

STATE OF MICHIGAN

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-Appellants,

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.

S Ct Docket N^o: 138863, 138864, 138865,
138866

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

L.C. Case N^o: 06-11697-CE(M)
Hon. Dennis F. Murphy

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APPELLANTS' REPLY BRIEF TO APPELLEE MDNRE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

September 23, 2010

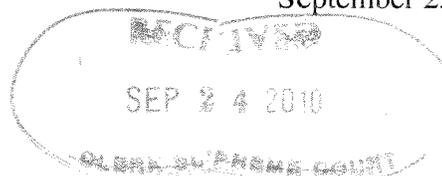


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ARGUMENT¹

The MDNRE State Appellee's water law arguments on the scope of riparian easements obfuscate important common law riparian law limitations on the right to grant easements to discharge large quantities of water for the benefit of non riparian property. *Thompson v Enz*, 379 Mich 667, 686-687; 154 NW2d 473 (1967); *Little v Kin*, 249 Mich App 502; 644 NW2d 375 (2002), aff'd 468 Mich 699; 644 NW2d 749 (2003).² No case in Michigan has ever recognized authority of the MDNRE, or any riparian for that matter, to grant such an easement. Not even the right of a riparian to discharge or drain water from his or her own original riparian property includes the right to discharge water from a distant non-riparian one.³

The State's arguments also misstate more than 100 years of carefully integrated water law that restricts transfers or uses of water that benefit non riparians or those out of a watershed, *Dumont v Kellogg*, 29 Mich 420, 422 (1874), or limit transfers or uses of groundwater that benefit off-tract users where the transfer diminishes or impairs a lake, stream, or interferes with a neighbor's well. *Schenk v City of Ann Arbor*, 196 Mich 75, 83-84; 163 NW 109 (1917). The limitations on transfers

¹Appellants incorporate and rely on their Appellants' Brief on Appeal in response to Appellee MDNRE's arguments. The arguments in Appellant's Reply Brief address specifically the misstatements or mischaracterization of the questions or law presented by this appeal.

²These cases generally prohibit transfer of water from riparian property to non-riparian property unless the transfer involves an access easement to backlot owners to share in the riparian use of water connected to a common *original* parcel. Even the COA in the instant appeal recognized that "Michigan law ... allows the original owner of riparian property to grant an easement to backlot owners to enjoy certain rights ... traditionally regarded as riparian." *Anglers of the AuSable*, 283 Mich App at 131 (quoting *Little*). The COA also recognized that, "Traditionally, riparian owners are permitted to drain *their land* into an adjoining watercourse." *Id.* (Emphasis added).

³*Saginaw v McKillop*, 203 Mich 46, 53 (1918); Appellants' Brief on Appeal, p. 30.

to prevent the impairment or diminishment of lakes or streams are hall marks of Michigan's riparian law and correlative groundwater law.⁴

In addition, State's MEPA arguments ignore the fact that the term "conduct" is closely tied to orders or permits, and that these terms have been treated the same for purposes of judicial review under the MEPA. MCL 324.1702(1); MCL 324.1703(1); MCL 324.1704(2),(3)&(4); MCL 324.1705(2); *West Michigan Environmental Action Council v Natural Resources Commission*, 405 Mich 741, 751 and 768; 275 NW2d 538 (1979) ("WMEAC")⁵; *Nemeth v Abonmarche Development Co*, 457 Mich 16, 33; 576 NW2d 641 (1998); *Committee for Sensible Land Use v Garfield Township*, 124 Mich App 559, 565; 335 NW2d 219 (1983) (permit is "conduct," but rezoning is not).

I. MDNRE's Arguments Mischaracterize the Questions Presented in this Appeal

Despite MDNRE's assertions that *Michigan Citizens for Water Conservation v Nestlé Waters* ("MCWC v Nestlé") is not part of the questions presented on appeal⁶ or constitutes a "reappeal,"⁷

⁴See Appellants' Brief on Appeal, pp. 12-13, Table 1, p. 13, Table 2, p. 18; Cameron, *Real Property Law*, 3 ed., p 95; Am Jur Waters, Sec. 216 (2010), n 4, 5, and accompanying text; Kohler, *Ripples in the Water: Judicial, Executive, and Legislative Developments Impacting Water Management in Michigan*, 53 Wayne L Rev 1, 22-24 (2007). The author concludes that the COA had no basis in *MCWC v Nestlé* to expand the "reasonable use balancing test" to erase common law riparian and groundwater limitations on non riparian or off-tract water transfers or diversions. "The decision does not successfully explain ... why both riparian and groundwater off premises uses should no longer be held to a higher standard." *Id.*, at 24.

⁵Levin, J., concurring.

⁶MDNRE Brief, p. 10.

⁷MDNRE Brief, pp. 9-10.

both the trial court and Court of Appeals relied heavily on *MCWC v Nestlé*'s "reasonable use balancing test" as the test for all water disputes in Michigan.⁸ Indeed, this Court ordered the parties to brief whether *MCWC v Nestlé* was "correctly decided."⁹

Further, this Court s ordered the parties to address "what test should be applied to determine whether and the extent to which Merit may discharge water."¹⁰

Additionally, Appellants' Application for Leave to Appeal expressly submitted for review questions regarding the fundamental flaw in the trial court and COA water law tests now under review by this Court, because the "reasonable use balancing test" ignored riparian reasonable use and groundwater correlative rights doctrines that limit off premises or non riparian transfers and uses of water.¹¹

Although totally inaccurate, the State MDNRE argues for the proposition that *MCWC v Nestlé*'s reasonable use balancing test "converged" riparian reasonable use and groundwater correlative rights doctrines.¹² As demonstrated in Appellants' Brief on Appeal and below, nothing could be further from the truth.

⁸Appellants' Appendix 38A, (Trial Court) and 52A, 61A (COA).

⁹Order, January 29, 2010, parenthetical (4), p. 1.

¹⁰*Id.*, parenthetical (2).

¹¹Appellants' Brief on Appeal, p. 12-13, Tables 1, 2 and 3, pp 13, 18.

¹²Appellee MDNRE Brief on Appeal, p. 2. The MDNRE argues that the Court of Appeals in *Nestlé* determined that the tests for riparian law and groundwater law "had converged to the point where courts were essentially applying the same reasonable use standard." Ironically, MDNRE circuitously cites *MCWC v Nestlé* as the precedent for rejecting established nonriparian or out of watershed limitations inherent in the riparian reasonable use doctrine. MDNRE Brief, p. 12.

II. The “Reasonable Use Balancing Test” Ignored and Abandoned this Court’s Riparian Law Reasonable Use and Groundwater Correlative Rights Doctrines

There are two branches to Michigan’s correlative rights doctrine for groundwater law: (1) on-tract uses and (2) off-tract uses. *Schenk, supra*. Disputes between groundwater users for withdrawals or diversions of water used on tract, that is on the land overlying the common aquifer, are determined by an equal apportionment or accommodation of the competing uses to minimize harm. *Hart v D’Agostini*, 7 Mich App 319; 151 NW2d 826 (1967); *Maerz v US Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982). Disputes between groundwater users for withdrawals or diversions used off-tract, that is on land other than that lying over the common aquifer, are determined by the degree of interference with other on-tract users wells or the material diminishment or impairment of the flow or other characteristics of a riparian lake or stream. *Schenk, supra*, at 83-84; *Bernard v City of St. Louis*, 220 Mich 159, 165; 189 NW 891 (1922); *Hart, supra*, at 322. *MCWC v Nestlé*’s “reasonable use balancing test” ignored and erased this Court’s reasonable use and correlative rights rules.¹³

There are also two branches to the riparian or reasonable use doctrine: (1) disputes between riparians on the same common lake or stream who use water to benefit their riparian property, such as domestic uses, growing crops, mills, resorts, or manufacturing on the land; and (2) disputes (a) between riparians on the same water course, where a riparian diverts or transfers water to benefit non-riparian land or uses, or (b) between riparians and a non riparian, where the non riparian diverts or transfers out of the watershed. *Dumont v Kellogg, supra*.¹⁴

¹³See Kohler, *supra*, n 3; 53 Wayne L Rev at 22-24.

¹⁴See Appellant’s Brief, pp. 9-12. Although passed over, these distinctions were recognized by the Court of Appeals in *MCWC v Nestlé*, 269 Mich App 57, n 34.

As between riparians in common, each has a coequal and reasonable use of the water flowing by or through their land. Each has to accept minor inconvenience or disturbances in respect of the equal right of reasonable use of the other, but it is unreasonable when it causes material harm or injury to another riparian's equal use. *Dumont, supra*, at 425; *People v Hulbert*, 131 Mich 156, 169-170; 91 NW 211 (1902). Such disputes may also include members of the public who have correlative access to use the surface of a lake or stream for fishing, boating, swimming, or recreation. *Thompson v Enz, supra*. 379 Mich at 689. In addition, one riparian cannot physically or legally overtake the use and enjoyment of another riparian for social or public benefits in the absence of acquisition of those rights by compensation or prescription. *Hulbert, supra*, at 173-174. To do so would violate the "equality of right" between riparians to use the stream. *Id.*, at 173; *Dumont, supra*, at 425.

Appellee MDNRE outlandishly suggests these above riparian law tests or principles, including limitations on transfers to benefit non riparians or out of the watershed, are "obtuse"¹⁵ or non-existent. In fact, these principles are doctrinal to riparian reasonable use law. MDNRE's bald statements are without legal authority and inapplicable to the instant appeal. How could these principles not be applicable? This case undisputedly involves the transfer or diversion of water for discharge groundwater from and to benefit Merit's activities on non riparian land. Merit is not a riparian. The water originates in a plume underlying Merit's non riparian production facility, located in another watershed.

¹⁵MDNRE Brief, p. 11.

III. The Term “Conduct,” as Used in the MEPA for Purposes of Any Judicial Review or Action Against State and Local Government Bodies, Includes the Closely Related “Trigger” of Permits That Result in Actions That Pollute, Impair, or Destroy the Air, Water, Natural Resources or Public Trust in Those Resources

The MEPA in Sec. 1702 (1) (MCL 324.1702(1)), provides for broad declaratory and equitable relief for any alleged violation of the requirements and standards of the MEPA, under the language of the Act or its common law of environmental quality, *Ray v Mason Co Drain Comm’r*, 393 Mich 294, 306; 224 NW2d 883 (1975); Mich Const 1963, art 4, § 52.

Section 1702. (1) 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 ... from pollution, impairment, or destruction.

In event of an alleged violation, Section 1703(1), MCL 324.1703(1), provides:

Section 1703. (1) When the plaintiff in the action has made *a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources*, the defendant may rebut the prima facie showing by the submission of evidence to the contrary * * *.

Section 1704(2),(3)&(4), MCL 324.1704(2),(3)&(4), provide for original and continued circuit court jurisdiction for independent findings and direct judicial supervision to assure protection of the air, water, and natural resources or public trust pending completion of administrative, licensing, or other governmental proceedings:

(2) If administrative, licensing, or other proceedings are required or available to determine the *legality of the defendant's conduct*, the court *may* direct the parties to seek relief in such proceedings. Proceedings ... shall be conducted in accordance with and subject to the administrative procedures act ... [*T*]he court *retains jurisdiction of the action pending completion of the action to determine* whether adequate protection from pollution, impairment, or destruction is afforded.

(3) Upon completion of proceedings, ... *the court shall adjudicate the impact of the defendant's conduct on the air, water, or other*

natural resources... In adjudicating an action, the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this part.

(4) If judicial review of an administrative, licensing, or other proceeding is available, *notwithstanding the contrary provisions ... pertaining to judicial review*[the APA], *the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.*

Section 1705(2), MCL 324.1705(2), mandates that the governmental body in any administrative, licensing or other proceeding, or in any judicial review of such proceedings,¹⁶ shall determine likely pollution, impairment or destruction based on the allegations in the proceeding or the circuit court:

Section 1705(2). In any administrative, licensing, or other proceedings, *and in any judicial review* of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and *conduct shall not be authorized or approved that has or is likely to have such an effect* if there is a feasible and prudent alternative...

MDNRE's Appellee Brief argues that, under *Preserve the Dunes Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), the term "conduct" does not include a permit or approval issued by the MDNRE, and that Anglers of the Au Sable has no cause of action against the MDNRE as a defendant. MDNRE then argues that "conduct" is the actual construction or activity taken independent of or after a permit issued or approved, citing *Ray v Mason Co Drain Comm'r, supra* (construction of a drain by County Drain Commissioner), and *State Hwy Comm'n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974). *Ray* is simply one type of activity that is "conduct" under Section 1703(1) of MEPA. *Vanderkloot* actually held there was a cause of action for the State's approval of "necessity" for a highway construction project, not the construction itself.

¹⁶ This would also include Section 1703(1) and the provisions of Section 1704 above.

However, it is clear from the provisions in MEPA, taken as a whole, that the term “conduct,” by both its plain and legal meaning as used in the MEPA, is not limited by a physical development activity requirement. Rather “conduct” focuses on the reality that a permit, approval, or authorization, in effect, directs, manages, controls, guides, and regulates behavior and actions that will or probably result in pollution, impairment, or destruction of the environment.

“Conduct” is defined as the “act of leading,” “escort,” “guide,” or “mode or standard of personal behavior.”¹⁷ Synonyms include “manage, control, direct;” and “control implies regulating or restraining ... to keep within bounds.”¹⁸ “Conduct” is similarly defined as “to lead, guide, escort, to direct, command, or manage,”¹⁹ Black’s Law Dictionary defines “conduct” as “personal behavior; deportment; mode of action; any positive or negative act.”²⁰ As a verb, Black’s defines “conduct” as “to manage; direct; lead; have direction; carry on; regulate; do business.”

Surely the plain and ordinary meaning of “conduct” is not limited to physical and actual construction or development activities as argued by MDNRE. Clearly, acts or behavior by the MDNRE in guiding proposed actions by a regulated person or governmental entity constitute “conduct” within the plain meaning of that word as used in the MEPA. The term “conduct” appears in three places:

¹⁷Merriam Websters Collegiate Dictionary (10th ed), p. 240.

¹⁸*Id.*

¹⁹New Webster’s Dictionary and Thesaurus of the English Language (Lexicon) (1992), p 203.

²⁰Black’s Law Dictionary, 4th ed., p. 367.

First, in Section 1703(1), if a plaintiff makes a prima facie showing that “the conduct of the defendant” has “polluted, impaired or destroyed” or is “likely to pollute, impair or destroy,” the conduct is prohibited unless there is no feasible and prudent alternative.

Second, in Section 1705(1), a person may intervene in any government proceeding or judicial review of such proceeding that “involves conduct” that is likely to pollute or impair the environment.

Third, in Section 1705(2), in agency administrative, licensing or other proceedings and “any judicial review of such proceeding,” the “alleged” pollution, impairment or destruction must be determined, and “conduct shall not be ... approved that has or is likely to have such effect.”

Reading these sections together, the Legislature expressly intended that “conduct” would include permits, approvals or other authorizations by agencies or governmental entities. Under Section 1705(2), “any judicial review” of permits, approvals or authorizations requires a determination of likely effects. Judicial review also includes Section 1703(1) and the allegations regarding “conduct” include permits, approvals or other authorizations that open the gate for construction and development activities that cause or are likely to cause harm. In short, the regulation or management, that is conduct directing behavior or conduct, by permit or other approval is the mechanism for judicial review of conduct likely to degrade the environment. The very purpose of the MEPA is to prevent and minimize environmental degradation. *Ray, supra*, at 306.

This Court has decided two cases involving judicial review of orders, approvals or authorizations by agencies. *WMEAC, supra*, at 751, 768 (order and permits constituted “conduct”), and *Preserve the Dunes, supra*, at 519 (administrative decision to allow sand mining permit not “conduct.”). In a third case, *Nemeth, supra*, at 33, the Court recognized that the order for ten permits

for drilling constituted “conduct”. The Court of Appeals has held that permits are subject to a claim under MEPA, but that rezoning is not. *Committee for Sensible Land Use, supra*, at 564.

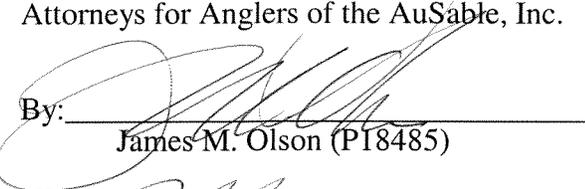
As stated in *WMEAC, supra*, at 753:

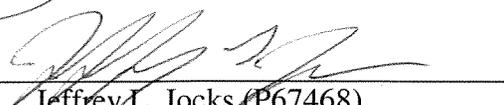
The environmental protection act would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands.

Conclusion and Relief

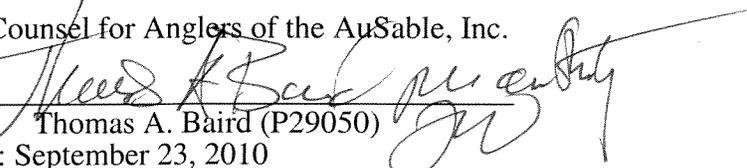
For the reasons set forth in **Appellants’ Brief on Appeal**, dated July 19, 2010, and this **Appellants’ Reply Brief**, Appellants Anglers of the Au Sable and the Mayer and Forcier families submit that the COA’s *MCWC v Nestlé*’s “reasonable use balancing test,” relied on by the trial court and COA in the instant appeal, should be overruled. Further, Appellants submit that the extension of *MCWC v Nestlé*’s “reasonable use balancing test” in *Anglers of Au Sable v MDEQ* to all riparian lakes and streams in Michigan, and the COA’s strangulation of citizen suits under the MEPA against the MDNRE and other governmental units, should be reversed. Appellants also restate all relief requested in their Brief on Appeal.

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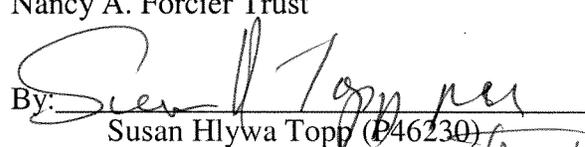
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