

STATE OF MICHIGAN
IN THE SUPREME COURT

ANGLERS OF THE AUSABLE, INC.,
a Michigan nonprofit corporation;
MAYER FAMILY INVESTMENTS, LLC,
a Michigan limited liability company; and
NANCY A. FORCIER TRUST,
Plaintiffs-Appellees,

S. Ct. Docket No. 138863,
138864, 138865, 138866

COA Docket No. 279301,
279306, 280265, 280266
(Consolidated)

v

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, a
department in the Michigan Executive
Branch, and STEVEN E. CHESTER,
Director of the Michigan Department of
Environmental Quality; and MERIT
ENERGY COMPANY, a Delaware
Corporation
Defendants-Appellees

LC Case No. 06-11697-CE(M)
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AMICUS CURIAE BRIEF OF
NATIONAL WILDLIFE FEDERATION AND
GREAT LAKES ENVIRONMENTAL LAW CENTER

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TABLE OF CONTENTS

INDEX OF AUTHORITIES..... iii

STATEMENT OF JURISDICTION..... 1

STATEMENT OF QUESTIONS PRESENTED..... 2

SUMMARY OF PROCEEDINGS AND FACTS 4

INTEREST OF AMICI CURIAE..... 5

INTRODUCTION 6

ARGUMENT 8

 I. The Court of Appeals erred by holding that DNR could convey a right to discharge treated wastewater to Merit Energy. The easement was not granted when Merit Energy's land was separated from a riparian parcel, and the purported right is not to access and enjoy the watercourse. Therefore, the easement does not fall within the limited exception to the general prohibition on conveyances of riparian rights.....8

 A. Standard of Review 8

 B. The basis of the riparian doctrine is contiguity between a riparian owner's land and a natural watercourse. 8

 C. Michigan generally prohibits conveyances of riparian rights apart from the land. The one exception is the narrow circumstance in which access is given by easement when a riparian property is split into parcels, in order to grant the back lot owners the rights to enjoy the watercourse. .. 9

 D. Because the DNR's easement did not meet the requirements of this narrow exception, the Court of Appeals erred in holding that the easement conveyed a riparian right to discharge to Merit Energy..... 12

 II. The Court of Appeals erred in holding that Merit Energy had a riparian right to discharge that was equal to the Plaintiffs-Appellants' rights. Because Merit Energy's discharge will cause pollution, it is not an exercise of a riparian right.. 14

 A. Standard of Review 14

 B. Merit Energy's pollution of Kolke Creek and Lynn Lake is not a riparian right. 14

C.	Treating Merit Energy's pollution as a riparian right would not only be contrary to the underpinnings of riparian law, it would also leave open the possibility that pollution is protected by the Taking Clause.....	19
D.	Merit Energy's pollution should not have been balanced against the Plaintiffs-Appellants' riparian rights.....	20
III.	MEPA creates a cause of action against the DEQ permitting process and <i>Preserve the Dunes</i> should be limited or overruled accordingly.	21
A.	Standard of Review	21
B.	MEPA requirements create a cause of action against the DEQ for granting a permit that will pollute, impair or destroy the naturalresources of Michigan.....	21
C.	MEPA Application by the Courts.....	23
D.	The conduct at issue in <i>Preserve the Dunes</i> is distinguishable from the final permit approval here. However, if the Court of Appeals was correct in its interpretation of this Court's holding in <i>Preserve the Dunes</i> , this Court should expressly limit or overrule its prior decision.....	24
IV.	This Court's recent ruling in <i>Lansing Schools Education Association v Lansing Board of Education</i> overrules the standing decision of <i>Michigan Citizens for Water Conservation</i> and reaffirms the right of the Plaintiff-Appellants and citizens generally to bring an action based on an "actual controversy" to protect "air, water, and other natural resources and the public trust from pollution, impairment, or destruction" under MEPA.	
A.	Standard of Review	28
B.	This Court's adoption of a standing doctrine consistent with the Michigan Constitution restores the legislatively created legal cause of action created byMEPA.....	28
	CONCLUSION AND RELIEF REQUESTED	31

INDEX OF AUTHORITIES

Cases:

<i>Anglers of the AuSable, Inc v Dep't of Environmental Quality</i> , 283 Mich App 115; 770 NW2d 359 (2009).....	<i>passim</i>
<i>Attorney General ex rel. Emmons v City of Grand Rapids</i> , 175 Mich 503; 141 NW 890 (1913).....	7, 16, 17, 18, 21
<i>Attorney General, ex Rel Natural Resources Comm v Balkema</i> , 191 Mich App 201; 477 NW2d 100 (1991).....	23
<i>Battle Creek v Goguaac Resort Ass'n</i> , 181 Mich 241; 148 NW 441 (1914).....	9
<i>Bott v Commission of Natural Resources</i> , 415 Mich 45; 327 NW2d 838 (1982).....	20
<i>Citizens to Preserve Overton Park, Inc v Volpe</i> , 91 S Ct 814; 28 L Ed 2d 136 (1971).....	24
<i>City of Jackson v Thompson-McCully Co</i> , 239 Mich App 482; 608 NW2d 531 (2000).....	23
<i>Dohany v Birmingham</i> , 301 Mich 30; 2 NW2d 907 (1942).....	17
<i>Dyball v Lennox</i> , 260 Mich App 698; 680 NW2d 522 (2003).....	13
<i>Eyde v Michigan</i> , 393 Mich 453; 225 NW2d 1 (1975).....	27
<i>Fenmode, Inc v Aetna Casualty & Surety Co</i> , 303 Mich 188; 6 NW2d 479 (1942).....	15
<i>Glass v Goeckel</i> , 473 Mich 667; 703 NW2d 58 (2005).....	20
<i>Hilt v Weber</i> , 252 Mich 198; 233 NW 159 (1930).....	6, 8, 9, 11, 20
<i>Industrial Union Dep't, AFL-CIO v Hodgson</i> , 162 US App DC 331; 499 F2d 467 (1974).....	24

<i>In re KH</i> , 469 Mich 621; 677 NW2d 800 (2004).....	28
<i>Little v Kin</i> , 249 Mich App 502; 644 NW2d 375 (2002) <i>aff'd</i> , 468 Mich 699; 644 NW2d 749 (2003)	10-13
<i>Lujan v Defenders of Wildlife</i> , 112 S Ct 2130; 119 L Ed 2d 151 (1992).....	28, 29
<i>Lansing Schools Educ. Ass'n v Lansing Bd. Of Educ.</i> , 2010 Mich LEXIS 1657 (July 31, 2010).....	3, 7, 28, 30
<i>Lewis v Sheldon</i> , 103 Mich 102; 61 NW 269 (1894).....	20
<i>MacNamara v Taft</i> , 196 Mass 597; 83 NE 310 (1907).....	18
<i>Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc. aff'd on other grounds</i> 269 Mich App 25; 709 NW2d 174 (2006).....	20
<i>Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.</i> , 479 Mich. 280; 727 NW2d 447 (2007).....	6, 29
<i>Michigan United Conservation Clubs v. Anthony</i> , 90 Mich App 99; 280 NW2d 883 (1979).....	23
<i>Monroe Carp Pond Co v River Raisin Paper Co</i> , 240 Mich 279; 215 NW 325 (1927).....	18
<i>Nemeth v Abonmarche Dev, Inc</i> , 457 Mich 16; 576 NW2d 641 (1998).....	23, 24, 27
<i>Parker v American Woolen Co</i> , 195 Mass 591; 81 NE 468 (1907).....	18
<i>Peterman v Dep't of Natural Resources</i> , 446 Mich 177; 521 NW2d 499 (1994).....	20
<i>Phillips v Village of Armada</i> , 155 Mich 260; 118 NW 941 (1908).....	17, 18
<i>People v Hulbert</i> , 131 Mich 156; 91 NW 211 (1902).....	17

<i>People v Petty</i> , 469 Mich 108; 665 NW2d 443 (2003).....	8, 14
<i>Preserve the Dunes, Inc v Dep't of Environmental Quality</i> , 471 Mich 508; 684 NW2d 847 (2004).....	6, 7, 25, 27
<i>Oade v. Jackson Nat'l Life Ins Co</i> , 465 Mich. 244; 632 NW2d 126 (2001).....	21
<i>Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources</i> , 403 Mich 215; 268 NW2d 240 (1978).....	24
<i>Ray v. Mason County Drain Commissioner</i> , 393 Mich. 294; 224 NW2d 883 (1975).....	22, 23, 27
<i>Saginaw Co v McKillop</i> , 203 Mich 46; 168 NW 922 (1918).....	15, 16
<i>State Highway Commission v. Vanderkloot</i> , 392 Mich. 159; 220 NW2d 416 (1974).....	22
<i>Thies v Howland</i> , 424 Mich 282; 380 NW2d 463 (1985).....	11
<i>Thompson v Enz</i> , 379 Mich 667; 154 NW2d 473 (1967).....	8, 10, 11
<i>Wayne County Dep't of Health v Olsonite Corp</i> , 79 Mich App 668; 263 NW2d 778 (1978).....	24
<i>West Michigan Environmental Action Council v Natural Resources Comm</i> , 405 Mich 741; 275 NW2d 538 (1979).....	27, 28
<i>Whittaker Gooding Co v Scio Twp Zoning Bd of Appeals</i> , 117 Mich App 18; 323 NW2d 574 (1982)	23
Constitutions, Statutes, and Rules:	
MCL §324.1701.....	22
MCL §324.1701(1).....	22, 25, 29
MCL §324.1701(2).....	23

MCL §324.1703(1).....	22
MCL §324.1706.....	23
Mich Const 1963, art 10, § 2.....	20
Mich Const 1963, art 4, § 52.....	22
Other Authorities:	
25 Am Jur 2d, Easements and Licenses in Real Property, §1.....	8
Robert E. Beck & Amy L. Kelley, <i>Waters and Water Rights</i> 1-7 (3rd ed. 2009).....	9-13
Garret Hardin, <i>The Tragedy of the Commons</i> , 162 Science 1243 (1968).....	12

STATEMENT OF JURISDICTION

Amici Curiae National Wildlife Federation and the Great Lakes Environmental Law Center rely upon the Statement of Jurisdiction as set forth in Plaintiffs-Appellants' Brief on Appeal.

STATEMENT OF QUESTIONS PRESENTED

- I. Because the basis of the riparian doctrine is actual contact between land and water, conveyance of riparian rights apart from the land is generally prohibited. The courts have recognized an exception for riparian rights to access and enjoy the watercourse if they are conveyed by easement when riparian property is split into parcels. Did the Court of Appeals err in holding that the riparian owner Department of Natural Resources could convey a right to discharge treated wastewater to the non-riparian Merit Energy?

Appellants' answer: "Yes."

Appellees' answer: "No."

Amici Curiae's answer: "Yes."

- II. A riparian owner does not have a property right to "use" a watercourse by polluting it. The Circuit Court found that the proposed discharge of wastewater by Merit Energy would severely affect the water quality of the ecosystem, and the Court of Appeals did not disturb that finding. Did the Court of Appeals err in holding that Merit Energy has a riparian right to discharge wastewater equal to the riparian rights of the Plaintiffs-Appellants?

Appellants' answer: "Yes."

Appellees' answer: "Did not address."

Amici Curiae's answer: "Yes."

- III. The Michigan Environmental Protection Act (MEPA) allows for "any person" to bring a court action for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. Plaintiffs-Appellants have demonstrated that the Department of Environmental Quality's granting of a permit to Merit Energy would or is likely to pollute, impair, or destroy the environment. Did the Court of Appeals err in holding that *Preserve the Dunes* precludes any MEPA claims regarding agency permitting decisions?

Appellants' answer: "Yes."

Appellees' answer: "No."

Amici Curiae's answer: "Yes."

IV. Until recently, Michigan standing jurisprudence required the existence of an actual "case or controversy" between two parties before a plaintiff could establish standing. However, this Court recently ruled that the "case or controversy" requirement is inconsistent with Michigan law, and that a plaintiff has standing wherever a legal cause of action exists.¹ Because the Plaintiff-Appellants have a legal cause of action under MEPA, do they have standing to bring a claim under the same pursuant to the standing doctrine adopted by this Court?

Appellants' answer: "Did not address."

Appellees' answer: "Did not address."

Amici Curiae's answer: "Yes."

¹ *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 2010 Mich LEXIS 1657 (July 31, 2010).

STATEMENT OF PROCEEDINGS AND FACTS

Amici Curiae National Wildlife Federation and the Great Lakes Environmental Law Center rely upon the Statement of Proceedings and Facts as set forth in Plaintiffs-Appellants' Brief on Appeal. On November 5, 2009, Amici Curiae submitted a motion to file a brief in support of Plaintiffs-Appellants' Application for Leave to Appeal. On January 29, 2010, the Court granted the motion. The National Wildlife Federation and the Great Lakes Environmental Law Center now file this Amicus Brief in support of Plaintiffs-Appellants' Brief on Appeal.

INTEREST OF AMICI CURIAE

National Wildlife Federation ("NWF") is a nonprofit corporation organized and existing under the laws of the District of Columbia. NWF is the largest citizen-supported conservation advocacy and education organization in the United States, with affiliate organizations, members, and supporters across the nation, including Michigan. NWF works actively on behalf of its members to maintain and enhance the quality of the nation's waters, including the waters of the Great Lakes, the waters in the Great Lakes Basin, and all the waters under Michigan's jurisdiction. Maintaining the integrity of Michigan's groundwater, streams, lakes, and rivers is a priority for NWF and its members in order to protect the quality of Michigan's drinking water and the integrity of Michigan's great outdoor heritage.

The **Great Lakes Environmental Law Center** ("GLELC") is a Michigan nonprofit organization founded to protect the world's greatest freshwater resource and the communities that depend on it. Based in Detroit, the GLELC has a board and staff of dedicated and innovative environmental attorneys to address our most pressing environmental challenges. The GLELC was also founded on the idea that law students can and must play a significant role in shaping the future of environmental law. The GLELC works in all three branches of government to promote the conservation, protection, and wise use of Michigan's water resources.

Both NWF and the GLELC are concerned that the outcome of this appeal could have significant impacts on the waters of the AuSable River system and on all the waters and natural resources of Michigan. Both organizations have an interest in the development and clarification of Michigan riparian law and the Michigan Environmental Protection Act, and believe that this amicus curiae brief will aid the Court in weighing the legal issues.

INTRODUCTION

Amici Curiae National Wildlife Federation and the Great Lakes Environmental Law Center submit this brief to address four significant legal issues raised by the Court in its order granting leave: (1) whether the Department of Natural Resources (DNR) could convey a riparian right to the non-riparian Merit Energy by easement; (2) whether Merit Energy could discharge treated wastewater into Kolke Creek under the reasonable use test for riparian rights; (3) whether the Department of Environmental Quality (DEQ) may be sued under the Michigan Environmental Protection Act (MEPA) for its approval of the wastewater discharge; and (4) whether *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*² and *Preserve the Dunes, Inc v Department of Environmental Quality*³ were correctly decided.⁴

(1) The Conveyance of Riparian Rights to Merit Energy is Prohibited.

It is a fundamental principle of riparian doctrine that there must be actual contact between a parcel of land and a natural watercourse before a landowner may exercise riparian rights.⁵ In Michigan, riparian rights generally cannot be severed from riparian land and conveyed to non-riparian owners. A narrow exception exists when the riparian property has been split into parcels and the original owner seeks to convey certain rights to enjoy the watercourse to back lot owners through an easement.⁶ By holding that the DNR could convey a right to discharge wastewater to the non-riparian Merit Energy, the Court of Appeals incorrectly extended this exception. Such a rule of law would impair the value of riparian property and result in degradation of the common watercourse.

(2) There is No Riparian Right to Pollute a Watercourse.

² 479 Mich 280; 727 NW2d 447 (2007).

³ 471 Mich 511; 684 NW2d 847 (2004).

⁴ Because *Preserve the Dunes* concerned whether a state agency may be sued under MEPA for its permit decisions, Amici Curiae will address whether *Preserve the Dunes* was correctly decided in Part III of the Argument.

⁵ *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930).

⁶ *Little v Kin*, 249 Mich App 502; 644 NW2d 375 (2002) *aff'd*, 468 Mich 699; 644 NW2d 749 (2003).

A riparian landowner's right to use water from a watercourse flowing across or adjacent to his land does not include pollution of that watercourse.⁷ By holding that the DNR had a property right to "use" Kolke Creek and Lynn Lake for a discharge of pollutants, the Court of Appeals incorrectly elevated the right to pollute to the same level as the riparian rights of the Plaintiffs-Appellants. Rather than evaluating the reasonableness of two competing riparian rights, the Court of Appeals should have enjoined Merit Energy's discharge to the extent that the pollution caused material harm to the riparian rights of Plaintiffs-Appellants.

(3) The DEQ May Be Sued under MEPA for Its Decision to Grant a Permit.

The Court of Appeals committed reversible legal error when it relied upon *Preserve the Dunes* to hold that citizens do not have a cause of action against an administrative agency's permitting process when it will or is likely to cause "pollution, impairment, or destruction" of air, water, or other natural resources. If *Preserve the Dunes* did require such a result, it should be overruled because it is contrary to the legislative intent of MEPA and it violates the Legislature's mandatory duty to protect the environment pursuant to Article IV, section 52 of the Michigan Constitution.

(4) Any Person May Bring a Claim under MEPA for Protection of Natural Resources.

This Court's recent decision, *Lansing Schools Education Association v Lansing Board of Education*, overrules previous Michigan standing cases that required an actual "case or controversy" between two parties in order for a plaintiff to establish standing to bring a claim.⁸ Under *Lansing Schools Education Association*, a plaintiff can now establish standing "wherever there is a legal cause of action."⁹ Because MEPA establishes a legal cause of action for any

⁷ *Attorney General v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913); *Kernen v Homestead Dev Co*, 232 Mich App 503, 512; 591 NW2d 369 (1998). See also 4 Restatement Torts, 2d, § 849 cmt e.

⁸ *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 2010 Mich LEXIS 1657 (July 31, 2010).

⁹ *Id.* at *34

person for declaratory or equitable judgment against any other person for the protection of Michigan's natural resources, the Plaintiff-Appellants can establish standing.

ARGUMENT

I. The Court of Appeals erred by holding that DNR could convey a right to discharge treated wastewater to Merit Energy. The easement was not granted when Merit Energy's land was separated from a riparian parcel, and the purported right is not to access and enjoy the watercourse. Therefore, the easement does not fall within the limited exception to the general prohibition on conveyances of riparian rights.

A. Standard of Review

The proper scope and application of the common law is reviewed de novo, as a question of law.¹⁰

B. The basis of the riparian doctrine is contiguity between a riparian owner's land and a natural watercourse.

Unlike more traditional property rights, riparian rights are limited interests founded in the relationship between land and a natural watercourse. "[T]he basis of the riparian doctrine, and an indispensable requisite to it, is actual contact of the land with the water."¹¹ Thus, a proprietor is a "riparian proprietor" and may exercise riparian rights if he "is in possession of riparian lands or . . . owns an estate therein."¹² In turn, riparian land is "defined as a parcel of land which includes therein a part of or is bounded by a natural watercourse."¹³

The riparian rights recognized by Michigan courts rely on the land's physical proximity to the natural watercourse. There are four traditional categories of riparian rights: "(1) [u]se of the water for general purposes, as bathing, domestic use, etc.[;] (2) [t]o wharf out to navigability[;]

¹⁰ *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

¹¹ *Hilt v Weber*, 252 Mich 198, 218; 233 NW 159 (1930).

¹² *Thompson v Enz*, 379 Mich 667, 677; 154 NW2d 473 (1967) (opinion of Kavanagh, J.). "An easement is not an estate in land, but is merely an interest in land in the possession of another." 25 Am Jur 2d, Easements and Licenses in Real Property, §1.

¹³ *Thompson*, *supra* at 677.

(3) [a]ccess to navigable waters; [and] (4) [t]he right to accretions."¹⁴ Each hinges on actual contact between water and land. The riparian's right to use water—also known as a "usufructuary" right—is dependent on the characteristics of the watercourse as it appears next to or on his property.¹⁵ "In the context of riparian rights, the statement that one owns only a usufructuary right indicates that one owns only a right to use the water *as it passes over, or lies upon, one's land*."¹⁶ Moreover, to wharf out, access navigable waters, and take title to accretions are rights that are naturally exercised from land that is adjacent to the watercourse.

Contiguity is not required simply because owners of adjacent property are in the best position to use these rights. It is designed to protect the resource on which the doctrine is based. A watercourse is a commons, and as such, it can easily be overused.¹⁷ By limiting the number of people with full rights to use the water to those who own property adjacent to it, the requirement of contiguity preserves the value of a riparian owner's property, provides some level of certainty about the possible demands on the resource, and protects against degradation that could ultimately destroy the resource.

C. Michigan generally prohibits conveyances of riparian rights apart from the land. The one exception is the narrow circumstance in which access is given by easement when a riparian property is split into parcels, in order to grant the back lot owners the rights to enjoy the watercourse.

Because riparian rights are based on actual contact between water and land, there is "a long tradition [in some states] that riparian rights are not transferable apart from the land to which those rights are attached."¹⁸ Indeed, the very term "usufruct" implies that riparian rights cannot be conveyed by easement or otherwise:

¹⁴ *Hilt, supra* at 225.

¹⁵ *Battle Creek v Goguaac Resort Ass'n*, 181 Mich 241, 247; 148 NW 441 (1914).

¹⁶ Robert E. Beck and Amy L. Kelley, 1-7 Waters and Water Rights §7.02(a) (3rd ed) (emphasis added).

¹⁷ See Garret Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

¹⁸ Beck, §7.04.

This concept [of usufructuary rights] derives from Roman law, under which full property rights were described as involving three aspects—usus, fructus, and abusus. Usus means the right to use the property; fructus means the right to enjoy the fruits of the property; and abusus means the right to consume, waste, destroy, or alienate (sell) the property. By definition, a "usufructuary" right includes the right to use and enjoy the property (usus and fructus), but not the right to waste or convey the property.¹⁹

Michigan follows this tradition by prohibiting conveyances of riparian rights apart from the land, with a limited exception that preserves rights in land that was connected to a watercourse.²⁰ Under this exception, access to the watercourse and the associated riparian rights of building a dock and permanently anchoring a boat may be conveyed by easement to back lot owners when riparian land is developed into multiple parcels.²¹ Because the dominant tenement was historically connected to the watercourse, this exception is consistent with the riparian doctrine's basis in "actual contact" between land and water.

In 1967, a plurality of the Court affirmed in *Thompson v Enz* that riparian rights cannot generally be transferred apart from the riparian land.²² The Court began by framing the question as "whether or not riparian rights may be conveyed to a grantee or reserved by the grantor in a conveyance which divides a tract of land with riparian rights into more than one parcel, of which parcels only one would remain bounded by the watercourse."²³ After reviewing cases in Michigan and other states, the Court held that "*riparian rights are not alienable, severable, divisible, or assignable apart from the land which includes therein, or is bounded, by a natural*

¹⁹ *Id.* §7.04(a).

²⁰ Every state now allows at least some form of a transfer apart from the land, but most states do not allow full transferability. *Id.* §7.04.

²¹ *Thompson, supra* at 686; *Little v Kin*, 249 Mich App 502, 513; 644 NW2d 375 (2002) (*Little I*) *aff'd*, 468 Mich 699; 644 NW2d 749 (2003) (*Little II*).

²² Justice Kelly concurred in the result and apparently agreed with the plurality on the question of riparian rights; however, the Justice would not have remanded to determine reasonableness because the parties did not raise the issue in their pleadings. *Thompson, supra* at 693.

²³ *Id.* at 686.

watercourse" and that "*riparian rights may not be conveyed or reserved.*"²⁴ But the Court also acknowledged that "easements, licenses and the like for a right-of-way for access to a watercourse do exist and oftentimes are granted to nonriparian owners."²⁵ Thus, at least one recognized riparian right—access to the watercourse—could be conveyed to back lot owners.²⁶ The Court then remanded to determine whether granting an easement for access to the lake was a reasonable use by the riparian defendant developer.²⁷

In 1985, the Court again addressed conveyance of riparian rights in *Thies v Howland*.²⁸ As in *Thompson*, the question was whether a developer of a riparian parcel could convey riparian rights to back lot owners. In *Thies*, the Court considered whether the back lot owners in a subdivision could exercise riparian rights in a walk abutting the shoreline that was dedicated in the original plat to "the joint use of all the owners of the plat."²⁹ The Court treated the walk as an easement over the front lot riparian owners' land, and reasoned that the back lot owners could exercise the riparian rights of "erecting a dock or permanently anchoring their boats if these activities are within the scope of the plat's dedication and do not unreasonably interfere with [the front lot owners'] use and enjoyment of their property."³⁰ In making this determination, the Court did not mention *Thompson*, although it did cite the case in its discussion of the nature of riparian rights.³¹

Finally, in 2003, the Court of Appeals confronted the same question in *Little v Kin*: whether a corporation could convey by easement "access to and use of the riparian rights" to

²⁴ *Id.* (emphasis added).

²⁵ *Id.* at 686.

²⁶ See *Hilt, supra* at 218; Beck, §6.01(a)(1).

²⁷ *Thompson, supra* at 686, 688.

²⁸ 424 Mich 282; 380 NW2d 463 (1985).

²⁹ *Id.* at 286-89.

³⁰ *Id.* at 289, 293-94.

³¹ *Id.* at 288.

back lot owners when it subdivided riparian property.³² The Court of Appeals reconciled the apparent inconsistencies in *Thompson* and *Thies* in the following manner: "[W]hile full riparian rights and ownership may not be severed from riparian land and transferred to nonriparian backlot owners, Michigan law *clearly allows the original owner of riparian property to grant an easement to backlot owners to enjoy certain rights* that are traditionally regarded as exclusively riparian."³³ These certain rights included the right of access to the watercourse as well the right to build and maintain a dock.³⁴ On appeal, this Court affirmed the judgment with two clarifications not relevant here.³⁵

Taken together, these cases stand for the narrow proposition that access to a watercourse and rights to enjoy the water, such as building a dock and permanently anchoring a boat, may be conveyed by easement to back lot owners when a riparian property is split into parcels. Limiting conveyances to land that was once riparian and to rights that are least likely to degrade the resource protects the watercourse for the benefit of riparian owners.³⁶

D. Because the DNR's easement did not meet the requirements of this narrow exception, the Court of Appeals erred in holding that the easement conveyed a riparian right to discharge to Merit Energy.

Assuming that the easement from the DNR to Merit Energy in fact included the right to use the watercourse by discharging treated wastewater, and that this is a riparian right, the easement could not convey such a right.³⁷ The Court of Appeals erred by extending the narrow exception applied in previous cases to a non-riparian owner with no connection to the

³² *Little I, supra* at 505.

³³ *Id.* at 504-05 (emphasis added).

³⁴ *Id.* at 514.

³⁵ *Little II, supra* at 700-01.

³⁶ See Beck §7.04(3) (noting that the "conveyance of a right to non-consumptive uses is, in some respects, easier to justify than a conveyance of a right to make consumptive uses . . . [because] [t]hese uses usually do not affect the rights of other riparians").

³⁷ For purposes of this argument, Amici assume that the text of the easement conveyed a right to discharge. In addition, Amici assume that there is a riparian "right to discharge." If, as Amici contend in Part II, there is no riparian right to pollute a watercourse by discharging wastewater, there would not be a right for DNR to convey.

watercourse, and to a riparian right that is distinct from the rights of access and enjoyment.

While some of these cases—notably *Thies*—include language that could be read broadly to allow any riparian right to be conveyed by easement to any non-riparian owner, turning this dicta into law would undercut the riparian doctrine by dramatically increasing the burden on the common watercourse.³⁸

In holding that DNR could convey a right to discharge to Merit Energy, the Court of Appeals relied on *Little* and another Court of Appeals decision, *Dyball v Lennox*.³⁹ Neither case supports the holding.⁴⁰ While the easement at issue in *Little* purported to convey all riparian rights, the Court of Appeals only discussed the rights of access and building a dock. The language in *Little* quoted by the Court of Appeals—also quoted above—only states that conveyances of "certain rights" by the "original owner of riparian property" to back lot owners are allowed.⁴¹ *Dyball*, like the other cases to apply this exception, involved a riparian owner who split the land into parcels and provided an easement to back lot owners.⁴² The easement was "for the purpose of ingress and egress."⁴³ In discussing *Little*, the Court of Appeals in *Dyball* noted that an easement could convey more than access rights; but this citation does not support the panel's apparent belief in the case at bar that all rights can be conveyed.⁴⁴

³⁸ The DNRE suggests that expanding the number of users by easement would not degrade the resource because the uses would be limited to those considered reasonable for the riparian. DNRE's Brief on Appeal, p 8. While such a rule if adopted would limit the impact on the watercourse, the number of uses that reach the limits of reasonableness would still more than likely increase.

³⁹ *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 283 Mich App 115, 131; 770 NW2d 359 (2009); *Dyball v Lennox*, 260 Mich App 698; 680 NW2d 522 (2003).

⁴⁰ The Court of Appeals also reasoned that because a riparian right was being conveyed, and the easement was on riparian land, the conveyance was connected to, not apart from, the land. *Anglers of the AuSable, Inc, supra* at 131-32. This is incorrect. Easements conveying riparian rights are granted apart from the land because they do not accompany conveyances of the underlying riparian land, such as by deed. See Beck §7.04.

⁴¹ *Little I, supra* at 504-05.

⁴² *Dyball, supra* at 699-700.

⁴³ *Id.* In a later deed, the easement was referred to again as an easement for access. *Id.* The Court of Appeals treated the conveyance as one easement.

⁴⁴ See *id.* at 706.

When the narrow exception is properly applied to the facts of this case, it is clear that the conveyance is invalid. The conveyance did not occur when a riparian owner split his land into parcels, and there is no evidence in the record that the land owned by Merit Energy was at one time riparian. In addition, granting access for a right to discharge is not the type of activity that this Court or the Court of Appeals has recognized as transferable. Discharge of wastewater is not a right to enjoy the water, like the building of a dock or the permanent anchoring of a boat. Opening the door to this right would allow unfettered use of the watercourse by non-riparians.

Although DNR cannot convey a right to discharge to Merit Energy by easement, this does not mean that companies like Merit Energy must always dispose of their wastewater on site. Rather, Merit Energy does not have a *property right* to discharge its water into Kolke Creek, and thus cannot degrade a watercourse if it is considered a reasonable use. If the now-DNRE gave permission to Merit Energy to discharge the wastewater from DNRE property, the company could still do so if the discharge did not harm the rights of other riparian owners. The company could also purchase riparian property and discharge the wastewater from that property as a riparian owner, assuming such a discharge was a reasonable use.⁴⁵

II. The Court of Appeals erred in holding that Merit Energy had a riparian right to discharge that was equal to the Plaintiffs-Appellants' rights. Because Merit Energy's discharge will cause pollution, it is not an exercise of a riparian right.

A. Standard of Review

The proper scope and application of the common law is reviewed de novo, as a question of law.⁴⁶

B. Merit Energy's pollution of Kolke Creek and Lynn Lake is not a riparian right.

⁴⁵ As argued below, a "use" of water that causes pollution is not a riparian right, and thus Merit Energy could not discharge the wastewater if it caused pollution.

⁴⁶ *Petty, supra* at 113.

Riparian uses include a broad range of activities, which the courts have generally divided into "natural uses" and "artificial uses." "Natural uses . . . encompass all those absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purposes," while "[a]rtificial uses are those which merely increase one's comfort and prosperity and do not rank as essential to his existence, such as commercial profit and recreation."⁴⁷ In a dispute between artificial riparian uses, courts assess whether a use is reasonable.⁴⁸

A riparian use may involve not just a withdrawal, but also return of water to the watercourse through runoff or other means. The Court of Appeals relied on the Court's decision in *Saginaw County v McKillop* for a general riparian "right to discharge."⁴⁹ There is no such broad "right" recognized by the courts of this state.⁵⁰ In holding that an action against a drain project for its negative effects on downstream riparians should go to trial, the Court in *McKillop* acknowledged that individual riparian owners could drain their own land for "lawful purposes" if they did not alter the natural stream.⁵¹ *McKillop* is thus best understood as referring to the more limited right of a riparian owner to "drain" diffuse surface waters *originating on her land* into the adjacent watercourse.⁵²

⁴⁷ *Thompson, supra* at 686.

⁴⁸ *Id.* at 686-87. Natural uses "enjoy a preferred nonproratable position" as against other uses, and thus are not subject to the reasonable use test.

⁴⁹ *Anglers of the AuSable, Inc, supra* at 131-32 (citing *Saginaw Co v McKillop*, 203 Mich 46, 52; 168 NW 922 (1918)).

⁵⁰ Moreover, until the Court of Appeal's decision, no court has recognized a riparian right to discharge water from another watershed.

⁵¹ *McKillop, supra* at 53.

⁵² *Id.* at 52-53. Surface waters are defined as "waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence." *Fenmode, Inc v Aetna Casualty & Surety Co*, 303 Mich 188, 192; 6 NW2d 479 (1942). It is important to note that the law governing the drainage of diffuse surface water is traditionally separate from the law governing riparian rights to defined watercourses.

Even if *McKillop* could be read for the proposition that there is a riparian "right to discharge" water, that property right should not include the right to "use" a waterway by polluting it. As the Restatement (Second) of Torts explains, "[t]here is no riparian right or privilege to pollute water, nor do landowners have rights to pollute surface and ground water found on or within their land."⁵³ "Pollution" is defined as "the alteration of [a water's] physical, chemical or biological qualities so as to make it harmful to domestic, commercial, industrial, agricultural, recreational or other beneficial uses of water or uses of land, or detrimental to public health, safety and welfare or to livestock, wild animals, birds, fish or other aquatic life."⁵⁴ This treatment of pollution does not mean that discharges that cause pollution are prohibited per se—such a rule of law would halt industrial activity. Instead, it means that polluting discharges are not accorded the status of *property rights*, and thus are not privileged as equal in right to other "artificial uses" such as swimming and building a dock.

The Court's cases on the discharge of pollutants by riparians often mingle the discussion of a "right" with its "reasonableness." But a careful look at the reasoning of these cases demonstrates that a polluting activity is not considered a "right" on equal footing with other "uses." Michigan's cases are thus consistent with the Restatement position.

For example, in *Attorney General v Grand Rapids*, the Court considered a public nuisance claim on behalf of riparian owners against Grand Rapids for depositing sewage into the Grand River.⁵⁵ Grand Rapids argued that its riparian "use" of sewerage was reasonable given the needs of its populace and the lack of alternatives.⁵⁶ Initially, the Court agreed that "[u]ndoubtedly the city has the right to make a reasonable use of the waters of the river as a

⁵³ Restatement Torts, *supra* § 849 cmt e.

⁵⁴ *Id.* § 832 cmt c.

⁵⁵ *Attorney General v Grand Rapids*, 175 Mich 503, 505; 141 NW 890 (1913).

⁵⁶ *Id.* at 509-11.

riparian owner." But the Court then treated the issue as one in which the City had no *right* to pollute:

The city may be treated as a riparian proprietor, and as such riparian proprietor it has no *right* to destroy the use of the water to other riparian proprietors, and it may not unreasonably increase the burden to lower riparian proprietors by carrying from a distance, by artificial means, refuse substances which would not be naturally deposited therein, thereby causing the pollution which would destroy the use of the water to the lower riparian owner.⁵⁷

Because the Court found no right to pollute, it enjoined the City's activities until the sewage could be treated.⁵⁸

In deciding the case against Grand Rapids, the Court distinguished two previous cases—*People v Hulbert* and *Phillips v Village of Armada*—that could have been read to allow pollution as a use.⁵⁹ In *Hulbert*, the Court found that a riparian had the right to bathe in a lake even though there was a possibility that the bathing could affect the community's drinking water.⁶⁰ The *Grand Rapids* Court pointed out that the question was one of degree; the riparian did not have the right to cause actual pollution: "It was said [in *Hulbert*] that 'any' use of the '[w]ater which defiles and corrupts it to such a degree as essentially to impair its purity, and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, . . . is an infringement of the right of other owners of land through which a watercourse runs."⁶¹ In *Phillips*, the Court stated that some pollution could be necessary because sewerage was critical for public health.⁶² Noting that "[t]he question [was] barely referred to in the brief of counsel

⁵⁷ *Id.* at 534 (emphasis added).

⁵⁸ *Grand Rapids*, *supra* at 543. Accord *Dohany v Birmingham*, 301 Mich 30, 41-42; 2 NW2d 907 (1942) (prohibiting the City of Birmingham from allowing sewage to drain across a riparian's land and pollute the watercourse, in part because the City was not a riparian owner). While here Merit Energy has treated its wastewater, the discharge will still cause pollution because it will impair water quality in the ecosystem.

⁵⁹ *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902); *Phillips v Village of Armada*, 155 Mich 260; 118 NW 941 (1908).

⁶⁰ *Hulbert*, *supra* at 173.

⁶¹ *Grand Rapids*, *supra* at 541 (quoting *Hulbert*, *supra* at 162).

⁶² *Phillips*, *supra* at 262.

for the plaintiff, and its decision [was] not essential to a determination of [the] case," the Court in *Grand Rapids* declined to follow this dicta.⁶³

The Court also analyzed pollution as an issue of a right in *Monroe Carp Pond Co v River Raisin Paper Co*.⁶⁴ In that case, the Court considered a claim by the operator of a carp pond that the wastes from a box plant had adversely affected his riparian rights.⁶⁵ The Court treated the issue to be resolved as the reasonableness of the box plant's use, but focused on the right itself in its analysis:

That which plaintiff here complains of is not the use which defendants make of the water for manufacturing purposes. The gravamen of the charge here made is that defendants use the stream for a dumping ground in which the waste products of the mills are deposited, and that the amount of such deposit is so great that the water cannot and does not become purified when it reaches the place on the river where plaintiff's pond is located.⁶⁶

In support of this analysis, the Court quoted two Massachusetts cases, both of which declare there is no riparian right to pollute waters if the pollution materially affects the uses of downstream riparians.⁶⁷

In determining that the proposed discharge by Merit Energy would likely impair or pollute Kolke Creek and Lynn Lake, the Circuit Court in the case at bar "made detailed and specific findings that the proposed discharge would: significantly affect wildlife; cause increased flooding, sedimentation, phosphorus levels, chloride levels, and erosion; and severely affect the water quality of the system."⁶⁸ The Court of Appeals did not disturb these findings. In a related action challenging the Certificate of Coverage for the discharge, the Circuit Court held that the

⁶³ *Grand Rapids*, *supra* at 542 (quoting *Phillips*, *supra* at 264).

⁶⁴ *Monroe Carp Pond Co v River Raisin Paper Co*, 240 Mich 279; 215 NW 325 (1927).

⁶⁵ *Id.* at 283.

⁶⁶ *Id.* at 286.

⁶⁷ *Id.* at 286-87 (quoting *Parker v American Woolen Co*, 195 Mass 591; 81 NE 468 (1907); *MacNamara v Taft*, 196 Mass 597; 83 NE 310 (1907)). In considering the economic benefits of the two businesses, the Court ultimately denied the carp pond owner an injunction and imposed damages instead. *Monroe Carp Pond Co*, *supra* at 288-89.

⁶⁸ *Anglers of the AuSable, Inc*, *supra* at 133.

Certificate exceeded the scope of the General Permit and thus violated the requirements of the federal Clean Water Act and Part 31 of the Natural Resources and Environmental Protection Act, 324.3101 *et seq.*⁶⁹ Because the discharge will cause pollution, Merit Energy does not have a riparian right to engage in this activity.

C. Treating Merit Energy's pollution as a riparian right would not only be contrary to the underpinnings of riparian law, it would also leave open the possibility that pollution is protected by the Taking Clause.

The law of riparian rights rests on the premise that a water resource can serve several uses over the long term. To the extent there is a conflict between uses, the law privileges those that generally require clean water—"natural" uses such as drinking water supply—over ones that may not—"artificial" uses. Polluting a watercourse not only damages the integrity of the resource, it also destroys the resource's usefulness to a broad swath of owners now and in the future. Thus, it makes sense to define a riparian right not to include the "use" of pollution, rather than to determine on a case-by-case basis whether the pollution is reasonable. As the Restatement (Second) of Torts explains:

This Chapter deals with the rights, privileges and powers of proprietors of land to withdraw, store and use water for beneficial purposes to supply the needs of man and animals, to produce power, to irrigate land, to manufacture goods and to satisfy intangible wants for recreation and aesthetic pleasures, and with the protection the law gives to uses for these purposes. Most of these uses and purposes require clean water, and the very existence of man depends upon the preservation and restoration of an environment conducive to his health and well-being. For these reasons the protection given to beneficial uses is not extended to those activities that impair the quality of water to the point of creating pollution.⁷⁰

⁶⁹ *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, No. 07-012072-AA (Otsego Circuit Court, Jan. 31, 2008), lv den, 2008 Mich. App. LEXIS 2647 (Sept. 24, 2008), lv gtd and remanded, 482 Mich 1078; 758 NW2d 258 (2008), motion for reconsideration gtd and lv den, 483 Mich 887; 760 NW2d 230 (2009). The opinion can be found in the DNRE's Appendix starting at p. 22b.

⁷⁰ Restatement Torts, *supra* § 849 cmt e.

Moreover, "[r]iparian rights are property, for the taking or destruction of which by the State compensation must be made."⁷¹ If pollution is treated as a "use" of a watercourse—that is, as a riparian right—this treatment implies that a "reasonable" amount of pollution could be protected by operation of the Taking Clause.⁷² Encouraging the permanence of pollution undercuts the premise of riparian law and is contrary to the treatment of pollution in other contexts, such as nuisance law and administrative permitting. The Court has noted "the unfairness of eliminating a property right without compensation" in the context of riparian rights and warned that "stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance."⁷³ Therefore, it is critically important for the Court to clarify that pollution is not a property right.

D. Merit Energy's pollution should not have been balanced against the Plaintiffs-Appellants' riparian rights.

Because the Court of Appeals held that Merit Energy's discharge was a riparian right, it determined that "this dispute should be analyzed under the law applicable to disputes between riparian proprietors."⁷⁴ The applicable law, according to the Court of Appeals, is the reasonable use balancing test articulated in *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc.*⁷⁵ But as the Court of Appeals also recognized, riparian uses are only "balanced" when each riparian has a recognized use or right: "[U]nder Michigan's riparian

⁷¹ *Hilt, supra* at 225. This property right is not absolute—it is limited by the usufructuary nature of the right as well as superseding public interests such as the navigational servitude and the public trust doctrine. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 193-94; 521 NW2d 499 (1994); *Glass v Goeckel*, 473 Mich 667, 694 n 24; 703 NW2d 58 (2005).

⁷² Mich Const 1963, art 10, §2. Indeed, if this case is remanded to the Circuit Court and Merit Energy decides to go forward with some discharge of treated wastewater, it could presumably argue that this discharge is protected from a governmental taking.

⁷³ *Bott v Comm of Natural Resources*, 415 Mich 45, 77-78; 327 NW2d 838 (1982) (citing *Lewis v Sheldon*, 103 Mich 102; 61 NW 269 (1894); *Hilt, supra* at 198).

⁷⁴ *Anglers of the AuSable, Inc, supra* at 135.

⁷⁵ *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005), aff'd in part, rev'd in part, and remanded on other grounds 479 Mich 280; 737 NW2d 447 (2007).

authorities, water disputes between riparian proprietors are resolved by a reasonable use test that balances competing water uses to determine whether one riparian proprietor's water use, which interferes with another's use, is unreasonable under the circumstances."⁷⁶

Instead of using the balancing test, the Court of Appeals should have determined that the proposed discharge would cause pollution and thus was not an exercise of a riparian right.⁷⁷ As a use of the watercourse that is not a property right, Merit Energy's discharge should then have been enjoined to the extent that it would cause material harm to the Plaintiffs-Appellants' riparian rights.⁷⁸ This remedy is consistent with the one granted by the Court in *Grand Rapids* and protects the only individuals who have cognizable property rights in the water resources: the riparian Plaintiffs-Appellants.⁷⁹ Whether a lower level of discharge by Merit Energy should be considered "pollution" may be a factual issue that warrants remand, given the legal implications of such a finding.

III. MEPA creates a cause of action against the DEQ permitting process and *Preserve the Dunes* should be limited or overruled accordingly.

A. Standard of Review

As the issue presented involves a question of statutory interpretation, the standard of review is de novo.⁸⁰

B. MEPA requirements create a cause of action against the DEQ for granting a permit that will pollute, impair or destroy the natural resources of Michigan.

⁷⁶ *Anglers of the AuSable, Inc, supra* at 135 (quoting *Michigan Citizens for Water Conservation, supra* at 58).

⁷⁷ In discussing whether surface water or riparian law should apply, the Court of Appeals below noted that a riparian owner cannot pollute a watercourse. But it did not then analyze the riparian rights issue in the manner urged by Amici Curiae. *Anglers of the AuSable, Inc, supra* at 134 n 16.

⁷⁸ According to the Restatement, pollution by riparians should be considered under traditional tort standards such as nuisance. Restatement Torts, *supra* §849. To the extent that a tort standard helps to pinpoint the harms to riparian rights, it could be helpful.

⁷⁹ Amici Curiae recognize that Merit Energy's proposed discharge was determined to be unreasonable by the Circuit Court, and that this determination was upheld by the Court of Appeals. Amici Curiae's concern lies with the manner in which the courts below analyzed the issue.

⁸⁰ *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250; 632 NW2d 126 (2001).

The Michigan Constitution establishes the protection of public health, welfare, and the environment as a paramount concern for state government:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest 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.⁸¹

This Court has made clear that this Constitutional text imposes a mandatory duty on the Michigan Legislature to protect the environment.⁸² The Legislature carried out this duty by passing MEPA,⁸³ a "world famous" statute that was one of the first in the United States to provide citizens with a legal tool to protect the environment from public or private degradation.⁸⁴ The MEPA allows for "any person" to bring a court action for "the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."⁸⁵ Plaintiffs-Appellants have demonstrated that Merit Energy's proposed discharge would or is likely to "pollute, impair, or destroy" the environment. As DEQ and Merit Energy have not put forth adequate rebuttal evidence, the proposed discharge must be enjoined unless DEQ and Merit Energy demonstrate that there is "no feasible and prudent alternative" that would achieve the objective of the site cleanup and that the proposed discharge is "consistent with the promotion of the public health, safety, and welfare in light of the state's 'paramount concern' for the protection of its natural resources from pollution, impairment and destruction."⁸⁶ MEPA

⁸¹ Mich Const 1963, art 4, §52.

⁸² *State Highway Comm v Vanderkloot*, 392 Mich 159, 179-80; 220 NW2d 416 (1974). This Court noted that "Certainly a construction favoring mandatoriness best implements this constitutional 'paramount public concern' with protection of our environment."

⁸³ MCL 324.1701 *et seq.*

⁸⁴ *Ray v Mason County Drain Comm'r*, 393 Mich 294, 298 & n 1; 224 NW2d 883 (1975).

⁸⁵ MCL 324.1701(1).

⁸⁶ MCL 324.1703(1).

supplements all other existing administrative and regulatory procedures and Michigan courts have rightly applied MEPA broadly.⁸⁷

C. MEPA Application by the Courts

The threshold question under MEPA is whether a proposed action would "pollute, impair, or destroy" the environment. Michigan courts have defined "impair" as "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner."⁸⁸ Permitting standards do not limit the definition of impairment; in reviewing a MEPA case, this Court may evaluate the adequacy of any applicable "standard for pollution or for an antipollution device or procedure" and "direct the adoption" of a more stringent standard if the court finds that standard to be "deficient,"⁸⁹ or determine on a factual basis whether there is a "likely pollution or impairment."⁹⁰ In evaluating whether such impairment has occurred, this Court should not weigh the benefits of the discharge against its impacts, but rather should evaluate whether the discharge poses a significant enough environmental risk to natural resources to trigger a MEPA prima facie case.⁹¹ A showing that environmental harm will definitely occur is not necessary because "a MEPA claim may be founded on 'probable damage to the environment'" alone.⁹² The trial court correctly concluded, and the Court of Appeals affirmed, that the discharges from the pipeline constituted a MEPA violation.

The resources impaired by a proposed action need not be rare or unique in order to trigger the MEPA, because "one of the primary purposes of the MEPA is to protect our natural resources

⁸⁷ MCL 324.1706.

⁸⁸ *Whittaker Gooding Co v Scio Twp Zoning Bd of Appeals*, 117 Mich App 18, 22; 323 NW2d 574 (1982) (citing *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99; 280 NW2d 883 (1979)).

⁸⁹ MCL 324.1701(2).

⁹⁰ *Ray, supra*; *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 34; 576 NW2d 641 (1998).

⁹¹ *Attorney General v Balkema*, 191 Mich App 201, 206; 477 NW2d 100 (1991).

⁹² *Jackson v Thompson-McCully Co*, 239 Mich App 482, 490; 608 NW2d 531 (2000) (citing *Ray, supra*, at 309).

before they become 'scarce.'"⁹³ Thus, if Merit Energy's proposed discharge is likely to significantly injure or diminish a natural resource, then the MEPA is triggered. If the proposed discharge triggers the MEPA, then it "may not proceed . . . as planned" if there is one or more feasible and prudent alternatives that would reduce the pollution, impairment, or destruction that the discharge would cause."⁹⁴ The proponents of the proposed discharge, Merit Energy and DEQ, are therefore required to prove that no "feasible and prudent" alternatives exist before they may proceed with the discharge as planned.⁹⁵ An alternative is considered "feasible" if it "is likely to work out or be put into effect successfully."⁹⁶ An alternative may be rejected on the basis of cost only if it is "prohibitively expensive" and should not be dismissed simply because it would "substantially increase production costs" or be "financially burdensome."⁹⁷ Of course, often a less polluting alternative also proves to be less costly, creating an immediate mutually beneficial situation that serves the proposed need at a reduced cost. The determination of whether an alternative is "prudent" does not involve a "comprehensive balancing of competing interests."⁹⁸ Instead, an alternative is imprudent only if there are "truly unusual factors" that result in "unique problems" or costs that "approach 'extraordinary magnitude.'"⁹⁹ In the absence of such a showing, the discharge should not be allowed, and MEPA provides a cause of action to challenge both the permitting of the discharge and the discharge itself.

D. The conduct at issue in *Preserve the Dunes* is distinguishable from the final permit approval here. However, if the Court of Appeals was correct in its interpretation of this Court's holding in *Preserve the Dunes*, this Court should expressly limit or overrule its prior decision.

⁹³ *Nemeth, supra* at 34 (emphasis added).

⁹⁴ *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 403 Mich 215, 232; 268 NW2d 240 (1978).

⁹⁵ *Wayne County Dep't of Health v Olsonite Corp*, 79 Mich App 668, 700; 263 NW2d 778 (1978).

⁹⁶ *Id.* at 796.

⁹⁷ *Id.* (citing *Industrial Union Dep't, AFL-CIO v Hodgson*, 162 US App DC 331, 341-42; 499 F2d 467 (1974)).

⁹⁸ *Id.* at 797 (citing *Citizens to Preserve Overton Park, Inc v Volpe*, 91 S Ct 814, 821; 28 L Ed 2d 136 (1971)).

⁹⁹ *Id.*

As discussed *supra*, a cause of action exists under MEPA against an administrative agency when the grant of a permit authorizes conduct that will cause, or is likely to cause, "pollution, impairment or destruction" of Michigan's natural resources.¹⁰⁰ If this Court's decision in *Preserve the Dunes* does reach beyond a very limited ruling on the Sand Dune Mining Act (SDMA) and hold that DEQ's grant of a permit in cases like the instant case is not subject to a MEPA claim, then this Court should overrule *Preserve The Dunes*.¹⁰¹ However, if the Court of Appeals misinterpreted and improperly extended the holding in *Preserve the Dunes*, then this Court should expressly limit its holding in *Preserve the Dunes* to internal agency decisions only, as distinct from direct actions on specific permits that are likely to pollute, impair, or destroy the environment.

As the majority in *Preserve the Dunes* noted:

The only issue properly before us is whether MEPA authorizes a collateral challenge to the DEQ's decision to issue a sand dune mining permit under the sand dune mining act (SDMA), MCL 324.63701 *et seq.*, in an action that challenges flaws in the permitting process unrelated to whether the conduct involved has polluted, impaired, or destroyed, or will likely pollute, impair, or destroy natural resources protected by MEPA.¹⁰²

The Court of Appeals mistakenly interpreted this Court's holding in *Preserve the Dunes* to include that the granting of a permit is a DEQ decision that cannot be challenged under MEPA. The facts of *Preserve the Dunes* are distinguishable from those in the instant case and in most disputes over permits because they involved unique facts and the unique permitting process under the SDMA. The Court's narrow inquiry in *Preserve the Dunes* mirrored the SDMA's narrow permitting process. In that case, this Court ruled that a challenge to DEQ's preliminary mistakes in reviewing a sand mining permit did not fall under MEPA. The Court characterized

¹⁰⁰ MCL 324.1701(1)

¹⁰¹ *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

¹⁰² *Preserve the Dunes, supra* at 511.

DEQ's preliminary action on the sand mining permit as an administrative decision. The limited holding of *Preserve the Dunes* has been mischaracterized in this case. Here, the Court of Appeals held that DEQ's issuance of a National Pollutant Discharge Elimination System (NPDES) permit to pollute could not be challenged under MEPA even though DEQ's approval of the permit would likely pollute, impair and destroy natural resources. In contrast to the parties in *Preserve the Dunes*, the actions and future actions of DEQ and Merit Energy in this case are in direct violation of MEPA and subject to a cause of action under the same.

In the instant case, the underlying MEPA claim was based upon the DEQ's allowance of a large discharge of wastewater by Merit Energy into Kolke Creek and Lynn Lake pursuant to a NPDES General Permit. The trial court found that the proposed discharge would violate MEPA. The Court of Appeals upheld the Circuit Court's finding of an underlying MEPA violation, but dismissed the MEPA claim against DEQ because it mistakenly interpreted *Preserve the Dunes* as requiring such a result. The Court of Appeals reasoned that because DEQ's issuance of an NPDES permit to pollute was an administrative decision, this Court's holding in *Preserve the Dunes* prevented the possibility of any MEPA claim. That reasoning is incorrect and the Court of Appeals' reliance on the unique analysis of *Preserve the Dunes* in the instant case is in error. Amici Curiae agree with Justice Kelly's dissent in *Preserve the Dunes* and with the long line of previous MEPA decisions that state that MEPA is intended to prevent conduct that is *likely* to harm the environment and not merely to stop conduct that is *presently* harmful. As stated by Justice Kelly in her dissent:

This majority perpetuates the DEQ's unprincipled decision to permit illegal mining of critical dunes by insulating it from the scrutiny of the Michigan Environmental Protection Act (MEPA). MCL 324.1701 *et seq.* Its holding that the DEQ's decision to grant the permit to mine critical dunes is "unrelated to" the destruction of those critical dunes defies reality. It mocks our Legislature's intent

to prevent environmental harm. In addition, it is contrary to this Court's earlier MEPA decisions.^{103 104}

As Justice Kelly noted, this Court has expressly held that the grant of an order, permit, or specific authorization by a state agency is conduct under MEPA and subject to a claim under the statute.¹⁰⁵

The Court of Appeals' interpretation is at odds with this Court's decision in *West Michigan Environmental Action Council v Natural Resources*. This Court held that in a MEPA suit to restrain the state from issuing any permits to drill for oil or gas in state forests, evidence established that the drilling of ten exploratory wells for which permits had been granted would result in serious and lasting, though unquantifiable, damage to an elk herd.¹⁰⁶ Therefore, plaintiffs made a prima facie showing that conduct of the Natural Resources Commission and oil companies had, or was likely to pollute, impair or destroy natural resources.¹⁰⁷ This Court should expressly reverse or limit *Preserve the Dunes* to its unique set of facts and follow the rule set forth in *West Michigan*. Without clarification in this matter the DEQ's and other agencies' permitting processes will not be subject to MEPA, which is in opposition to the Legislature's intent and prior decisions of this Court. Further, the current ambiguity regarding the challenging of agency permitting places the natural resources of this state under threat, violating MEPA and hindering the Legislature's constitutionally mandatory duty to safeguard Michigan's environmental integrity.

¹⁰³ *Preserve the Dunes*, *supra* at 526.

¹⁰⁴ See, e.g., *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975); *Ray*, *supra*; *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 751; 275 NW2d 538 (1979); *Nemeth*, *supra*.

¹⁰⁵ See *West Michigan Environmental Action Council v Natural Resources Comm'n*, 405 Mich 741; 275 NW2d 538 (1979), where the grant of an administrative order or issuance of a permit is subject to a MEPA claim because it properly constitutes "conduct" that may be "likely to pollute, impair, and destroy the air, water or other natural resources or the public trust therein."

¹⁰⁶ *Id.* at 760.

¹⁰⁷ *Id.*

This Court should expressly limit or overrule *Preserve the Dunes* because the Court of Appeals' interpretation in the instant case is inconsistent with the plain meaning of MEPA and seriously undermines the Legislature's stated goal of protecting the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. This Court's holding in *West Michigan* that agency permit approvals are subject to MEPA claims is the correct interpretation of MEPA and accordingly should be adopted by this Court.

IV. This Court's recent ruling in *Lansing Schools Education Association v Lansing Board of Education* overrules the standing decision of *Michigan Citizens for Water Conservation* and reaffirms the right of the Plaintiff-Appellants and citizens generally to bring an action based on an "actual controversy" to protect "air, water, and other natural resources and the public trust from pollution, impairment, or destruction" under MEPA.

A. Standard of Review

Whether a party has standing to bring an action is reviewed de novo, because it is a question of law and not fact.¹⁰⁸

B. This Court's adoption of a standing doctrine consistent with the Michigan Constitution restores the legislatively created legal cause of action created by MEPA.

This Court's recent ruling in *Lansing Schools Education Association v Lansing Board of Education* overrules the standing decision of *Michigan Citizens for Water Conservation*, in which the Court incorporated federal standing jurisprudence into Michigan standing law and adopted the *Lujan* requirement of a "case or controversy"¹⁰⁹ to determine if a plaintiff has standing.¹¹⁰ In *Lansing Schools Education Association*, this Court stated that "strictly interpreting the judicial power of Michigan courts to be identical to the federal court's judicial

¹⁰⁸ *In re KH*, 469 Mich. 621, 627; 677 NW2d 800 (2004).

¹⁰⁹ See *Lujan v Defenders of Wildlife*, 112 S Ct 2130; 119 L Ed 2d 151 (1992), where a "case or controversy" is required to establish federal standing based on Article III of the Federal Constitution.

¹¹⁰ *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 2010 Mich LEXIS 1657 (July 31, 2010).

power does not reflect the broader power by the state courts," and decided that the Article III "case or controversy" federal standing test as articulated in *Lujan* has "no basis in Michigan law [and is] contrary to it."¹¹¹ Rather than continue to limit standing even in instances where the Legislature has created a legal cause of action, this Court adopted "a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing," and declared that "[a] litigant has standing wherever there is a legal cause of action."¹¹² Furthermore, when there is no legal cause of action, litigants may still have standing if they "[have] a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant."¹¹³

The citizen suit provision of MEPA states:

The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.¹¹⁴

Under the Court's decision in *Michigan Citizens for Water Conservation*, a plaintiff seeking to bring a MEPA claim was also required to establish that "he has suffered or will imminently suffer a concrete and particularized injury in fact."¹¹⁵ This significantly weakened the citizen suit provision of MEPA by abrogating the ability of citizens to bring an enforcement action under MEPA in instances where they could not demonstrate that they were the immediate victims of an environmentally harmful activity. However, the Court's decision in *Lansing*

¹¹¹ *Id.* at *17, *22.

¹¹² *Id.* at *34.

¹¹³ *Id.*

¹¹⁴ MCL 324.1701(1).

¹¹⁵ *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.*, 479 Mich 280, 297; 727 NW2d 447 (2007).

Schools Education Association recognizes that where there is "an express cause of action" or a statute "expressly confer[s] standing on plaintiffs to enforce the act's provisions," that is sufficient to establish standing.¹¹⁶ Because the Plaintiff-Appellants are conferred a legislatively mandated legal cause of action under the citizen suit provision of MEPA, they successfully established standing to bring an action under MEPA.

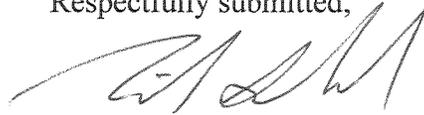
¹¹⁶ *Lansing Sch Ed Ass'n, supra* at *37.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Amici Curiae respectfully request that the Court grant the following relief:

- (1) Reverse the Court of Appeals' holding that the State can convey a riparian right to discharge to Merit Energy by easement;
- (2) Reverse the Court of Appeals' holding that Merit Energy has a riparian right to discharge treated wastewater, as this grants a property right to pollute;
- (3) Overrule *Preserve the Dunes, Inc v. Dep't of Environmental Quality* and allow MEPA claims to proceed against state administrative agencies for final agency decisions which will or are likely to "pollute, impair, or destroy" the environment, or alternatively, limit the holding of *Preserve the Dunes* to its unique set of facts;
- (4) Apply this Court's recent standing decision in *Lansing Schools Educ Ass'n v Lansing Bd of Educ* to MEPA claims and hold that any person has standing to bring a cause of action to protect the environment from pollution, impairment, or destruction.

Respectfully submitted,



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