request to dismiss the appeal. The Road Commission has filed an Application for Interlocutory Appeal to the Michigan Court of Appeals, again arguing that there is no jurisdiction in the circuit court to review a decision by a Road Commission to vacate a public road. Resolution of that appeal, and proceedings in the circuit court, are pending.

The decision may provide some guidance in the future for Road Commissions as to which of their functions may be exercised without the potential for the extra cost of judicial review. Road Commissions are entrusted by Michigan law with responsibility for overseeing public roads. The expertise they gain in the administration of such a system, and their responsibility to the public cannot be replicated by a court. A decision in this matter in favor of the Road Commission will help to reaffirm Michigan's commitment to a separation of powers within the government, with authority and jurisdiction over public roads left with the sole discretion of elected road commissions.

Stay Tuned



**Michigan County Road Commission Self-Insurance Pool  
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**MCRCSIP BOARD MEETING**

**Kewadin Casino Sault Ste. Marie  
February 19-20, 2009**

**Past and present issues of the Pool Cue are available on the MCRCSIP website – [www.mcrقسip.org](http://www.mcrقسip.org).**

**The Pool Cue is published quarterly by the  
Michigan County Road Commission  
Self-Insurance Pool  
417 Seymour Street, Suite #2  
P.O. Box 14119  
Lansing, Michigan 48901**