

STATE OF MICHIGAN

SUPREME COURT

ANGLERS OF THE AU SABLE, 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<sup>o</sup> 138863, 138864, 138865,  
138866

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

L.C. Case N<sup>o</sup> 06-11697-CE(M)  
Hon. Dennis F. Murphy

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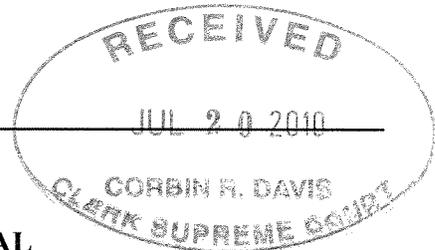
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**APPELLANTS' BRIEF ON APPEAL**  
**ORAL ARGUMENT REQUESTED**

July 19, 2010

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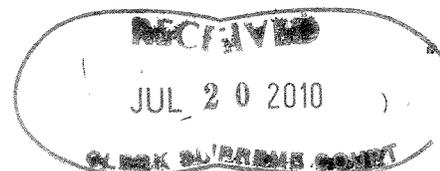
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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iv

STATEMENT OF QUESTIONS PRESENTED ..... vii

STATEMENT IDENTIFYING JURISDICTION, JUDGMENT AND ORDERS APPEALED FROM, AND RELIEF SOUGHT ..... ix

INTRODUCTION ..... 1

    Correcting Michigan Water Law ..... 1

    Correcting the Common Law of the Environment under the MEPA ..... 3

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS ..... 3

    1. Background Proceedings and Facts ..... 3

    2. Plaintiffs’ Complaint and Claims ..... 5

    3. The Trial ..... 5

    4. The Trial Court Opinions and Orders ..... 6

        a. Opinion and Order Granting Plaintiffs Motion for An Injunction ..... 6

        b. Opinion and Final Order Granting in Part and Denying in Part Plaintiffs’ Motion for Clarification and Modification, June 25, 2007 ..... 7

    5. The Court of Appeals Decision, March 31, 2009 ..... 8

ARGUMENTS ..... 9

    I. The Court of Appeals’ “Reasonable Use Balancing Test” in *MCWC v Nestlé’s* for Michigan Groundwater Law Was Incorrectly Decided ..... 9

        A. Standard of Review ..... 9

        B. Riparian Law Background ..... 9

        C. Groundwater Law: Michigan Supreme Court *Schenk v City of Ann Arbor* and COA *MCWC v Nestlé* ..... 13

            a. Reading tract and watershed distinctions out of *Schenk* ..... 15

            b. *Maerz v U.S. Steel* ..... 17

c.	A distinction between uses of water on-tract and within the source watershed or aquifer, and diversions off-tract and out of the source watershed or aquifer, are consistent with the rules of many other eastern states .....	20
D.	Michigan water law does not include an economic or social benefit criteria that is balanced against individual harm or interference with the rights and uses of riparian owners or groundwater uses .....	21
E.	<i>MCWC v Nestlé's</i> Adoption of the "Reasonable Use Balancing Test" Was Incorrect and Must be Overturned .....	23
II.	The COA decision in the Instant <i>Anglers</i> Appeal Should Be Reversed Because it Erroneously Extended and Applied <i>MCWC v Nestlé's</i> groundwater law test to a Riparian Case, thus Violating the Riparian Principles in <i>Dumont, Kennedy, and Hoover</i> . ....	25
A.	Standard of Review .....	25
B.	The Proper Riparian Law Test for the Instant <i>Anglers</i> Appeal Is the Non Diminishment or Impairment or No Benefit to Non Riparian Land or Out-of-Watershed Use as Established in <i>Dumont, Kennedy, and Hoover</i> .....	25
C.	The "reasonable use balancing test" in <i>MCWC v Nestlé</i> and the application of the test in <i>Anglers of the AuSable v MDNRE and Merit Energy</i> Are Based on Reversible Error and Dicta .....	27
III.	The MDNRE's grant of a pipeline easement could not include the right to discharge groundwater from Merit's non-riparian property to Kolke Creek under Michigan Riparian Law .....	29
A.	Standard of Review .....	29
B.	The Department of Natural Resources Could Not Grant Merit A Riparian Right or Other Right to Discharge that Violates or Exceeds the Rights that Can Be Conveyed under Michigan Riparian Law .....	29
C.	The MDNRE Easement Violated the Riparian Rule that Prohibits Severance of Riparian Rights or the Granting Easements of Riparian Rights that Benefit Non-Riparian Property in Another Watershed .....	30
IV.	The MDNRE is Subject to a Michigan Environmental Protection Act Claim Either Because <i>Preserve the Dunes</i> Should be Overruled or Because the Court of Appeals Improperly Extended <i>Preserve the Dunes</i> .....	31
A.	Standard of Review .....	34
B.	<i>Preserve the Dunes</i> should be overruled to the extent that it holds that MDNRE's grant of permits cannot be subject to a MEPA claim .....	34

1.	MEPA creates a cause of action against the MDNRE for grant of a permit that authorizes conduct that will pollute, impair, or destroy the air, water, natural resources or the public trust	34
2.	This Court’s previous MEPA case law expressly stated that permit approvals authorizing “conduct” were subject to MEPA claims	38
3.	This Court Should Overrule <i>Preserve the Dunes</i>	39
C.	If <i>Preserve the Dunes</i> does not stand for the proposition that the MDNRE’s grant of a permit cannot be subject to a MEPA claim, then the Court of Appeals dismissal of MDNRE should still be reversed in the instant Appeals	40
D.	Section Conclusion	41
V.	This Court’s Decision in <i>MCWC v Nestlé</i> was Incorrect and Should be Overruled	41
A.	Standard of Review	42
B.	The Standing Decision in <i>MCWC v Nestlé</i> Should be Overturned Because MEPA Established A Right of Citizens to Bring Actions Based on “Actual Controversies” to Prevent Conduct that Will Pollute, Impair, or Destroy the Air, Water, and Natural Resources and the Paramount Public Interest in those Resources	42
1.	This Court’s Incorporation of Federal Standing Law into Michigan’s Judicial Power Provision of the State Constitution and MEPA was Incorrect	42
2.	Even Under Federal Standing Law the <i>MCWC</i> Plaintiffs had Standing	46
C.	Section Conclusion	47
	Conclusion and Relief Requested	48

## TABLE OF AUTHORITIES

### CASES:

<i>Anglers of the AuSable v Dep't of Environmental Quality</i> , 283 Mich App 115; 770 NW2d 359 (2009) .....	1, 8, 28
<i>Anway v Grand Rapids Ry Co</i> , 211 Mich 592; 179 NW 350 (1920) .....	45
<i>Attorney General ex rel. Emmons v City of Grand Rapids</i> , 175 Mich 503; 141 NW 890 (1913) .....	31
<i>Bernard v City of St. Louis</i> , 220 Mich 159; 189 NW 891 (1922) .....	16
<i>Carr v City of Lansing</i> , 259 Mich App 376; 674 NW2d 168 (2003) .....	27
<i>Collens v New Canaan Water Co</i> , 155 Conn 477; 234 A2d 825 (CT 1967) .....	20
<i>Committee for Sensible Land Use v Garfield Twp</i> , 124 Mich App 559; 335 NW2d 219 (1983) .....	39
<i>Daniels v People</i> , 6 Mich 381 (1859) .....	45
<i>Dumont v Kellogg</i> , 29 Mich 420 (1874) .....	10, 12, 15, 21, 22, 24-26, 31
<i>Dyball v Lennox</i> , 260 Mich App 698; 680 NW2d 522 (2004) .....	29
<i>Fultz v Union-Commerce Assoc</i> , 470 Mich 460; 683 NW2d 587 (2004) .....	9, 25
<i>Gehlen Brothers v Kohler</i> , 101 Iowa 700; 70 NW 757 (1897) .....	21
<i>Great Lakes Gas Transmission Co v MacDonald</i> , 193 Mich App 571; 484 NW2d 129 (1992) .....	29
<i>Griswold Properties LLC v Lexington Ins Co</i> , 276 Mich App 551; 741 NW2d 549 (2007) ...	28
<i>Hart v D'Agostini</i> , 7 Mich App 319; 151 NW2d 826 (1967) .....	16, 17, 22, 27
<i>Hoover v Crane</i> , 362 Mich 36; 106 NW2d 563 (1960) .....	12, 15, 22, 26, 31
<i>House Speaker v Governor</i> , 441 Mich 547; 495 NW2d 539 (1993) .....	46
<i>In re MCI Telecommunications Complaint</i> , 460 Mich 396; 596 NW2d 164 (1999) .....	34
<i>Kennedy v Niles Water Co</i> , 173 Mich 473; 475-477 (1913) .....	12, 15, 22, 26, 31
<i>Lee v Macomb County Board of Comm'rs</i> , 464 Mich 726; 629 NW2d 900 (2001) .....	42
<i>Little v Kin</i> , 249 Mich App 502; 644 NW2d 375 (2002) .....	7, 30
<i>Lujan v Defenders of Wildlife</i> , 504 US 555; 112 SCt 2130 (1992) .....	47

<i>Maerz v US Steel Corp</i> , 116 Mich App 710; 323 NW2d 524 (1982) .....	17, 18
<i>Martin v City of Linden</i> , 667 So2d 732 (AL 1995) .....	20
<i>Meeker v City of East Orange</i> , 77 NJ Law 623; 74 A 379 (1909) .....	14
<i>Mich Citizens for Water Conservation v Nestlé Waters North America</i> , 479 Mich 280; 737 NW2d 447 (2007) .....	41, 42, 47
<i>Mich Citizens for Water Conservation v Nestlé</i> , 269 Mich App 25; 709 NW2d 174 (2005) ...	7, 9, 11, 12, 16, 19, 21, 22, 27
<i>National Wildlife Federation v Cleveland Cliffs Iron Co</i> , 471 Mich 608; 684 NW2d 800 (2004) .....	42
<i>People v Goldston</i> , 470 Mich 523; 682 NW2d 479 (2004) .....	45
<i>People v Higuera</i> , 244 Mich App 429; 625 NW2d 444 (2001) .....	27
<i>People v Hulbert</i> , 131 Mich 156; 91 NW 211 (1902) .....	21, 22, 25, 31
<i>People v Petty</i> , 469 Mich 108; 665 NW2d 443 (2003) .....	9, 25, 29
<i>Preserve the Dunes Inc v Dep't of Environmental Quality</i> , 471 Mich 508; 684 NW2d 847 (2004) .....	32, 36, 39, 40
<i>Ray v Mason County Drain Comm'r</i> , 393 Mich 294; 224 NW2d 883 (1975) .....	35, 36
<i>Saginaw Co v McKillop</i> , 203 Mich 46; 168 NW 922 (1918) .....	29, 30
<i>Schenk v City of Ann Arbor</i> , 196 Mich 75; 163 NW 109 (1917) .....	14, 15, 17, 21, 22, 24, 27
<i>Sierra Club v Morton</i> , 405 US 727; 92 Sct 1361 (1972) .....	46
<i>Stroebel v Salt Co</i> , 164 NY 303; 58 NE 142 (1900) .....	22
<i>Thompson v Enz</i> , 379 Mich 667; 154 NW2d 473 (1967) .....	7, 21, 22, 30, 31
<i>Warth v Seldin</i> , 422 US 490; 95 S Ct 2197 (1975) .....	47
<i>Washington-Detroit Theater Co v Moore</i> , 249 Mich 673; 229 NW 618 (1930) .....	45
<i>West Mich Environmental Action Council Inc v Natural Resources Comm'n</i> , 405 Mich 741; 275 NW2d 538 (1979) .....	38, 39

**CONSTITUTIONS, STATUTES AND RULES:**

MCL 324.1701 .....	34, 40, 44
MCL 324.1701(1) .....	34

MCL 324.1703 .....	34
MCL 324.1703(1) .....	5, 33, 36
MCL 324.1706 .....	35
MCL 324.301(h) .....	34, 40
MCL 324.63702(1) .....	40
Mich Const 1963, art 1, § 1 .....	42
Mich Const 1963, art 3, § 2 .....	43
Mich Const 1963, art 4 .....	43
Mich Const 1963, art 4, § 52 .....	43, 44
Mich Const 1963, art 6 .....	43
Mich Const 1963, art 6, § 10 .....	43
Mich Const 1963, art 6, § 13 .....	43
Mich Const 1963, art 6, § 4 .....	43, 46

**MISCELLANEOUS:**

Cooley on Constitutional Limitations (7th Ed.) 132 .....	45
Restatement of Torts, 2d, Sec. 858 .....	13, 17

## STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals' Incorrectly Decide *MCWC v Nestlé* by Adopting Its Own "Reasonable Use Balancing Test" for Michigan Groundwater Law?
- The Trial Court and Court of Appeals answered, "No.."
- The Plaintiffs/Appellants Anglers of AuSable answer, "Yes."
- The Defendant/Appellee Merit Energy will answer, "No."
- The Defendant/Appellee MDNRE will answer, "No."
- II. Should the COA Decision in the Instant *Anglers Appeal* Be Reversed Where the COA Erroneously Applied *MCWC v Nestlé's* Groundwater Test to a Water Dispute over Riparian Watercourse Contrary to the Michigan Riparian Principles Established in *Dumont v Kellogg*, *Kennedy v Niles Water Supply Co*, and *Hoover v Crane*?
- The Trial Court and Court of Appeals answered, "No."
- The Plaintiffs/Appellants Anglers of Au Sable answer, "Yes."
- The Defendant/Appellee Merit Energy will answer, "No."
- The Defendant/Appellee MDNRE will answer, "No."
- III. Is the Department of Natural Resources and Environment Pipeline Easement to Merit Energy Invalid or Unlawful Because ,Under Michigan Riparian Law, the Department Could Not Grant the Right to Discharge Treated Groundwater from Merit's Non-Riparian Property Located in Another Watershed?
- The Trial Court answered, "No."
- The Court of Appeals answered, "Yes" and "No."
- The Plaintiffs/Appellants Anglers of AuSable answer, "Yes."
- The Defendant/Appellee Merit Energy will answer, "No."
- The Defendant/Appellee MDNRE will answer, "No."
- IV. Is the Michigan Department of Natural Resources and Environment Subject to a Michigan Environmental Protection Act ("MEPA") Claim, Either Because *Preserve the Dunes* Should be Overruled or Because the Court of Appeals Improperly Extended *Preserve the Dunes* to an Authorization of Conduct Found Likely to "Pollute or Impair" Contrary to MEPA?
- The Trial Court answered, "Yes."

The Court of Appeals answered, “No.”

The Plaintiffs/Appellants Anglers of AuSable answer, “Yes.”

The Defendant/Appellee Merit Energy will answer, “No.”

The Defendant/Appellee MDNRE will answer, “No.”

- V. Should the Standing Decision in *MCWC v Nestlé* Be Overturned Because MEPA Established a Right of Citizens to Bring Actions Based on “Actual Controversies” to Prevent Conduct that Will Pollute, Impair, or Destroy the Air, Water, and Natural Resources and the Constitutionally Declared Paramount Public Interest in those Resources?

The Trial Court did not answer.

The Court of Appeals did not answer.

The Plaintiffs/Appellants Anglers of AuSable answer, “Yes.”

It is not known how the Defendant/Appellee Merit Energy will answer.

The Defendant/Appellee MDNRE will most likely answer, “Yes.”

**STATEMENT IDENTIFYING JURISDICTION, JUDGMENT AND ORDERS APPEALED FROM, AND RELIEF SOUGHT**

Plaintiffs/Cross-Appellants file this Appellants' Brief pursuant to this Court's Order, January 29, 2010, granting their Application for Leave to Appeal from the Court of Appeals Opinion and Order in *Anglers of the AuSable et al. v Mich Dep't of Environmental Quality et al.*, COA Docket Nos. 279301 (Consolidated), Mar. 31, 2009, 283 Mich App 115, 770 NW2d 359 (2009) pursuant to MCR 7.301(A)(2) and MCR 7.302.

This Court has jurisdiction under MCR 7.301(A)(2).

Plaintiffs ask that this Court grant and order the following relief:

1) (a) Overturn the "reasonable use balancing test" in *MCWC v Nestlé Waters*, 269 Mich App 25; 709 NW2d 174 (2005) and *MCWC v Nestlé Waters*, 479 Mich 280, 737 NW2d 447 (2007), because the test is contrary to the binding decisions of the Michigan Supreme Court and otherwise is contrary to and without basis in Michigan law, and (b) overturn *MCWC v Nestlé Waters, supra*, because the Court incorrectly ruled that affected persons did not have standing to bring an action under the Michigan Environmental Protection Act, Part 17, NREPA, MCL 324.1701, *et seq.*;

2) Reverse the COA and Trial Court decisions in *Anglers of the AuSable et al. v Mich Dep't of Environmental Quality, et al, supra*, because the application or extension of the *MCWC v Nestlé* "reasonable use balancing test" to a riparian water law case was contrary to law and binding precedent; rule that the proper test is the reasonable use standard and modify the injunction prohibiting discharge of non riparian wastewater into Kolke Creek; and

3) Reverse the Court of Appeals' holding that the State can grant Merit riparian rights to discharge to Kolke Creek contrary to the common law of riparian rights; and modify the injunction so as to prohibit any discharge by Merit from any such easement or license

4) Overrule *Preserve the Dunes Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004) because the Court incorrectly held that an affected person could not bring an

action under the MEPA against the Michigan Department of Environmental Quality (MCL 324.1701, *et seq*); and

5) Reverse the Court of Appeals decision in *Anglers of the AuSable v Mich Dep't of Environmental Quality, et al, supra*, because it incorrectly extended *Preserve the Dunes* to hold that the DEQ's authorization to discharge wastewater that was determined to "impair" Kolke Creek and Lynn Lake was not subject to the citizen suit provision of the Michigan Environmental Protection Act (MCL 324.1701, *et seq*); and order that the DEQ was subject to Plaintiffs' Michigan Environmental Protection Act (MCL 324.1701, *et seq*) claim and reinstate the trial court's order holding that the DEQ's authorization of conduct that will "pollute or impair" the environment violated the MEPA; and

6) Grant such other relief as is appropriate under MCR 7.302(D).

## INTRODUCTION

The decisions of the trial court and COA in *Anglers of the Au Sable v MDEQ* and *MCWC v Nestlé* have cast a shadow of confusion and misapplication of water law over the rights and interests of landowners, farmers, businesses, and citizens, and our lakes, streams, and the Great Lakes.

### **Correcting Michigan Water Law**

Although the trial court determined that Merit Energy's continuous discharge of 1.15 million gallons per day of treated oil-field wastewater into the headwaters of the Au Sable River would be unlawful, the court refused to apply Michigan Supreme Court riparian law precedents and instead applied the unprecedented "reasonable use balancing test" recently adopted by the Court of Appeals ("COA") in *Mich Citizens for Water Conservation v Nestlé Waters North America Inc* ("*MCWC v Nestlé*"). Similarly, while affirming the unlawful discharge into riparian waters, the Court of Appeals, in *Anglers of the AuSable v Dep't of Environmental Quality*, 283 Mich App 115; 770 NW2d 359 (2009) ("*Anglers v DEQ*"), compounded the error in *MCWC v Nestlé* by extending the "reasonable use balancing test" to all water disputes in Michigan – groundwater, lakes and streams, and the Great Lakes.

The COA's decisions in *Anglers v DEQ* and *MCWC v Nestlé* have veered so far from the basic principles of Michigan water law, that the unprecedented "reasonable use balancing test" has expanded, nearly infinitely, the range of uses that qualify for "reasonable use" or coequal treatment under riparian and groundwater law doctrines. As will be seen in the arguments that follow, these decisions are contrary to long established riparian and groundwater law principles of this Court that respect water as a commons for landowners, enterprises, and communities to use and enjoy it for both private and public uses within a watershed. As a result of these COA decisions, an entire universe of new users may acquire water rights, and export or sell water for any purpose elsewhere.<sup>1</sup>

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<sup>1</sup> Given the rising tide of the world water crisis, in which demand in some areas of the world will far exceed water supply, where the court draws a line on what can and cannot be diverted or exported may well determine the economic stability, quality of life, and security of a region, state, or country for decades. See Peter Gleick, *The World's Water: The Biennial Report on the World's* (continued...)

As recognized by this Court's Order granting leave, these decisions raise grave legal questions that form the basis of this appeal.

First, there is a structural error in the *MCWC v Nestlé's* "reasonable use balancing test." This unprecedented test erased traditional reasonable use and correlative rights principles of water law. Without first considering and resolving the errors of law in *MCWC v Nestlé*, the remaining water law issues cannot be fully addressed.

Second, even if *MCWC v Nestlé's* "reasonable use balancing test" is accepted for disputes between on-tract groundwater users, the COA should not have extended it to apply to disputes between riparians on the same stream or lake. Otherwise, private and public rights to use our lakes, streams, including the Great Lakes, would be rendered inferior to the removal and transfers of water for export and sale outside of our watersheds and the Great Lakes Basin.

Third, based on consideration of the first two issues, the proper test for riparian law in Michigan and this case requires a limitation on discharges that harm riparian waters, or that benefit non-riparian or out of watershed properties.

Fourth, under the riparian law limitations on out of watershed or non-riparian uses or purposes, the Department of Natural Resources and Environment did not have the legal right to grant an easement to Merit Energy for the discharge of groundwater that would originate from and benefit Merit's non-riparian property located in the Manistee River watershed.

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<sup>1</sup> (...continued)

*Freshwater Resources* (Island Press); Gleick and Palaniappan, Meena, "Peak Water: Limits to Freshwater Withdrawal and Use," Proceedings of the National Academy of Sciences, May 24, early edition; *Circle of Blue, Water News*, [www.circleofblue.org/waternews/](http://www.circleofblue.org/waternews/) for the following articles: "Era of Water Scarcity," Schneider, Keith, "Alaska to Sell Bulk Water to India," "The Himalayas," "Nigeria Delta: War on Water," "Water + Climate," "Yunnan China: Water Crisis," Water Top Global Priority;" See also, Michael Specter, "The Last Drop," *New Yorker*, Oct. 23, 2006; Schwartz and Randall, "Imagining the Unthinkable," *An Abrupt Climate Change Scenario and Its Implications for the United States National Security* (Pentagon, Oct. 2003); Pearce, Fred, *When the Rivers Run Dry* (Eden Books, London); Diamond, Jared, *Collapse*, Chapter 12 (Viking); cf Phillips, Melanie, "Global Warming or Global Fraud," *Daily Mail*, Jan. 12, 2004.

Fifth, *MCWC v Nestlé's* dramatic water law change from a consideration of competing uses and harms to the offsetting of individual harm based on a broad “social and economic benefit” found in the “reasonable use balancing test” is not supported by the common law.

### **Correcting the Common Law of the Environment under the MEPA**

Relying on *Preserve the Dunes Inc v Dep't of Environmental Quality*, the COA erroneously held that citizens have no cause of action against a State agency under the MEPA for issuing a permit that authorized conduct that will or is likely to “pollute, impair, or destroy” the water and aquatic resources of Kolke Creek and Lynn Lake. This, raises the more basic question of whether *Preserve the Dunes* was itself correctly decided. At the very least it raises the question of whether the COA unduly stretched the holding in *Preserve the Dunes* to bar the Appellant Anglers of Au Sable’s action against an agency decision that directly authorized the conduct that MEPA was enacted to prevent.

Second, in a closely related question, *MCWC v Nestlé, supra*, incorrectly curtailed the rights of citizens’ standing to bring suits where the actual controversy over harm or threatened harm to water and related natural resources is distinct and real.

The consideration and decisions by this Court regarding these arguments, hopefully, will bring about water quality and security, and a sustainable economy for present and future generations.

### **CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

#### **1. Background Proceedings and Facts**

Kolke Creek forms part of the headwaters of the Au Sable River.<sup>2</sup> The creek originates in springs and wetlands on State property and flows under a driveway owned by Plaintiff Forcier Trust into Lynn Lake.<sup>3</sup> Kolke Creek and Lynn Lake are oligotrophic systems with high water quality.<sup>4</sup> Plaintiff Mayer Trust owns land on either side of the creek and is the only riparian owner on Lynn Lake. The Mayer family has owned and used the lake and creek since 1916 for swimming, fishing,

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<sup>2</sup> Appx 43A, COA Opinion, p 4.

<sup>3</sup> Appx 43A, COA Opinion, p 4; Appx 7A, Tr Ct Opinion, p 3.

<sup>4</sup> Appx 43A, COA Opinion, p 4; Appx 7A, Tr Ct Opinion, p 3.

rowing, canoeing, and kayaking.<sup>5</sup> Kolke Creek feeds into Bradford Creek and the Au Sable River which are State designated Blue Ribbon trout streams.<sup>6</sup> Kolke Creek and Lynn Lake provide superb habitat for native brook trout spawning.<sup>7</sup> The wetland surrounding the headwaters of Kolke Creek is a complex ecological community<sup>8</sup> that maintains the high water quality of Kolke Creek and Lynn Lake.<sup>9</sup>

Defendant Merit Energy (“Merit”) purchased the Hayes 22 Production Facility (“CPF”) in 2004.<sup>10</sup> Pursuant to the transfer agreement with Shell Oil and Michigan Department of Environmental Quality (“MDEQ”), Merit assumed responsibility for remediation of the CPF groundwater contamination plume. The plume contains benzene toluene, ethylbenzene, and xylenes (BTEX), and chlorides, among other contaminants.<sup>11</sup>

Merit submitted a Corrective Action plan to the MDEQ to remediate 1.15 million gallons per day (“gpd”) of contaminated groundwater by using “air stripping.”<sup>12</sup> Air stripping does not remove chloride or brine contamination.<sup>13</sup> Once treated, the groundwater must be discharged – the choices are return to the aquifer through infiltration basins and/or re-injection wells, or in proper instances

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<sup>5</sup> **Appx 43A**, COA Opinion, p 4 & n4. For three generations they have never operated any gas motor boats on the lake.

<sup>6</sup> **Appx 20A**.

<sup>7</sup> **Appx 43A**, COA Opinion, p 4 & n4.

<sup>8</sup> **Appx 7A, 20A - 21A**.

<sup>9</sup> **Appx 20A - 21A**.

<sup>10</sup> **Appx 42A**.

<sup>11</sup> **Appx 42A**.

<sup>12</sup> **Appx 42A - 43A**. The method of treatment, air stripping, was not in dispute during trial. The issues involved the method, location and nature of the discharge of 1.15 mgd of treated wastewater approved by the DEQ’s Certificate of Coverage. **Appx 8A, 13A, 24A**.

<sup>13</sup> **Appx 23A**.

to abutting surface waters.<sup>14</sup> In the instant appeal, MDEQ authorized Merit to divert the 1.15 million gpd from the Manistee River watershed through a 1.3 mile pipeline into Kolke Creek and the Au Sable River watershed.<sup>15</sup>

Merit obtained an easement from the DNR for the pipeline.<sup>16</sup> The easement is silent as to a right to discharge to Kolke Creek.<sup>17</sup> The legal description ends at the end of the pipeline on DNR upland property.<sup>18</sup>

## **2. Plaintiffs' Complaint and Claims**

Plaintiffs filed a complaint for violations of (1) the surface water law, (2) riparian water law, (3) Section 1703(1) of the Michigan Environmental Protection Act, MCL 324.1703(1) ("MEPA"), and (4) a request for injunctive relief.<sup>19</sup>

## **3. The Trial**

At trial, Plaintiffs proved that Merit's groundwater was beneath non-riparian property in the Manistee watershed and would be diverted to the Au Sable River watershed for discharge to Kolke Creek.<sup>20</sup> The proposed discharge would exceed the flow of Kolke Creek by more than 1200 percent and would continue 24 hours a day for more than 10 years dramatically increasing the flow, volume, and level of the watercourses.<sup>21</sup> These substantial effects would cause flooding, harmful erosion,

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<sup>14</sup> **Appx 18A - 19A.**

<sup>15</sup> **Appx 8A, 13A.** MDEQ used a Certificate of Coverage issued under a general permit category for petroleum products under the Clean Water Act (33 USC 1342) and state Water Quality Act (MCL 324.30101 *et seq.*) **Appx 43A.** However, Merit did not disclose in its application the presence of chlorides or the total dissolved solids – sediments. **Appx 103A-104A.**

<sup>16</sup> **Appx 106A-110A.**

<sup>17</sup> **Appx 106A-110A.**

<sup>18</sup> **Appx 15A, 26A-27A, 106A-110A.**

<sup>19</sup> **Appx 62A-85A.**

<sup>20</sup> **Appx 7A-8A, 13A.**

<sup>21</sup> **Appx 20A-21A.**

sedimentation, the release of phosphorous, and the creation of turbidity.<sup>22</sup> The erosion, sedimentation and turbidity would, in turn, cause significant harm and impairment to aquatic life, including fish, insects and plants.<sup>23</sup> It would also release phosphorous into the water column creating the growth of additional plants and shifting Lynn Lake from a high quality oligotrophic lake to a mesotrophic lower quality lake.<sup>24</sup> In addition to these effects and impacts, the discharge itself would contain chlorides that would impair aquatic life.<sup>25</sup>

Plaintiffs also proved that infiltration basins and/or reinjection wells were feasible and prudent alternatives to Merit's proposed discharge to Kolke Creek.<sup>26</sup> That is, no discharge to Kolke Creek, or any surface water, was necessary in order for Merit to remediate its contaminated groundwater.<sup>27</sup>

#### **4. The Trial Court Opinions and Orders**

##### **a. Opinion and Order Granting Plaintiffs Motion for An Injunction**

On May 29, 2007, the Trial Court issued an opinion with detailed findings of fact and held that Defendant's proposed discharge was unlawful. First, the Trial Court held that the DNR easement did not grant riparian rights to Merit. However, it then ruled that "Even so... the law does not prevent the DNR from granting Merit riparian use of Kolke Creek through an easement, so long as that use is reasonable."<sup>28</sup>

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<sup>22</sup> Appx 20A-23A.

<sup>23</sup> Appx 21A-22A.

<sup>24</sup> Appx 22A.

<sup>25</sup> Appx 23A-24A, 30A.

<sup>26</sup> Appx 18A-19A.

<sup>27</sup> Appx 18A-19A

<sup>28</sup> Appx 16A.

Second, the court ruled that even if Merit obtained riparian rights from the DNR, the proposed discharge was unreasonable under riparian law principles.<sup>29</sup> However, in reaching this result, the trial court applied the “reasonable use balancing test” for groundwater law from *Mich Citizens for Water Conservation v Nestlé*, 269 Mich App 25; 709 NW2d 174 (2005) (“*MCWC v Nestlé*”).<sup>30</sup>

Third, the trial court held the proposed discharge, and MDNRE’s authorization of such conduct, violated MEPA.<sup>31</sup>

Fourth, the trial court issued an injunction to prohibit the proposed discharge into Kolke Creek.<sup>32</sup> However, because of its erroneous reliance on the “reasonable use balancing test,” the court left open the possibility for Merit to request a modification of the injunction at lower discharge levels in the future if Merit acquired an easement for riparian rights.<sup>33</sup>

**b. Opinion and Final Order Granting in Part and Denying in Part Plaintiffs’ Motion for Clarification and Modification, June 25, 2007**

On June 25, 2007, the trial court clarified its original opinion and order and specifically ruled that: (1) *Thompson v Enz*, 379 Mich 667, 677; 154 NW2d 473 (1967) recognized “easements, licenses, and the like for a right of way for access to a water course do exist and oftentimes are granted to nonriparian owners,”<sup>34</sup> and that *Little v Kin*, 249 Mich App 502; 644 NW2d 375 (2002) recognized “that rights normally afforded exclusively to riparian landowners may be conferred by

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<sup>29</sup> Appx 25A.

<sup>30</sup> *MCWC v Nestlé* involved a proposed 400,000 gallons per day extraction and diversion of groundwater for bottling “spring water,” which significantly diminished flows and levels of a stream and lakes that were fed by the groundwater and springs.

<sup>31</sup> Appx 20A-21A.

<sup>32</sup> Appx 34A.

<sup>33</sup> Appx 36A.

<sup>34</sup> Appx 38A.

easement;”<sup>35</sup> (2) the riparian right of the DNR to discharge groundwater from its riparian parcel could be extended to Merit, so Merit could discharge its treated groundwater from its distant out of watershed property;<sup>36</sup> and (3) the “reasonable use balancing test” for groundwater disputes in *MCWC v Nestlé*, should be applied to a riparian law dispute like the instant appeal.<sup>37</sup>

**5. The Court of Appeals Decision, March 31, 2009**

On March 31, 2009, the COA in *Anglers of the AuSable v DEQ*, affirmed the Trial Court’s finding of facts,<sup>38</sup> and held that Merit’s proposed discharge constituted an unreasonable use under the “reasonable use balancing test” from *MCWC*.<sup>39</sup> It affirmed the Trial Court’s conclusion that the proposed discharge constituted conduct that would impair the creek, lake, wetlands, and aquatic resources contrary to the MEPA.<sup>40</sup> However, it dismissed MDNRE as a defendant to the MEPA claim.<sup>41</sup>

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<sup>35</sup> **Appx 38A.**

<sup>36</sup> **Appx 38A.**

<sup>37</sup> **Appx 38A.**

<sup>38</sup> **Appx 61A.** The COA affirmed the trial court’s fact finding and those facts are now undisputed.

<sup>39</sup> **Appx 52A, 61A.**

<sup>40</sup> **Appx 55A, 61A.**

<sup>41</sup> **Appx 47A.**

## ARGUMENTS

### I. The Court of Appeals' "Reasonable Use Balancing Test" in *MCWC v Nestlé's* for Michigan Groundwater Law Was Incorrectly Decided.

The Court of Appeals ("COA") "reasonable use balancing test" in *Mich Citizens for Water Conservation v Nestlé*, 269 Mich App 25; 709 NW2d 174 (2005), is based on the COA's flawed review and analysis of riparian and groundwater law precedents in Michigan. In order to expose the critical errors in *MCWC v Nestlé*, Appellants address the question in the same manner.

#### A. Standard of Review

The question whether *MCWC v Nestlé's* "reasonable use balancing test" was correctly decided is a question of common law that is reviewed de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 683 NW2d 587; 590 (2004); *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

#### B. Riparian Law Background

Whether in a watercourse or percolating beneath the land, water flows as a commons: "For water is a moveable, wandering thing, and must of necessity continue common by the law of nature."<sup>42</sup> As such no one owns the water, it is "public juris," and those who own the land have a right to use the water – a usufruct.<sup>43</sup> The basic principle of water as common – as between riparian landowners on the same water course, landowners who share groundwater, and landowners and other

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<sup>42</sup> *Cooley's Blackstone*, Vol. I, Chpt. 2, p. 16 (from *William Blackstone, Commentaries* \*18).

<sup>43</sup> "Flowing water, as well as light and air, are in one sense 'public juris'. They are a boon from providence to all, and differ only their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the flowing water through, the portion of soil belong to him. the property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property, and as incidental to it. \* \* \* 'Every proprietor of lands on the banks of a river has naturally an equal right to use the water itself, but a simple usufruct as it passes along.'" *People v Hulbert*, 131 Mich 156, 160; 91 NW 211 (1902) (quoting from *Wood & Waud*, 3 Exch. 748). See also *Institutes of Justinian*, 2.1.1, 529 A.D; *Arnold v Mundy*, 6 N.J.L. 1 (1821).

riparians or members of the public who use a lake or stream – is crucial to understanding and applying the proper water law principles in Michigan.<sup>44</sup>

In *Dumont v Kellogg*, 29 Mich 420 (1874), the plaintiff filed suit against the upstream mill owner for interfering with his riparian rights by diminishing or impairing the quantity of water for his downstream mill. The trial court instructed the jury to apply the non diminishment standard for diversions out of the watershed, rather than the equality of rights test for competing uses in the same stream. The Court ruled the instruction was in error and remanded to apply the equality of rights test. *Dumont, supra* at 421-422. In doing so, the Court set out all of Michigan riparian water law.

First, for the rule for riparian uses on the same stream the Court held,

It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, if in view of all of the circumstances, and having regard to the equality of rights in others, that which has been done and which causes injury is not unreasonable.

*Dumont, supra* at 425.

Second, for diversions of water outside of the common watershed, the Court stated,

[I]t may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from the proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will lie without proof of special damage.

*Dumont, supra* at 422.

Third, for competing water uses between a riparian and non-riparian, the Court stated,

It differs, also, from the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters: for this is wholly wrongful, and no question of the reasonableness of his actions... can possibly arise.

*Dumont, supra* at 422.<sup>45</sup>

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<sup>44</sup> The term “riparian” means “land which includes or is bounded by a watercourse.” *Thies v Howland*, 424 Mich 282, 287-288, n2; 380 NW2d 463 (1985). Technically, “riparian” applies to streams and “littoral” to lakes. *Id.* Both are referred to as “riparian” in this brief.

<sup>45</sup> *MCWC v Nestlé* recognized the long line of Supreme Court precedents that have affirmed these three basic principles of riparian law. *MCWC v Nestlé, supra* at 54-55, 57 n34. These  
(continued...)

In *MCWC v Nestlé*, the COA recognized that *Dumont* “adopted the reasonable use doctrine for competing riparian owners.” *MCWC v Nestlé*, *supra* at 55. The COA concluded,

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

*Id.*, at 58.

At the same time, the COA acknowledged the second and third principles:

However, diversions of water from a lake or stream that do not benefit riparian lands were generally considered unreasonable *per se*.<sup>46</sup>

*MCWC v Nestlé*, *supra* at 57 n34.<sup>47</sup>

However, the COA completely ignored these distinctions and principles for diversions or non-riparian proprietors or users, leading to the conclusion that Michigan follows a “reasonable use balancing test” for all water disputes.

[W]hile employing various tests, the courts have generally sought to ensure the greatest possible access to water resources for all users while protecting certain traditional water users. See *Dumont*, *supra* at 423-425. Michigan courts have already recognized the value of the reasonable use balancing test for that purpose. See *Maerz*, *supra* at 717-720; *Hart*, *supra* at 322-323, 151 NW2d 826; *Dumont*, *supra* at 423-425. Consequently, in order to recognize the interconnected nature of water sources and fully integrate the law applicable to water

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<sup>45</sup> (...continued)

principles have been repeatedly affirmed by this Court. *Hall v City of Ionia*, 38 Mich 493 (1878)(injunction against diversion of water to purposes “foreign to their use and enjoyment of the premises”); *Stock v City of Hillsdale*, 155 Mich 375, 119 NW 435 (1909)(injunction but for the 20 year prescriptive right); *Kennedy v Niles Water Co*, 173 Mich 473, 475-477 (1913)(water withdrawal diverted to city unlawful beyond prescriptive right); *Hoover v Crane*, 362 Mich 36, 42, 106 NW2d 563 (1960)(Resort and agricultural uses by riparians reasonable uses because “neither serves to remove water from the watershed); Getches, Water Law, *supra*, **Appx 134A135A**.

<sup>46</sup> Technically, a diversion by an upper riparian is subject to a strict non-diminishment or impairment standard, *Dumont*, *supra* at 422, whereas a diversion by a non-riparian out of the watershed for use on non-riparian lands or altogether disconnected, such as the distribution for sale of water, is subject to a unreasonable *per se* standard. *Id.*

<sup>47</sup> See also *MCWC v Nestlé*, *supra* at 56 n33; Getches, **Appx 134A-135A**; Sax, Thompson, Leshy, Abrams, Legal Control of Water Resources, 4<sup>th</sup> ed, Groundwater Law, **Appx 176A-177A**.

disputes, we adopt the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users.

*MCWC v Nestlé, supra*, at 67-68.

In *MCWC*, the COA failed to explain how it made this leap to its “reasonable use balancing test” from the distinct water law principles in *Dumont*. *Dumont, supra* at 422, 425, *Hoover v Crane*, 362 Mich 36, 42; 106 NW2d 563 (1960).<sup>48</sup> Nor did the COA explain how it arrived at the conclusion that Michigan courts have “sought to ensure the greatest possible access to water resources for all users”<sup>49</sup> without regard to in-watershed or out of watershed diversions or as required by *Dumont*, at 422, *Hoover* at 42, and *Kennedy v Niles Water Co*, 173 Mich 473; 475-477 (1913). The COA’s reasoning was flawed.

Contrary to the COA’s “reasonable use balancing test” in *MCWC v Nestlé*, Michigan's "reasonable use doctrine" treats uses of riparian landowners on the same lake or stream as in relation to each other. In a sense, the weighing of the impacts and benefits tied to specific competing uses of a stream or lake constitute a balancing. However, this balancing of common or equally shared uses does *not* extend to competing uses or users of water that are non-riparian or out of the watershed. *Dumont, supra* at 422, 425; *Kennedy, supra* at 475-477; and *Hoover, supra* at 42.<sup>50</sup> When water is diverted from its natural water course or diverted from a downstream proprietor, a balancing of the extent, nature, and effect of competing uses under a "reasonable use" test is no longer applicable. Rather, the test focuses on whether the use is a diversion for non-riparian property, hence unreasonable per se, *Dumont, supra*, 422 (and cited cases, or out of the watershed, and if so, whether

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<sup>48</sup> Getches, **Appx 134A-135A**.

<sup>49</sup> *MCWC v Nestlé, supra* at 69. There is no basis in Michigan water law for this observation. Indeed, this is not even recognized by the more lenient Restatement of Torts, Sec. 858 **Appx 160A-161A**. Such a common law regime would lead to, what experts refer to for common pool resources like water, the “Tragedy of Law and the Commons,” Glennon, Robert, Water Follies: Groundwater Pumping and the Fate of America’s Freshwaters (Island Press, 2002), Chpt 15, pp. 209-210.

<sup>50</sup> See also Sax, *et al.*, **Appx 176A-177A**.

the flows, levels, and characteristics of a stream would be measurably diminished or impaired. *Id.* at 422.<sup>51</sup>

Michigan water law has always recognized significant distinctions between uses of water on-tract or within the source watershed and uses of water off-tract or of the watershed. As demonstrated in Sections II and III of this Brief, the COA in *MCWC v Nestlé* and the instant Appeal committed serious error when it held otherwise.

**C. Groundwater Law: Michigan Supreme Court *Schenk v City of Ann Arbor* and COA *MCWC v Nestlé***

There are three common law groundwater doctrines – absolute capture (“English Rule”), reasonable user (“American Rule”), correlative rights (variant of “reasonable user” rule).<sup>52</sup> There is also a set of guidelines in the Restatement of Torts, 2d, Sec. 858 (adopted by a handful of states)<sup>53</sup> and the western appropriation doctrine. It is helpful to view in table form the first three groundwater doctrines, and the Restatement, Sec. 858, because for all practical purposes, *MCWC v Nestlé* did not follow Michigan case law, but adopted something akin to the Restatement, Sec. 858:

<b>Table 1</b>	<b>Capture</b>	<b>Reasonable Use</b>	<b>Correlative Rights</b>	<b>Restatement</b>
<b>Two or more uses of water on-tract and in the source aquifer</b>	<b>no liability</b>	<b>no liability</b>	<b>water use balanced between users</b>	<b>water use balanced between users</b>

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<sup>51</sup> This is exactly what the trial court (Hon. Lawrence Root) held in *MCWC v Nestlé*, 269 Mich App at 202. (“The trial court applied a hybrid rule.”) Of course, *Dumont* and progeny and *Schenk* and its subsequent correlative rights cases are hybrid rules. Riparians who share a right to use the water in common with others on a watercourse and adjacent owners who share groundwater moving beneath their land are restricted from transferring water out of a watershed or for non-riparian land or uses where there is diminishment or impairment. *MCWC*, *supra* at 57 n34; Getches, **Appx 134A-135A**. The COA in *MCWC* ignored all this, and adopted its own “modern rule.” *MCWC*, *supra* at 72 n49.

<sup>52</sup> Sax, et al., **Appx 172A-178A**.

<sup>53</sup> *Id.* **Appx 17&A-178A ; Appx 160A**.

A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with on-tract use, but can use surplus water	water use balanced between users
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### 1. Michigan's *Schenk* test

The seminal groundwater case in Michigan is *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917). In *Schenk*, an on-tract user of groundwater sued the city because the city planned to pump more groundwater off-tract to meet municipal needs. This Court held the common law rule:

does not prevent the proper user by any landowner of the percolating waters...although the underground water of neighboring properties may thus be interfered with or diverted; but it does *prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land* whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or *if his wells, springs, or streams are thereby materially diminished in flow...*

*Schenk*, 196 Mich at 84 (quoting *Meeker v City of East Orange*, 77 NJ Law 623; 74 A 379 (1909)) (emphasis added). This passage illuminates the limitation against off-tract or out of watershed diversion and sale by a competing groundwater user, similar but less in degree than the no diminishment or impairment standard under riparian law.<sup>54</sup> While *Schenk* falls somewhere between the American Rule and correlative rights rule, it is most certainly not the Restatement. Under the correlative rights rule, as in *Schenk*, the off-tract user is not absolutely prohibited from diverting off-tract; instead, the off-tract user can only use as much water as will not interfere with the on-tract use or diminish or impair a lake or stream. Stated as it was in *Schenk*, a standard of no "material

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<sup>54</sup> For an absolute prohibition of off-tract diversion and use as seen in the traditional American or reasonable user rule, see *Katz v Walkinshaw*, 141 Cal 116; 70 P 663 (1903). This Court cited approvingly *Katz* in *Schenk*, which sheds light on the importance the Court has placed on limiting off-tract diversions or use of water to protect the uses and riparian water bodies of the on-tract owner. This should not be surprising in a riparian law state that protects its lakes and streams from diversions, sales, or uses of water out of watersheds or by non riparians. *Dumont, supra* at 422, *Kennedy, supra* at 475-477; *Hoover, supra* at 42.

diminishment" looks more like a rule that allows some off-tract use, but only if there is no measurable impairment or diminishment of use to the stream or lake itself.

In other words, a landowner may make use of as much groundwater on-tract as does not unreasonably interfere with another landowner's on-tract use, but is prohibited from using or diverting the water off-tract "if his wells, springs, or streams are thereby materially diminished in flow." *Schenk, supra* at 83-84. While off-tract use may not cause any harm, interference, or diminishment; it is not categorically prohibited. Thus, *Schenk* adopted a rule that compared the effects and reasonableness of uses between on-tract users, but it was coupled with a rule that an off-tract use could not interfere with an on-tract use or diminish or impair the flow or physical character of a stream or lake.

The standard in *Schenk* and under the American Rule linked groundwater law with riparian law principles that prohibit off-tract or out of water shed use or sale of water if it measurably diminishes the flow or level of a stream. Had the Court ignored the effects that the removal of groundwater could have had on a lakes or streams, it would have ignored the reality that (1) the tributary groundwater was directly part of the stream and lakes,<sup>55</sup> and (2) it would have subordinated the rights of riparians to groundwater users who diminish a stream and allow them to do directly what riparian law prohibits. *Dumont, supra* at 422, *Kennedy* at 475-477; *Hoover*, at 42.

**a. Reading tract and watershed distinctions out of *Schenk***

In *MCWC v Nestlé* and the case at bar, the COA seemed to think that *Schenk* recognized a distinction between on-tract and off-tract uses (and, correspondingly, between uses within the source aquifer and uses outside it). The COA even phrased the concept in language that sounds more like the no-injury rule of correlative rights than the absolute prohibition of pure reasonable use:

Thus, the Court [the Supreme Court in *Schenk*] adopted the traditional reasonable use rule, which permits withdrawals whose use was not connected with the land from which it was withdrawn, but

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<sup>55</sup> Streams, lakes, and their tributary or source groundwater have a direct single hydrological connection, and are properly viewed as one watercourse. E.g. see Restatement, Sec. 858, comment to Clause (c), **Appx 266-267**. This is the basis of the application of the correlative rights or American rule for off-tract groundwater use or diversion.

only to the extent that they do not interfere with an adjacent water user's reasonable use.

*MCWC v Nestlé*, 269 Mich App at 61-62.

However, despite having recognized that *Schenk* drew a distinction between on-tract and off-tract uses, the COA then concluded the opposite – that the remedy in *Schenk* and the cases that followed it represented a trend away from *Schenk's* distinct common law groundwater rule:

After *Schenk*, Michigan courts continued to apply the reasonable use rule stated in *Schenk*, but applied it in a flexible manner to ensure that no one user would be deprived of all beneficial use of their water resources.

*Id.*

The *Schenk* Court found that because the plaintiff was able to supply his water needs by lowering his well slightly, there was no continued interference by the off-tract user requiring an injunction. The Court only modified the injunction, not the underlying liability, and even reserved plaintiff's right to renew an injunctive remedy if material interference or diminishment occurred in the future. Thus, at most, whatever “flexible manner” the COA gleaned from *Schenk* goes to the nature of relief, and not the interference giving rise to liability under the reasonable user or correlative rights rule. Contrary to the COA's belief, affirming the damages remedy instead of a permanent injunction did *not* change liability.

Nonetheless, the COA still claimed a trend away from distinguishing between on-tract and off-tract use by reviewing *Bernard v City of St. Louis*, 220 Mich 159; 189 NW 891 (1922), and *Hart v D'Agostini*, 7 Mich App 319; 151 NW2d 826 (1967). Again, the COA's assertion is simply not supported by those opinions. *Hart* emphasized the importance of tract or watershed distinctions in *Schenk* and *Bernard*, and upheld the pumping because the water was not being diverted away:

Both cases [*Schenk* and *Bernard*] involved a public water company intentionally removing water from the subterranean supply and transporting it elsewhere for consumption, and in both cases it was held that such removal of the water, which was in fact a partial destruction of the water table, was an unreasonable use of the specific land and unreasonable as to the surrounding lands. The municipalities were liable for the partial destruction of the water table with the resulting damages to the wells on surrounding land. *The restricted nature of these holdings* was pointed out in the *Schenk* case:

\* \* \*

In the case before us *water was not transported to distant areas for consumption*, nor was there any evidence or permanent damage to the subterranean water table. Here, water was merely moved out of the immediate area of the public easement in order to facilitate sewer construction.

*Hart, supra* at 322 quoting *Schenk, supra* at 84. (emphasis added). In light of this language, any suggestion that *Bernard* and *Hart* represented a shift away from *Schenk's* version of the “reasonable user” or correlative rights rule is wrong.

**b. *Maerz v U.S. Steel***

The COA in *MCWC v Nestlé* stated that tract and watershed distinctions were eliminated, and the unprecedented new “reasonable use balancing” akin to the Restatement of Torts, 2nd, Section 858,<sup>56</sup> had been adopted in *Maerz v US Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982). Again, this is incorrect. *Maerz* involved two adjacent on-tract users. The defendant's pumping of groundwater for a limestone quarry dried up plaintiff's well and plaintiff filed suit for damages. The defendant argued that under the traditional American Rule or “reasonable user” doctrine it had no liability for its on-tract harm to groundwater. The COA in *Maerz* disagreed, holding that an on-tract user of groundwater could not unreasonably interfere with a neighbor's on-tract use. However, the court did not change the distinctions and tests for off-tract or out-of-watershed diversions or uses in *Schenk*; and most certainly it did not erase the off-tract or out-of-watershed rules of *Dumont*.

Using Tables 2 and 3, it can be seen that the COA interpreted *Maerz* to shift the law on groundwater from here:

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<sup>56</sup> Section 858, p. 258. **Appx 160A.** As can be seen, subsection 1(c) does not contain a “reasonable use balancing test” but focuses on the degree of harm. While the Restatement removes the distinction and limitation on off-tract uses or transfers for sale under the American or “reasonable user” rule, it continues to recognize the concept of correlative rights, such as *Schenk* and the majority view in other correlative rights and “reasonable user” jurisdictions, except that Section 858 increases the threshold for a claim by requiring a showing of “substantial effect” as opposed to the correlative rights and riparian principles limiting the use where it would result in some degree of “diminishment” or impairment. Even the comment to subsection 1(c), Section 858, recognizes this difference. **Appx 161A-2A.**

Table 2	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with or diminish on-tract use or water body	water use balanced between users

to here:

Table 3	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with on-tract use or water body	water use balanced between users

However, the holding in *Maerz* actually kept the law on groundwater right where it was – with correlative rights for on-tract and off-tract situations as in *Schenk*, supported by the following passage in *Maerz*: (discussing liability for an on-tract use that unreasonably interfered with another on-tract use):

More recently, in the case of *Woodson v Twp of Pemberton*, 172 NJ Sup 489, 503-504; 412 A2d 1064 (1980), the New Jersey court pointed to Meeker's strong approval of a New Hampshire decision which held that:

"[T]he true rule is that the rights of each owner being similar, and their enjoyment dependent upon the action of other landowners, their rights must be correlative and subject to the operation of the maxim sic utera, &c, so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property in view of the similar rights of others."

*Woodson* concluded that *Meeker* never intended its correlative rights rule be limited to situations of off-premises use...

*Maerz*, *supra* at 718-19.

Thus, the view that *Schenk* established a rule permitting unrestricted withdrawal of underground water for on-premises purposes not only relies upon dictum but assumes *Schenk* adopted from *Meeker* a rule that was not there.

In summary, *Maerz* did not eliminate the doctrine of reasonable use when it held that the defendant's on-tract use of groundwater could not unreasonably interfere with another on-tract use. *Maerz* simply recognized that *Schenk* adopted correlative rights as the rule in Michigan. Rather than adopt the Restatement, *Maerz* kept the law right where *Schenk* put it, which is here:

	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot physically interfere with or diminish on-tract use or lakes and streams.	water use balanced between users

*Maerz* found that the correlative rights doctrine already existed in Michigan and prevented the defendant from making an *on-tract use* that unreasonably interfered with another on-tract use.

The COA in *MCWC v Nestlé* was confused by the dicta in *Maerz* about the Restatement of Torts with the rules of correlative rights for on-tract and off-tract uses. The COA ascribed an error to *Maerz* as having adopted the Restatement but mistakenly calling it correlative rights:

While the *Maerz* Court correctly summarized the restatement approach, the characterization of the Restatement's rule as a correlative rights rule is unfortunate. As noted above, the phrase "correlative rights" has been used to describe both the American or reasonable use doctrine and the California modification of that doctrine, but neither of those doctrines employs a strict balancing test. See Restatement, §§ 850A, 858(2).

*MCWC v Nestlé*, *supra* at 66 n39.

In fact, *MCWC v Nestlé* had it backwards. *Maerz* recognized that *Schenk* adopted reasonable user/correlative rights, but mistakenly characterized this was the same thing as the Restatement. Recognizing and applying correlative rights as all *Maerz* had the power to do, since *Schenk* was a

decision of this Court which the Court of Appeals could not overturn. If *Schenk* adopted correlative rights, *Maerz* had no authority to repudiate it or adopt the Restatement. Therefore, the COA should not have done so by adopting the “reasonable use balancing test” in *MCWC v Nestlé*. Nor should it have done so in the instant case by extending the test to lakes and streams.

**c. A distinction between uses of water on-tract and within the source watershed or aquifer, and diversions off-tract and out of the source watershed or aquifer, are consistent with the rules of many other eastern states**

The common law doctrines represented by *Dumont* and *Schenk* are also the law of many other eastern states on these issues:

At common law, any use of water on land outside the watershed (the area draining into the water-body) of the source of supply was unreasonable per se and actionable even if it caused no injury. The philosophical premise of the rule is that water courses and lakes exist primarily to benefit the lands through which they flow, rather than to benefit riparian landowners \* \* \* Despite adoption of a reasonable use theory, the majority of states continue to apply this watershed limitation.<sup>57</sup>

Specifically, many eastern riparian jurisdictions follow the rule that gives uses of water on the land from which it is taken protection from diversions or off-tract uses. E.g. *Collens v New Canaan Water Co*, 155 Conn 477; 234 A2d 825 (1967) (groundwater impacting surface water); *Martin v City of Linden*, 667 So2d 732 (1995).<sup>58</sup>

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<sup>57</sup> Getches, pp. 51-52, **Appx 134A-135A**; Sax, et al., **Appx 176A-177A**.

<sup>58</sup> Among the eastern states drawing a distinction based on tract, watershed, or aquifer of use are: Arkansas – *Lingo v City of Jacksonville*, 258 Ark 63 (1975) (groundwater); Florida – *Tequesta v Jupiter Inlet Corp*, 371 So2d 663 (1979) (groundwater); Kentucky – *United Fuel Gas v Sawyers*, 259 SW2d 466 (1953) (groundwater); Maryland – *Finley v Teeter Stone Inc*, 251 Md 428 (1968) (groundwater); New York – *Baumann v City of New York*, 227 NY 25 (1919) (groundwater); Pennsylvania – *Rothrauff v Sinking Springs Water Co*, 14 A2d 87 (1940) (surface water); Tennessee – *Nashville C & St L Ry v Rickert*, 19 Tenn App 446 (1935) (groundwater); Virginia – *Clinchfield Coal Corp v Compton*, 148 Va 437 (1927) (groundwater); *Town of Gordonsville v Zinn*, 129 Va 542; 106 SE 508 (1921) (surface water); and West Virginia – *Drummond v White Oak Fuel Co*, 104 W Va 368 (1927) (groundwater). Also on this list are Michigan, New Jersey, and California (*Katz, supra*) which were discussed above.

**D. Michigan water law does not include an economic or social benefit criteria that is balanced against individual harm or interference with the rights and uses of riparian owners or groundwater uses.**

As part of its new “reasonable use balancing test,” the COA included a “benefits to society and community” criteria to offset actual harm, impairment, or diminishment that is prohibited under both riparian law, *Dumont*, at 422, and progeny, and groundwater law, *Schenk*, at 84, and progeny:

Negative social effects should weigh against the use, see Restatement, Sec. 850A, comment f, p. 226, and positive social effects should weigh in favor of a determination of reasonableness.

*MCWC v Nestlé, supra* at 73.

Overall, under the facts of this case, the harms inflicted on the riparian plaintiffs and community in general are significantly offset by the economic benefits to society and the local community.

*MCWC v Nestlé, supra* at 77.

This Court has limited the factors to determine reasonableness between adjacent owners to physical consequences, such as extent, nature, suitability, and interference of the use, and whether the use is artificial or natural. *People v Hulbert*, 131 Mich 156, 169-170; 91 NW 211 (1902), quoting *Gehlen Brothers v Kohler*, 101 Iowa 700, 705; 70 NW 757 (1897); *Thompson, supra* at 688. However, this Court has never adopted a social or economic benefit test that can be used to outweigh the harm to, or interference with the use of, a lake, stream, or tributary groundwater. The COA’s conclusion regarding the “balancing” of “economic or social benefits,” like jobs and payment of taxes, is contrary to Michigan law.

To reach its erroneous conclusion, the COA first relied on the following quote:

Whether and to what extent a given use shall be allowed under the reasonable use doctrine depends upon the weighing of factors on the would-be user’s side and balancing them against similar factors on the side of other riparian owners.

*MCWC v Nestlé, supra* at 55. This quote cites “*Id.*,” which refers back to “*Id.* at 423, 665 NW2d 423.” *MCWC v Nestlé, supra* at 55. The “*Id.*” if traced back refers to “*Stoebuck & Whitman, The Law of Property 3d ed.*, pp. 422-425, and not the parallel cite at “665 NW2d 423.” *MCWC v Nestlé,*

*supra* at 53-55. The “665 NW2d 423” cite is to *People v Perry*, which is a criminal case having nothing to do with riparian water law!

Second, using the same source, the COA concluded “...the reasonable use doctrine generally allows water to be transported to non-riparian lands...” *MCWC v Nestlé*, *supra* at 55. However, this statement of “reasonable use” for riparian law relies on *Stoebuck & Whitman*, and not Michigan case law. This unsupported statement disconnects the reasonable use doctrine from riparian lands and water in favor of transfers and diversions under a “weighing” of factors for off-tract or non-riparian diversion disputes. It conflicts directly with prohibitions against the use where it results in a material diminishment or impairment of flow or use. *Dumont*, *supra* at 422, *Kennedy*, *supra* at 475-477, *Hoover*, *supra* at 42; *Schenk*, *supra* at 84; *Hart*, *supra* at 322. There is no balancing, it is an impairment standard. And, there certainly is no weighing of social and economic benefits.

Moreover, the so-called “factors” listed by the COA as part of the “reasonable use balancing test” are not found in *Hulbert*. *MCWC v Nestlé*, *supra* at 7 citing *Hulbert*, at 170. The correct factors are derived from *Thompson*, *supra* at 688-689, and *Hulbert* at 170, and are limited to the characteristics of the water body, the extent and nature of the uses, and other physical consequences and purposes related to the physical use of the water itself. These factors are based on the “injury to one proprietor and the benefit to the other...” *Hulbert* 170, and “the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights and interests of *other riparian proprietors* and also on the interests of the State including fishing, navigation, and conservation.” *Thompson*, at 688-89 (emphasis added). In short, the benefits or injuries in the cited Michigan cases refer to the benefits and injuries to the *proprietors* who have a right to use the water from the same lake, stream or aquifer.

In *Stroebel v Salt Co*, 164 NY 303; 58 NE 142 (1900), cited by this Court in *Hulbert* at 66, the court stated:

They [the courts] will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old familiar rule, every man (sic) must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in

carrying on a lawful and useful business upon his own land does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner....<sup>59</sup>

Unfortunately, this is exactly what happened with the *MCWC v Nestlé* “reasonable use balancing test.” This is not to say, that jobs and taxes are not important, if not critical, at this or anytime in history, but that the accomplishment of such laudatory goals cannot be done by changing basic property law and burdening or harming the rights of other water users who own and operate farms, homes, businesses, or simply enjoy the water for fishing, boating, or recreation.

**E. *MCWC v Nestlé’s* Adoption of the “Reasonable Use Balancing Test” Was Incorrect and Must be Overturned.**

*MCWC v Nestlé* was fundamentally flawed and should be corrected. Once corrected, the proper test for riparian law can be applied to the undisputed findings of fact as determined by the Trial Court and COA.<sup>60</sup> The outcome will require a modification of the injunction to prohibit outright the unlawful impairment of Kolke Creek and Lynn Lake caused by the massive discharge of treated waste water that originates from and benefits a totally non-riparian tract completely disconnected from the uses within the riparian Kolke Creek watershed.<sup>61</sup>

The correction of *MCWC v Nestlé’s* “reasonable use balancing test” will stabilize and secure private and public rights in Michigan’s lakes and streams from competition by those who want to export water to satisfy the world water crisis and growing freshwater shortages.<sup>62</sup> Under the

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<sup>59</sup> See *Attorney General ex rel. Emmons v City of Grand Rapids*, 175 Mich 503, 539, 141 NW 890 (1913) (Defendants argue that “... defendants’ right to use the river ... in disposing of sewage is superior to the rights of complainants, because of the magnitude of their right and the necessity to dispose of the sewage.... [I]t long has been the fundamental law of the land that no man is to be deprived of his property without due process of law and without compensation.”); *Stock v Twp of Jefferson*, 114 Mich 357, 357-361; 72 NW 132 (1897).

<sup>60</sup> See *infra*, Argument II.

<sup>61</sup> The Merit property and facility, along with treatment of contaminated groundwater, is located in the Manistee River watershed. *Anglers of the AuSable*, *supra* at 119.

<sup>62</sup> See Peter Gleick, n 1, et seq, *supra*; Glennon, Robert, *Unquenchable Thirst* (Island Press, 2009); Barlow, Maude, *Blue Covenant: The Global Water Crisis and the Coming Battle for the Right to Water* (NY, New Press, 2007); Barlow, Maude, and Clark, Tony, *Blue Gold* (NY New Press, 2002) (continued...)

“reasonable use balancing test” any person or entity can acquire land in Michigan and claim a property right to export water subject to existing or future regulations. The reason being that the limit on water exports is no longer based on background principles of riparian (*Dumont, supra* at 422) and groundwater law (*Schenk, supra* at 84). Hence, Michigan’s current or future regulations, and the conservation and diversion ban provisions of the Great Lakes Compact,<sup>63</sup> will be more difficult to enforce because of takings commerce clause claims, as well as international trade law claims under NAFTA or similar agreements.<sup>64</sup> If applied to riparian navigable waters, including the Great Lakes, the “reasonable use balancing test” would expand property rights to use water to include water exports and diversions.<sup>65</sup>

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<sup>62</sup> (...continued)

Press, 2002); Comprehensive Assessment of Freshwater Resources of the World: Report of the Secretary General, UN ESCOR Comm’n on Sustainable Development, 5<sup>th</sup> Sess., at 35, UN Doc. E/CN.17/1997/9 (1997).

<sup>63</sup> Pub. Law 110-342 (2009), Great Lakes – St. Lawrence River Basin Water Resources Compact.

<sup>64</sup> Been, *NAFTA’s Investment Protections and the Division of Authority for Land Use and Environmental Controls*, 32 ELR 11001 (Sept. 2002); Gantz, *Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA*, 31 ELR 10646 (June 2001); Dhooge, *The North American Free Trade Agreement and the Environment*, 10 Minn. J. Global Trade 209 (2001). In *Metalclad v Mexico*, the trade tribunal ruled that Mexico’s subsequent change of mind in prohibiting a permitted waste dump gave rise to an award of \$16.7 million. ICSID Case No. ARB(AF)/97/1, Award, p 131, at <http://www.worldbank.org/icsid/cases/mm-award-e.pdf>; *United Mexican States v Metalclad*, 2001 B.C.S.C. 664, ¶ 70 (Brit. Col. Sup. Ct. 2001). In *Methanex Corp v United States*, Draft Amended Claim, at <http://methanex.com/investorcentre/mtbe/draft-amended-claim>, a Canadian company filed a Chapter 11, NAFTA damage claim of \$970 million against the United States as a result of California’s banning of its MTBE as a gasoline additive because of MTBE’s substantial carcinogenic risks. See Waren, *Paying to Regulate: A Guide to Methanex v United States*, 31 ELR 10986 (Aug. 2001); John R. Johns, *North America Free Trade Agreement: A Comprehensive Guide* (1994); Howard Mann, “Who Owns the Water: Water and Foreign Investors in the Post-NAFTA Context, Address to the Hemispheric Forum on Water for the Americas in the 21<sup>st</sup> Century, Mexico City, Oct. 9, 2002;

<sup>65</sup> This would subordinate riparian water rights and uses protected by *Dumont, supra* at 422, *Schenk, supra* at 84, or important public trust rights under *Illinois Central Railroad v Illinois*, 146 US 387; 13 SCt 110; 36 L Ed 1018 (1892) (Great Lakes are held by Great Lakes states in public trust subject to rights of public under public trust doctrine). Moreover, Subsection (c), 858, Restatement, does not recognize a benefits test for off-tract or out of watershed transfers or uses. **Appx 160A-161A.**

It also should be noted that correcting *MCWC v Nestlé* and overruling its “reasonable use balancing test” will not affect farmers, manufacturers, industry, homeowners, utilities or municipalities. In fact, such a correction will protect these landowners’ rights to use water for uses on-tract or on their land, and it will protect the rights of the public in their use of lakes or streams. Moreover, it will not prevent off-tract use of groundwater under the correlative rights rule in *Schenk*, provided the use or diversion does not materially diminish or impair the quantity or quality of a lake or stream. Finally, it should be noted that overturning the “reasonable use balancing test” will not affect the plaintiff or defendants in *MCWC v Nestlé*, as they entered a final stipulated order on July 6, 2009, imposing final injunctive limits on pumping and removal of water from the Mecosta County wells and the Dead Stream.<sup>66</sup>

In summary, the COA “reasonable use balancing test” in *MCWC v Nestlé* with its broad “economic or social benefit” standard should be overturned and the riparian reasonable use principles of *Dumont* and progeny and correlative rights principles in *Schenk*, *Hart*, and *Maerz* reaffirmed as the water law of Michigan.

**II. The COA decision in the Instant *Anglers Appeal* Should Be Reversed Because it Erroneously Extended and Applied *MCWC v Nestlé’s* groundwater law test to a Riparian Case, thus Violating the Riparian Principles in *Dumont*, *Kennedy*, and *Hoover*.**

**A. Standard of Review**

Questions involving the proper interpretation and application of common law are questions of law, which are reviewed de novo. *Fultz, supra* at 683; *Petty, supra* at 113.

**B. The Proper Riparian Law Test for the Instant *Anglers Appeal* Is the Non Diminishment or Impairment or No Benefit to Non Riparian Land or Out-of-Watershed Use as Established in *Dumont*, *Kennedy*, and *Hoover*.**

The proper test for disputes as between riparians on the same lake or stream is “whether under all the circumstances of the case the use of the water by one is reasonable and consistent with the correspondent enjoyment of right by the other,” *Dumont, supra* at 421-422; *Hulburt, supra* at

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<sup>66</sup> Appx 123.

172.<sup>67</sup> For out-of-watershed diversions or uses of water that benefit non-riparian lands, the hallmark of unreasonableness is self-defining; such a diversion or use is unreasonable per se or actionable if it diminishes or impairs<sup>68</sup> the watercourse or riparian rights and uses. *Dumont*, *supra* at 422; *Kennedy*, *supra* at 475-77; *Hoover*, *supra* at 42.<sup>69</sup>

The instant appeal involves Merit Energy's proposed discharge of 1.15 million gallons per day of treated wastewater onto Kolke Creek and the Au Sable River watershed. Merit Energy's wastewater originates as contaminated groundwater in the Manistee watershed. Merit Energy is a off-tract, out of watershed, non-riparian that obtained an easement from the MDNRE to discharge for as long as 10 years. The proposed discharge would erode and cut down stream banks and the wetland resulting in harms to Kolke Creek and Lynn Lake that include sedimentation, the release of phosphorous, and the unacceptable increase in levels of chloride. These harms would, in turn, harm the plant, insect, and fish life in Kolke Creek and Lynn Lake.

MDNRE is a riparian on the upper reach of Kolke Creek. As a riparian, MDNRE was subject to the riparian law principles. MDNRE's attempted easement grant was therefore to an off-tract, out of watershed, non-riparian for purposes of the discharge of groundwater from property located in another watershed.

Under *Dumont*, *Kennedy*, *Hoover*, and *Kennedy*, the proper test under Michigan riparian law prohibits a diversion or use of riparian water to non-riparian uses or non-riparian property. *Dumont*, at 422; *Kennedy*, *supra* at 475-77; *Hoover*, *supra* at 42. This is especially true if the non-riparian property is located in another watershed.

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<sup>67</sup> "Use for an artificial purpose must be (a) only for the benefit of the riparian land and (b) reasonable in light of the correlative rights of other proprietors." *Thompson*, *supra* at 688.

<sup>68</sup> "Diminish" means "lessen." "Impair" means "to make worse" as if by "diminishing in some material respect." "Material" means "relating to, derived from, or consisting of matter" when used as adjective or adverb. Merriam Webster Online Dictionary, [www.merriam-webster.com/dictionary/](http://www.merriam-webster.com/dictionary/).

<sup>69</sup> Riparian law does not allow a riparian to materially alter the flow, level, size, or character of a lake or stream. *Hall v City of Ionia*, 38 Mich 493, \*5 (1878); *Hoover*, *supra* at 42. Moreover, a non-riparian cannot divert water for non-riparian or out-of-watershed use because such act is wrongful or actionable per se. *Dumont*, at 422; *Kennedy*, at 475-477; *Hoover*, at 42.

Accordingly, under these proper tests, Merit's proposed discharge of treated groundwater is either (1) unreasonable per se because Merit is a non-riparian and it would benefit non-riparian property, or (2) because the diversion by Merit, even if assumed to be "in the shoes" of the riparian DNRE, measurably diminishes, impairs, and harms Kolke Creek, Lynn Lake, and related aquatic resources. *Dumont, supra* at 422.

For these reasons, the COA's use of the "reasonable use balancing test" in the instant *Anglers* Appeal should be reversed. In addition, Appellants request the Court to modify the injunction of the Trial Court to prohibit any discharge that is unreasonable per se or measurably diminishes or impairs the watercourses and Plaintiffs' riparian rights and uses.

**C. The "reasonable use balancing test" in *MCWC v Nestlé* and the application of the test in *Anglers of the AuSable v MDNRE* and *Merit Energy* Are Based on Reversible Error and Dicta.**

The COA in the instant case quoted *MCWC v Nestlé's* general statement that "water disputes between riparian proprietors are resolved by a reasonable use balancing test," *MCWC v Nestlé, supra* at 58, as its basis for extending the new "reasonable use balancing test" to the riparian waters of Kolke Creek and Lynn Lake. This was obiter dictum. The issue in *MCWC v Nestlé* involved a groundwater withdrawal and diversion of water for sale where it violated the non material diminishment or impairment rule for off-tract groundwater use. *Schenk, supra* at 84; *Hart, supra* at 322. Accordingly, although *MCWC v Nestlé* should be overturned, no matter what groundwater law is applied, *MCWC v Nestlé* should not have been applied to the riparian water dispute in *Anglers of the AuSable*.

Dictum is a "judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." *Carr v City of Lansing*, 259 Mich App 376, 384; 674 NW2d 168 (2003) quoting *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001). Individual expressions of a judge, not purporting to be utterances of the court and not required by the issues, are not authoritative, nor are statements by way of illustration, or assumptions or concessions. Statements as to the law beyond the range of its application to the particular facts fall under the heading of dicta.

*Id.* Stare decisis does not arise from a point addressed in obiter dictum. *Griswold Properties LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Since *MCWC* applied an unprecedented “reasonable use balancing test” to a groundwater law claim involving a groundwater extraction and diversion, statements or inferences that the new test would apply to riparian claims or disputes are dicta.<sup>70</sup>

The confusion created by *MCWC v Nestlé*’s generalized statements about the “reasonable use balancing test” applying to all “water disputes” misled the Trial Court and COA panel in the instant *Anglers*’ appeal to apply the *MCWC v Nestlé* test to a riparian dispute. This is evidenced by the statements made by the COA below: “The *Dumont* test was not limited to groundwater cases. ... In light of this, it cannot be said that *Nestlé* ignored the doctrine of stare decisis or that its explanation ... constituted mere dicta.” *Anglers of the Au Sable, Inc, supra* at 136. *Dumont v Kellogg* involved reasonable use tests for competing riparians or riparians and non riparians as to out-of-watershed diversions or uses. No groundwater facts or law appear in the decision. It cannot be said, as suggested by the COA in the instant case, that *Dumont* was applicable, let alone “not limited to groundwater cases.”

For these reasons, the *MCWC v Nestlé* decision’s reference to all “water disputes” or its treatment of *Dumont* as somehow a groundwater case, or its application of groundwater law to a riparian dispute was reversible error, contrary to water law precedents of this Court, and based on dicta. Accordingly, the application of *MCWC v Nestlé* by the COA in the instant *Anglers* Appeal should be reversed.

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<sup>70</sup> The decisions by the COA in *MCWC v Nestlé* and *Anglers of the AuSable*, in applying the erroneous “reasonable use balancing test,” are also contrary to Supreme Court precedents. MCR 7.215(C).

**III. The MDNRE's grant of a pipeline easement could not include the right to discharge groundwater from Merit's non-riparian property to Kolke Creek under Michigan Riparian Law**

**A. Standard of Review**

The interpretation of an easement and applicable law of property and water rights involve questions of law, which are reviewed de novo. *Petty, supra*, at 113. The rights of an easement holder are defined by the easement agreement. *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571; 484 NW2d 129 (1992); *Dyball v Lennox*, 260 Mich App 698, 704; 680 NW2d 522 (2004).

**B. The Department of Natural Resources Could Not Grant Merit A Riparian Right or Other Right to Discharge that Violates or Exceeds the Rights that Can Be Conveyed under Michigan Riparian Law**

The trial court ruled the MDNRE, as riparian, had the right to grant an easement to discharge.<sup>71</sup> However, it ruled that the easement on its face did not grant Merit any riparian rights to discharge its wastewater into Kolke Creek.<sup>72</sup> The Court of Appeals reversed and ruled that the easement provided Merit Energy the “right to place, construct, operate, repair, and maintain” the pipeline over the MDNR land.<sup>73</sup>

The COA also held that a riparian owner can grant an easement because the general right to discharge any water is “inherently riparian”<sup>74</sup> – even if the easement benefits non-riparian lands out of the watershed. Relying on *Saginaw Co v McKillop*, 203 Mich 46, 52; 168 NW 922 (1918), the COA reasoned that because the MDNR has a riparian right to discharge water from its land to Kolke Creek, it could grant the same right to a non-riparian outside of the watershed to discharge any amounts of any type of water into Kolke Creek. Appellants Anglers argued that *McKillop* granted the MDNR a riparian right to only discharge its own “surface water *upon its land* into the stream” *Id.* at 51-52 (emphasis added) and prohibited water that originated on land other than the riparian

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<sup>71</sup> **Appx 13A, 16A.** Tr Ct Op, p 9, 12.

<sup>72</sup> **Appx 97A-98A; See also Appx 105A.**

<sup>73</sup> **Appx 48A,** COA Op, p 9.

<sup>74</sup> **Appx 49A,** COA Op, p 10.

land in question. The COA glossed over the distinction, by relying on an unsupported theory of an “inherent” right to discharge water.<sup>75</sup>

*McKillop* involved whether riparians could drain non-riparian surface water into a river. *Id.* at 53. The COA refused to allow the *McKillop* defendants to drain non-riparian land because it could find no authority that would allow the defendant to do so. *McKillop, supra* at 53.

The COA misinterpreted *McKillop*. It considered the MDNR’s right to discharge its own surface water “inherently riparian,” then assumed the MDNR could grant the same right to Merit. This simply begs the question. If *McKillop* does not recognize case law authority for a riparian property to be used to drain the surface water of non-riparian lands, *Id.* at 53, how did the MDNR have the authority to grant that right to Merit? The answer is, it did not.

Riparians have the inherent right to drain surface water from their own riparian property into adjacent water bodies, but surface water is not treated wastewater that originates in the groundwater on another out of watershed non-riparian property. Not even MDNR can use its inherent riparian rights to discharge treated wastewater that originates on Merit’s property.

Accordingly, this Court should reverse the Court of Appeals and specifically hold that the MDNR cannot grant an easement to discharge water to Kolke Creek if the water originates from off-tract, out of watershed, non-riparian property. Moreover, the Court should modify the injunction below and enjoin Merit from discharging any wastewater to Kolke Creek.

**C. The MDNRE Easement Violated the Riparian Rule that Prohibits Severance of Riparian Rights or the Granting Easements of Riparian Rights that Benefit Non-Riparian Property in Another Watershed**

Riparian rights cannot be severed from a riparian lake or stream and granted to non-riparian land. *Thompson, supra* at 686-687 (Use for an artificial purpose must be (a) only for the benefit of the riparian land...). *Thompson v Enz* and *Little v Kin (Little I)*, 249 Mich App 502; 644 NW2d 375 (2002), aff’d 468 Mich 699, involved the grants of easement to property that was part of the property of the easement grantor. The easements granted by the riparians in *Thompson* and *Kin* were out of

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<sup>75</sup> Appx 49A, COA Op, p 10.

the same “original” riparian property to backlot owners who would under the easement language share in the use of the surface of the lake based on the riparian rights granted. *Id.* In this case, Merit’s property is not part of any “original” tract, being that it is non-riparian and located in the Manistee Watershed. The dominant tenement, the Merit production facility, was not carved out of any original riparian property from which water could be discharged. The MDNRE’s right to discharge did not extend and could not be severed or transferred to a non-riparian out of watershed tract.

Furthermore, Merit cannot grant a riparian easement that would benefit a non-riparian tract. Such a grant would violate the requirement in *Thompson v Enz* that limits artificial riparian uses to benefitting the riparian land itself. *Thompson, supra* at 686-687. Such a grant would also constitute an unreasonable use per se under *Dumont, supra* at 422-423, as established above.

Even if not unreasonable per se, there is no right in the MDNR to grant an easement under riparian law that would impair or materially alter the flow or level of Kolke Creek to any degree. *Dumont, supra* 422; *Kennedy, supra* 475-477; *Hoover, supra* 42. There is also no right to grant a riparian right to pollute or impair a stream. *Attorney General ex rel. Emmons v City of Grand Rapids*, 175 Mich 503, 536-539; 141 NW 890 (1913); *Hulbert, supra*, 174.

For these reasons, the MDNR could not grant Merit an easement for the right to discharge and therefore the easement is void. Alternatively, if not void, the Court should modify the final injunction so as to prohibit Merit from discharging treated waste groundwater from its non-riparian production facility because it is unreasonable per se or unlawful as applied to the undisputed facts.

**IV. The MDNRE is Subject to a Michigan Environmental Protection Act Claim Either Because *Preserve the Dunes* Should be Overruled or Because the Court of Appeals Improperly Extended *Preserve the Dunes***

The COA ruled that the MDNRE<sup>76</sup> should not be a party to Anglers’ Michigan Environmental Protection Act (“MEPA”) case because MDNRE’s review of Merit’s Certificate of Coverage

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<sup>76</sup> This Court referred to the Department of Environmental Quality which has now been made the Michigan Department of Natural Resources and Environment (“MDNRE”).

("COC") was an administrative decision and not "conduct" under MEPA.<sup>77</sup> In doing so, the COA cited this Court's Opinion in *Preserve the Dunes Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

"MEPA provides a cause of action for declaratory and other equitable relief for conduct that is likely to result in the pollution, impairment, or destruction of Michigan's natural resources . . . and provides for immediate judicial review of allegedly harmful conduct." *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 512; 684 NW2d 847 (2004); MCL 324.1701(2) and MCL 324.1703(1). Regarding intervention in permit proceedings, the MEPA "requires a potential intervenor to file a pleading asserting that the proceeding or action for judicial review involves conduct that has violated, or is likely to violate, MEPA." *Id.* at 521 (emphasis supplied); MCL 324.1705(1). However, "[w]here a defendant's conduct itself does not offend MEPA, no MEPA violation exists." *Id.* at 519. Because plaintiffs challenged the DEQ's approval of the corrective action plan, their challenge pertained to an administrative decision rather than conduct. However, "[a]n improper administrative decision, standing alone, does not harm the environment." *Id.* Indeed, it is the actual discharge of treated water into Kolke Creek and Lynn Lake that plaintiffs assert would harm the environment. Thus, the MEPA provides no basis for judicial review of this agency decision. "To hold otherwise would broaden by judicial fiat the scope of MEPA and create a cause of action that has no basis in MEPA's language or structure." *Id.* at 524. Consequently, the court erred in failing to dismiss the DEQ from this action.<sup>78</sup>

The COA interpreted this Court's decision in *Preserve the Dunes* to mean that the MDNRE's grant of a permit to discharge wastewater cannot violate MEPA because the grant of a permit is not conduct that is likely to result in pollution, impairment or destruction of the natural resources. Despite the express mandate and purpose of MEPA to establish a claim directly against a

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<sup>77</sup> Appx 47A, COA Opinion, p 8.

<sup>78</sup> Appx 47A, COA Opinion, p 8.

governmental unit,<sup>79</sup> the result of this interpretation is that MDNRE's issuance of a permit can never result in the MDNRE being a party to a MEPA claim or subject to review in a civil MEPA case.

The trial court ruled that the MDNRE's authorized discharge into Kolke Creek would violate MEPA.<sup>80</sup> The Court of Appeals affirmed the trial court's findings that the discharge would cause erosion, sedimentation, substantial impairment of water resources, and harm to Kolke Creek and Lynn Lake.<sup>81</sup> However, it dismissed the MDNRE because it ruled that Section 1703 does not apply to MDNRE approvals.

MEPA provides for a civil action under Section 1703(1) to enjoin conduct that will or is likely to "pollute, impair, or destroy" the environment. MCL 324.1703(1). To the extent that *Preserve the Dunes* stands for the proposition that MDNRE's grant of a permit can never be subject to a civil action under the MEPA, this Court should overrule *Preserve the Dunes*, order that MDNRE was a proper party to this litigation, and affirm the Trial Court's opinion and order. Alternatively, if the Court of Appeals misinterpreted and improperly extended the holding in *Preserve the Dunes*, then this Court should limit *Preserve the Dunes* to its facts concerning internal agency decisions, as distinct from permit decisions that will pollute, impair, or destroy the environment. Under either scenario, this Court should overrule the Court of Appeals and order that MDNRE was a proper party to this litigation and that its action violated MEPA.

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<sup>79</sup> *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975). MEPA, including its cause of action directly against governmental units for approving conduct that would result in degradation of the environment, has been evaluated in depth. Haynes & Smary, Eds, *The Michigan Environmental Protection Act*, Chpt. 2, *Michigan Environmental Law Deskbook* (ICLE 1992), pp. 2-1 to 2-41; Sax & Connor, *Michigan's Environmental Protection Act: A Progress Report*, 70 Mich L. Rev 1004 (1972); Sax & Dimento, *Environmental Citizen Suits: Three Years Experience Under the Michigan Environmental Protection Act*, 4 Ecology LQ 1 (1974); Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law for Citizen Suits*, 53 U Det J Urban Law 589 (1976); Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as a Model*, 7 Harv Envtl L Rev 107 (1983); Olson, *Michigan Environmental Law*, 184-248; Olson, *The MEPA: An Experiment that Works*, 1985 MBJ 181 (February, 1985).

<sup>80</sup> **Appx 31A-33A**, Tr Ct Op, p 27-29.

<sup>81</sup> **Appx 47A**, COA Opinion, p 8.

**A. Standard of Review**

The proper interpretation of a statute is a question of law which this Court reviews de novo. *In re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

**B. *Preserve the Dunes* should be overruled to the extent that it holds that MDNRE's grant of permits cannot be subject to a MEPA claim**

As set out above, the Court of Appeals cited *Preserve the Dunes* for the proposition that the MDNRE's grant of a permit cannot be conduct subject to MEPA. To the extent that *Preserve the Dunes* does hold that MDNRE's grant of a permit cannot be conduct subject to MEPA it should be overruled. MEPA creates a cause of action against the MDNRE (and any other administrative agency) when the grant of a permit authorizes conduct that "has polluted, impaired, or destroyed or is likely to pollute, impair or destroy the air, water or other natural resources and the public trust in these resources." MCL 324.1701 & MCL 324.1703. In addition, this Court has expressly held that the grant of a specific order or permit is conduct that can violate MEPA.

**1. MEPA creates a cause of action against the MDNRE for grant of a permit that authorizes conduct that will pollute, impair, or destroy the air, water, natural resources or the public trust**

MEPA creates a cause of action against the MDNRE for the grant of a permit that would authorize conduct that will pollute, impair, or destroy the air, water or natural resources:

...any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for the 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.* MCL 324.1701(1) (emphasis added).<sup>82</sup>

NREPA defines person as: "an individual, partnership, corporation, association, governmental entity, or other legal entity." MCL 324.301(h) (emphasis added). Therefore, a plaintiff may maintain an action against the MDNRE "for the protection of the air, water and other natural resources and the public trust in these resources from pollution, impairment, or destruction." MCL

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<sup>82</sup> Several states have adopted citizen suit laws based on the MEPA: *E.g.*, Connecticut Environmental Protection Act, C.G.S.A. Secs. 22a-16; Florida Environmental Protection Act, West's F.S.A. 403.12 et seq., West's F.S.A. Constitution, Art, §3(b)(1); Minnesota Environmental Policy Act, M.S.A. § 116B.01 et seq.

324.1701(1). Anglers' case against the MDNRE sought protection of pristine Kolke Creek, Lynn Lake,<sup>83</sup> and the Au Sable River from the conduct authorized by MDNRE.

Furthermore, MEPA expressly supplements existing administrative and regulatory procedures. MCL 324.1706. That is, MEPA is intended to address permit approvals and plaintiffs that file claims under MEPA may present a prima facie case that the effects of a permit approval will likely result in pollution, impairment or destruction of the natural resources. In fact, a permit itself defines, describes, allows and conditions the activity that will result in the MEPA violation. The permit is the trigger that authorizes the pollution, impairment and/or destruction and sets it in motion.

This Court's analysis of MEPA in *Ray v Mason County Drain Commissioner* is the common understanding of MEPA. 393 Mich 294, 306; 224 NW2d 883 (1975). The interpretation includes the long held practice that the persons may bring an action against any other person, including a state agency.

Michigan's Environmental Protection Act marks the Legislature's response to our constitutional commitment to the 'conservation and development of the natural resources of the state.' Const. 1963, art 4 s 52 in its entirety reads:

Sec. 52. 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.

Michigan's EPA was the first legislation of its kind and has attracted worldwide attention. ... The enactment of the EPA signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be diligent and dedicated defenders of the environment. The EPA has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected—the public.

*The Act provides private individuals and other legal entities with standing to maintain actions in the Circuit Courts for declaratory*

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**Appx 190A-194A.** (Photographs of the Kolke Creek/Lynn Lake ecosystem).

*and other equitable relief against anyone 'for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.*

\* \* \*

*But the EPA does more than give standing to the public and grant equitable powers to the Circuit Courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities.*

*Id.* (emphasis added).

If the MDNRE's grant of a permit authorizes conduct that will or is likely to pollute, impair or destroy the water, then it would violate the MDNRE's duty "to prevent or minimize" under *Ray*, *supra*, at 308, and the standard under Section 1703(1) of the MEPA. A government's administrative decision approving certain conduct is directly related to whether pollution, impairment or destruction of the natural resources will occur.<sup>84</sup> The MDNRE's grant of Merit's COC would have resulted in pollution, impairment and destruction of Kolke Creek, and therefore was "conduct...likely to pollute, impair, or destroy...natural resources or the public trust in these resources." MCL 324.1703(1).

Plaintiffs agree with Justice Kelly's dissent in *Preserve the Dunes*:

MEPA is intended to prevent conduct that is likely to harm the environment as well as to stop conduct that is presently harming it. In *WMEAC*, this Court ordered that a permanent injunction be entered prohibiting the drilling of oil and gas wells pursuant to a DNR permit. The "issuance of permits was properly before the circuit court as conduct alleged to be likely to pollute, impair or destroy" natural resources under MEPA. *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 751; 275 NW2d 538 (1979) ("WMEAC"). The drilling would cause "apparently serious and lasting, though unquantifiable, damage" to elk herd population. *WMEAC*, *supra* at 760, 275 NW2d 538. This Court concluded that the previous MEPA, MCL 691.1203(1), is violated whenever the effects of permit issuance harm the environment to the requisite degree. *WMEAC*, *supra* at 760, 275 NW2d 538. *Preserve the Dunes*, *supra* at 534 (J Kelly dissenting).

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<sup>84</sup> In *State Hwy Comm'n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974), this Court recognized a special cause of action to prevent environmental degradation, including the enforcement by a claim against a governmental unit's administrative decision to authorize conduct likely to harm the environment. *Id.*, at 428. The Court expressly stated "we agree" that MEPA "does not confine itself to any one narrow area, but applies to any action on the part of any private entity or public entity which has harmed the environment or is likely to do so." *Id.* at 437. The Court recognized a cause of action against the highway department for its "necessity" determination prior to a condemnation action as "conduct" subject to MEPA.

The grant of an order, permit, or specific authorization of conduct that will or is likely to pollute, impair, or destroy the environment is conduct that is subject to a claim under MEPA.

The Court of Appeals made two fundamental mistakes in its analysis of Anglers' MEPA claim against the MDNRE. First, it stated:

Because plaintiffs challenged the DEQ's approval of the corrective action plan, their challenge pertained to an administrative decision rather than conduct. However, "[a]n improper administrative decision, standing alone, does not harm the environment." *Id.* Indeed, it is the actual discharge of treated water into Kolke Creek and Lynn Lake that plaintiffs assert would harm the environment. Thus, the MEPA provides no basis for judicial review of this agency decision.<sup>85</sup>

Anglers inclusion of MDNRE was not a claim that MDNRE made an "improper administrative decision,"<sup>86</sup> it was a claim, based on the plain language of MEPA, that the action authorizing the conduct that will "pollute, impair or destroy" the environment is "conduct" subject to MEPA. Section 1701 of MEPA authorizes any "person" to bring an action in circuit court against any other "person" which includes any state agency or political subdivision. Section 1704 grants jurisdiction to the circuit court where, in addition to jurisdiction under Section 1703(1), there is a pending administrative proceeding, and the court may or may not remand. If the court does remand, the matter is controlled by Section 1705(2), which requires that the "pollution, impairment, or destruction ... shall be determined" by the agency or governmental unit, or the court "in judicial review thereof." Section 1704(2) states that the circuit court "retains jurisdiction." Section 1704(3) mandates that the court "shall adjudicate" the pollution, impairment, or destruction on judicial review. Section 1704(4) requires that the court "shall maintain jurisdiction" for purposes of judicial review. The MEPA clearly authorized citizen suits in circuit courts that comprehensively included an agency or unit of government as a defendant. How could the court otherwise exercise judicial review and adjudicate the conduct authorized by a proceeding, if both government units and private parties seeking a permit are not defendants in the action?

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<sup>85</sup> Appx 47A, COA Opinion, p 8.

<sup>86</sup> Appx 47A, COA Opinion, p 8.

Second, the Court of Appeals focused on the word “conduct” and construed “conduct” to be narrowly defined and limited to the actual physical dumping of contaminants into Kolke Creek. This definition is inconsistent with the plain meaning of MEPA granting circuit courts jurisdiction and de novo judicial review to adjudicate the actions and conduct leading to pollution, impairment or destruction of the environment. In other words, the COA’s interpretation is simply too narrow and constrained, and would read the legislatively established cause of action out of the statute.

Neither MEPA nor NREPA define “conduct.” Blacks Law Dictionary defines “conduct” as a verb: “To manage; direct; lead; have direction; carry on; regulate; to do business.”<sup>87</sup> Blacks Law Dictionary defines “conduct” as a noun: “Personal behavior; deportment; mode of action; any positive or negative act.”<sup>88</sup> Conduct includes the acts of regulation or any positive or negative acts. MDNRE’s regulation and positive act of granting permits can directly result in impairment, pollution or destruction of Michigan’s natural resources. Here, MDNRE’s COC would have had direct effects on Kolke Creek and the Au Sable River. MDNRE’s acts authorizing the discharge constituted conduct under MEPA and are therefore subject to a MEPA claim.

**2. This Court’s previous MEPA case law expressly stated that permit approvals authorizing “conduct” were subject to MEPA claims.**

Prior to *Preserve the Dunes*, this Court had expressly held that the grant of a permit was conduct under MEPA and therefore the granting agency would be a proper party. In *West Mich Environmental Action Council Inc v Natural Resources Comm’n* (“WMEAC”), this Court concluded “that the issuance of the permits to drill ten exploratory wells was properly before the circuit court as conduct alleged to be likely to pollute, impair and destroy the air, water or other natural resources or the public trust therein.” 405 Mich 741, 751; 275 NW2d 538 (1979). In *WMEAC*, ten exploratory drilling permits were granted under a consent order between the Natural Resources Commission and four oil companies. *WMEAC, supra* at 749. The plaintiffs opposed the consent order and the drilling

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<sup>87</sup> Blacks Law Dictionary, 6<sup>th</sup> ed, p 295.

<sup>88</sup> Blacks Law Dictionary, 6<sup>th</sup> ed, p 295.

permits under MEPA and this Court ruled that the permits were subject to MEPA claims because their *effects* would result in pollution, impairment and/or destruction. *Id.* at 751.

The Court of Appeals has also held that administrative permit decisions are subject to MEPA in *Committee for Sensible Land Use v Garfield Twp*, 124 Mich App 559, 563; 335 NW2d 219 (1983). In that case, the plaintiffs sought to overturn a rezoning of property that would allow a mall. *Id.* at 562-63. The Court of Appeals ruled that rezoning would not rise to a violation of MEPA because the rezoning, a legislative act, did not mean that the mall or anything else that may cause pollution, impairment, or destruction would be built. *Id.* at 564-565. However, the Court then noted that a permit, such as a building permit, being the last specific authorization of the conduct, would be subject to a claim under the MEPA. *Id.*

Accordingly, the COC issued by the MDNRE in this case was the last administrative action authorizing Merit's conduct – the discharge of wastewater into Kolke Creek, Lynn Lake and the headwaters of the Au Sable River.

### **3. This Court Should Overrule *Preserve the Dunes***

This Court should overrule *Preserve the Dunes* to the extent that it holds that the MDNRE's grant of a permit cannot be considered conduct under MEPA. This Court's previous decision in *WMEAC* holding that the grant of a permit was conduct under MEPA was a correct interpretation of MEPA and was *stare decisis*. In *Preserve the Dunes*, the majority "imagined" a "world that they claimed the dissent's reasoning would create." *Preserve the Dunes, supra* at 523. In the imagined world, an oil company invested money "in oil exploration in Michigan in reliance on a DEQ-issued permit." *Id.* The majority claimed that in this world the oil company could never rely on a permit to do business because of the risk of challenge to the permit. *Id.* The majority speculated the "few people in Michigan would thank this Court for 'protecting' the environment in this radical fashion." *Id.* It further speculated that:

The dissent's regime would render the permitting process a useless exercise. It would cripple economic expansion in Michigan and probably lead to disinvestment.

*Id.*

The majority's arguments are not supported by anything but speculation. But worse, the majority's decision was in contradiction to *WMEAC* and to MEPA on its face. MEPA expressly allows plaintiffs to bring claims against governmental entities. MCL 324.1701; MCL 324.301(h). *WMEAC* properly held that a permit is conduct subject to MEPA and is stare decisis. Interestingly enough, prior to the majority's modification of MEPA in *Preserve the Dunes*, there was no record that MEPA crippled any economic expansion in Michigan in its more than thirty years of existence.

The majority in *Preserve the Dunes* created a conflict with *WMEAC* and was in contradiction to MEPA. Its reasoning was not supported by the law and not true to stare decisis. This Court should correct the conflict and reverse *Preserve the Dunes*. The MDNRE was a proper defendant in Anglers' MEPA claim.

**C. If *Preserve the Dunes* does not stand for the proposition that the MDNRE's grant of a permit cannot be subject to a MEPA claim, then the Court of Appeals dismissal of MDNRE should still be reversed in the instant Appeals**

Alternatively, if this Court rules that *Preserve the Dunes* was properly decided, then this Court should limit *Preserve the Dunes* in its impact to MEPA and rule that MDNRE was still a proper party to Anglers' MEPA claim.

*Preserve the Dunes* concerned the MDNRE's preliminary determination of eligibility for a permit under the Sand Dunes Management Act ("SDMA"). *Preserve the Dunes, supra* at 510-12, 519. The SDMA only allowed for the expansion of a sand mining operation into designated critical dunes under two scenarios. *Preserve the Dunes, supra* at 511-12; MCL 324.63702(1). The applicant did not fit under either, but the MDEQ nonetheless approved its permit to expand its mining. *Preserve the Dunes, supra* at 512. Plaintiffs' filed a MEPA claim challenging the MDEQ's failure to determine that the applicant did not fit under either exception. *Preserve the Dunes, supra* at 512-13. This Court ruled that MDEQ's failure to determine that the applicant was not eligible was not conduct under MEPA, but merely an administrative decision. *Preserve the Dunes, supra* at 519. This Court made the very narrow ruling that a separate preliminary eligibility determination is not conduct that could be subject to MEPA consideration. *Preserve the Dunes, supra* at 519-21. That

is, the administrative decision in *Preserve the Dunes* was not a permit or authorization action, but instead an internal administrative consideration.

However, the COA interpreted *Preserve the Dunes* to hold that no MDNRE permit could be subject to MEPA review and that MDNRE should be dismissed from the case.<sup>89</sup> It incorrectly extended *Preserve the Dunes* to this case. As set out above, the MDNRE's issuance of a permit is conduct subject to MEPA. The Court of Appeals has misinterpreted this Court's narrow ruling. This Court should clarify its ruling in *Preserve the Dunes* and expressly state that permit approvals are subject to MEPA. Further, this Court should reverse the Court of Appeals, and affirm that MDNRE was a proper party to this litigation and its action violated MEPA.

#### **D. Section Conclusion**

This Court should overrule *Preserve the Dunes*. It is not consistent with the plain meaning of MEPA, and *WMEAC*'s affirmative holding that agency permits are conduct subject to MEPA was the proper interpretation of MEPA. Alternatively, this Court should limit the holding in *Preserve the Dunes* and hold that although internal administrative decisions are not subject to MEPA, permitting decisions are subject to MEPA. Ultimately, this Court should reverse the Court of Appeals' decision that MDNRE was not a proper party to this case and hold that MDNRE was a proper party to Anglers' MEPA claim.

#### **V. This Court's Decision in *MCWC v Nestlé* was Incorrect and Should be Overruled**

This Court ordered the question of whether *Mich Citizens for Water Conservation v Nestlé Waters North America*, 479 Mich 280; 737 NW2d 447 (2007) was correctly decided. Anglers have addressed the errors as to water law issues found in the COA's *MCWC* opinion, Argument I above. Now, Anglers will address the standing question as decided by this Court and request that this Court overrule *Michigan Citizens for Water Conservation v Nestlé Waters North America*.

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<sup>89</sup> Appx 47A, COA Opinion, p 8.

**A. Standard of Review**

Standing is a question of law that this Court reviews de novo. *MCWC*, 479 Mich at 291.

**B. The Standing Decision in *MCWC v Nestlé* Should be Overturned Because MEPA Established A Right of Citizens to Bring Actions Based on “Actual Controversies” to Prevent Conduct that Will Pollute, Impair, or Destroy the Air, Water, and Natural Resources and the Paramount Public Interest in those Resources.**

In *Mich Citizens for Water Conservation v Nestlé Waters North America*, this Court ruled 4-3 that the *MCWC* plaintiff did not have standing to maintain its MEPA claim against Nestlé for harm that Nestlé’s pumping would cause to Osprey Lake and wetlands located on property that *MCWC* members did not have physical access to. *MCWC*, 479 Mich at 310. This Court applied *Lee v Macomb County Board of Commissioners* and *National Wildlife Federation v Cleveland Cliffs Iron Co.* and ruled that Article III of the Federal Constitution and federal constitutional standing law should be part of Michigan law and read into the Michigan Constitution. 464 Mich 726; 629 NW2d 900 (2001); 471 Mich 608; 684 NW2d 800 (2004); *MCWC*, 479 Mich at 291-303. This Court ruled that the legislature could not grant standing to plaintiffs to seek relief for MEPA violations on property that plaintiffs could not show actual constitutional standing requirements over. That is, the *MCWC* plaintiffs did not have standing to enforce MEPA on property other than property that they could demonstrate an interest in. This Court’s incorporation of federal standing law into Michigan was incorrect, and its analysis of federal standing law was incorrect.

**1. This Court’s Incorporation of Federal Standing Law into Michigan’s Judicial Power Provision of the State Constitution and MEPA was Incorrect.**

The Michigan Constitution does not incorporate the Federal Constitution or federal standing requirements into Michigan law. The Michigan Constitution, adopted and established by the people of Michigan, states that

All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

Mich Const 1963, art 1, § 1. It recognizes that the powers of each branch shall be separate in that

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of

one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Mich Const 1963, art 3, § 2.

It then sets out the duties and powers of the Legislature. Mich Const 1963, art 4. It requires specific action of the Legislature to protect the natural resources of the state and requires the Legislature to provide for the best way to accomplish that protection:

The conservation and development of the natural resources of the state are hereby declared to be 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.

Mich Const 1963, art 4, § 52 (emphasis added). It is the Legislature's mandate to provide for the protection of the air, water and other natural resources and it is the Legislature's duty to determine the best way to accomplish this mandate. *Id.* The Legislature did so by enacting MEPA.<sup>90</sup>

The Michigan Constitution then sets out the duties and powers of the Judiciary. Mich Const 1963, art 6. This Court has "appellate jurisdiction" over the lower courts. Mich Const 1963, art 6, § 4. The "jurisdiction of the court of appeals shall be provided by law..." Mich Const 1963, art 6, § 10. The "circuit court shall have original jurisdiction in all matters not prohibited by law;..." Mich Const 1963, art 6, § 13. The Michigan Constitution does not limit the powers and duties of the Michigan Judiciary to the extent found in Art III, Section 2 of the Federal Constitution.

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<sup>90</sup> The MEPA has been recognized as a landmark judicial tool that supplements the executive branches of state governments. The globally prestigious Blue Planet Award was awarded to its primary author, Professor Joseph Sax, for creation of the MEPA citizen suit law, now used by many states and countries around the world. Press Release, June 21, 2007, "2007 Blue Planet Prize: Announcement of Winners." The ASAHI Foundation, [www.af-info.or.jp](http://www.af-info.or.jp). Other states, such as Minnesota, Massachusetts, and Connecticut, have enacted citizen suit environmental laws in which standing has been upheld as a proper legislative enactment and valid exercise of judicial power. *E.g.* C.G.S.A. 22a-15 [Connecticut]; *Connecticut Coalition Against Millstone v Rocque*, 836 A 2d 414 (Conn. 2003); *Lewis v Planning and Zoning Comm'n*, 717 A2d 246 (Conn. 1998); *Fort Trumbull Conservancy v Alves*, 262 Conn. 480, 815 A2d 1188 (Conn. 2003).

The People of Michigan spoke through their Constitution and did not limit the Judiciary's power as found in the Federal Constitution.<sup>91</sup> The Michigan Constitution sets out the duties of each branch as described above and gives the Legislature the mandate to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." Mich Const 1963, art 4, § 52. This is a clear mandate which is not limited by any other contradicting language found in Michigan's Constitution.

MEPA does not threaten the powers of any branch of Michigan's government. The Executive Branch maintains its ability and authority to administer the laws of the State. MEPA makes the protection of Michigan's natural resources a shared responsibility of the attorney general and any member of the public. MCL 324.1701. The Judicial Branch likewise is not offended because nothing in Michigan's Constitution prohibits the Legislature from creating a citizen suit to protect the State's natural resources or the Judiciary from hearing such cases.

In interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical. Conversely, we are free to interpret our Constitution consistent with the United States Supreme Court's interpretation of the United States Constitution unless a compelling reason precludes us from doing so. As this Court stated in *Sitz v. Dep't of State Police*, 443 Mich. 744, 758, 506 NW2D 209 (1993), however, a " 'compelling reason' should not be understood as establishing a conclusive presumption artificially linking state constitutional interpretation to federal law." *Rather, we must determine what law "the people have made."* The following factors are relevant in determining whether a compelling reason exists to interpret the Michigan Constitution and the United States Constitution differently:

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<sup>91</sup> Justice Cooley articulated the lens by which the courts should view the people's will as expressed in *their* constitution:

A Constitution is made for the people by the people . ... [T]he interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it. ... it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that was the sense designed to be conveyed." [Cooley's Const. Lim. 81, quoted by Justice Black in *Buback v Romney*, 380 Mich 209, 231, 156 NW2d 549 (1968), citing *May Topping*, 65 W Va 660, 64 SE 848.]

1) [T]he textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest.

The above factors are also helpful in determining the intent of the ratifiers with respect to our state constitutional provisions.

*People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004) (emphasis added) (citations omitted).

Michigan common law recognizes judicial power as the power “to hear and determine controversies between adverse parties, and questions in litigation,” *Daniels v People*, 6 Mich 381, 388 (1859) (emphasis added). “To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.” *Anway v Grand Rapids Ry Co*, 211 Mich 592, 626; 179 NW 350 (1920), quoting Cooley on Constitutional Limitations (7th Ed.) 132; *Washington-Detroit Theater Co v Moore*, 249 Mich 673, 676; 229 NW 618 (1930).

When the People of Michigan adopted and established their Constitution, they demanded that the Legislature create a process to protect Michigan’s natural resources that did not offend Michigan’s Constitution.<sup>92</sup> The Legislature created such a process and did so without offending

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<sup>92</sup> Judicial review under the MEPA requires a threshold showing that likely harm rises to the level of “pollution, impairment or destruction. *Ray v Mason Co Drain Comm’r*, 393 Mich 294; 224 NW2d 883 (1975); *Nemeth v Abonmarche Development Co*, 457 Mich 16; 576 NW2d 641 (1998). Necessarily, the MEPA defines an actual “controversy between adverse interests” over which the circuit court can grant declaratory, injunctive, and equitable relief; i.e. declare and determine whether the standards of the MEPA have been or will be violated and that the defendant’s conduct is unlawful. If the conduct is unlawful, then MEPA authorizes appropriate declaratory or equitable relief to assure that no such conduct continues consistent with the MEPA standards. The MEPA defines a controversy that is real; one that involves specific conduct and resources or the public trust. It is between adverse interests, the citizen who brings the action in the shoes of the state interest, as established by the legislature, and the defendant who is responsible for the conduct.

Michigan's Constitution.<sup>93</sup> *See also, MCWC*, 479 Mich at 322 (Weaver, J dissenting). The Federal Constitution should not be read into the Michigan Constitution in this case.

The Michigan Constitution and common law require that a plaintiff filing a MEPA claim establish that there is a controversy between plaintiff and defendant, and that plaintiff and defendant are adverse parties. Once established, plaintiff can move forward with adjudicating the full scope of the MEPA claim and seeking to enjoin defendant's conduct that pollutes, impairs or destroys the environment.

## 2. Even Under Federal Standing Law the *MCWC* Plaintiffs had Standing

Even assuming that this Court properly extended Federal Constitutional standing into Michigan Law, the *MCWC* Plaintiffs still had standing to enforce MEPA over Nestle's entire pumping operation. The doctrine of standing exists to insure that a case or controversy exists affecting adverse interests between the parties. *House Speaker v Governor*, 441 Mich 547, 554; 495 NW2d 539 (1993). The *MCWC* Plaintiffs established standing to bring their MEPA claim by demonstrating that their interests in the Dead Stream would be harmed from Nestle's pumping. Once established, the *MCWC* Plaintiffs claim seeking protection of all harm caused by Nestle's pumping could continue. In *Sierra Club v Morton*, the US Supreme Court indicated that once a plaintiff establishes standing, the plaintiff can argue the full violation of a statutory mandate. 405 US 727, 737; 92 Sct 1361 (1972). The MEPA statutory mandate is the protection of the natural resources. In *Warth v Seldin*, the US Supreme Court stated that

[The Legislature] may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirements remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large

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<sup>93</sup> The Michigan Legislature has created causes of actions in the nature of citizens suits to address a wide variety of social, commercial, consumer, and health problems. *See* MCL 14.321(1) Public Safety; MCL 15.270(1) Open Meetings; MCL 15.271(1) Open Meetings; MCL 324.11151(1) NREPA; MCL 445.55(1) Identity Protection; MCL 445.360(1) Pricing and Advertising Consumer Items; MCL 445.815(1) Advertisements; MCL 445.911(1) Consumer Protection; MCL 445.964(1) Rental-Purchase Agreements; MCL 445.1611(1) Mortgage Lending; MCL 445.1628(3) Lender Violations; MCL 445.1681(1) Mortgage Brokers; MCL 487.2070(1) Consumer Financial Services; MCL 493.77(4) Secondary Mortgage; MCL 493.112(3) Credit Cards; MCL 500.2080(10) Insurance; MCL 550.1619(3) Health Care; MCL 600.2938(2) Obscene Publications.

class of other possible litigants. But so long as this requirement is satisfied, persons whom [the Legislature] has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

422 US 490, 501; 95 S Ct 2197 (1975).

This Court's analysis of *Warth* erroneously focused on the phrase "and, indeed, may invoke the general public interest in support of their claim." *Id.* This Court disregarded the phrase "may have standing to seek relief on the basis of the legal rights and interests of others..." *Id.* The US Supreme Court has thus stated that the Legislature may grant a right to seek relief on the basis of the legal rights and interests of others and a plaintiff may seek such relief when he or she demonstrates standing generally. *Id.*

*Lujan v Defenders of Wildlife*, does not modify *Warth*. 504 US 555; 112 SCt 2130 (1992). *Lujan* merely covers the *threshold* standing question. *Id.* If a plaintiff can overcome the threshold standing question and demonstrate standing to redress an injury to him or herself, then *Warth* states that the plaintiff can seek relief on the basis of legal rights and interests of others. In *MCWC*, there was no question that the Plaintiffs had standing to protect Thompson Lake and the Dead Stream. *MCWC*, 479 Mich at 285. Once established, *Warth* states that because MEPA gave them a cause of action to protect the natural resources of the state, the *MCWC* Plaintiffs could maintain a claim against Nestlé for all of their MEPA violations. *Warth, supra* at 501; *see also MCWC*, 479 Mich at 323-35 (Marilyn J. Kelly, J dissenting).

### **C. Section Conclusion**

*MCWC v Nestlé* should be overruled. MEPA does not offend the separation of powers or the individual powers of any governmental branch according to the Michigan Constitution. The Michigan Constitution only requires that the plaintiff establish a controversy with the defendant and that the plaintiff and defendant are adverse. Once established, a plaintiff can maintain a MEPA claim under the controversy that defendant's conduct is likely to pollute, impair or destroy the environment. Alternatively, even if the Federal Constitutional standing requirements are properly

read into the Michigan Constitution, a plaintiff can still maintain an entire MEPA claim once he or she establishes standing. *MCWC v Nestlé* should be overruled and standing in Michigan clarified as to the above.

### **Conclusion and Relief Requested**

Appellants/Plaintiffs Anglers, Mayer Trust, and Forcier Trust ask this Court to grant the following relief:

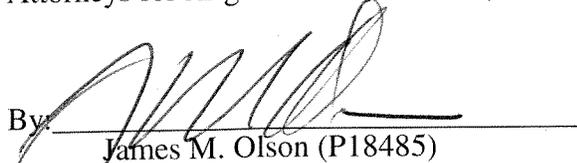
- 1) (a) Overturn the “reasonable use balancing test” in *MCWC v Nestlé Waters*, 269 Mich App 25; 709 NW2d 174 (2005) and *MCWC v Nestlé Waters*, 479 Mich 280, 737 NW2d 447 (2007), because the test is contrary to the binding decisions of the Michigan Supreme Court and is otherwise without basis in Michigan law; and  
(b) Overturn *MCWC v Nestlé Waters*, *supra*, because the Court incorrectly ruled that affected persons did not have standing to bring an action under the Michigan Environmental Protection Act, Part 17, NREPA, MCL 324.1701, *et seq.*;
- 2) Reverse the COA and Trial Court decisions in *Anglers of the AuSable et al. v Mich Dep’t of Environmental Quality et al*, *supra*, because the application or extension of the *MCWC v Nestlé* “reasonable use balancing test” to a riparian water law case was contrary to law and binding precedent; rule that the proper test is the reasonable use standard under *Dumont*, at 422, and progeny, and modify the injunction prohibiting discharge of non riparian wastewater into riparian Kolke Creek; and
- 3) Reverse the Court of Appeals’ holding that the State can grant an easement to Merit that transfers riparian rights to discharge to Kolke Creek contrary to the common law of riparian rights; and modify the injunction so as to prohibit any discharge by Merit from any such easement or license; and
- 4) Overturn *Preserve the Dunes Inc v Dep’t of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004) because the Court incorrectly held that an affected person could not bring an action under the MEPA against the Michigan Department of Environmental Quality where the department’s action or approval authorized conduct that will or likely to “pollute, impair, or destroy”

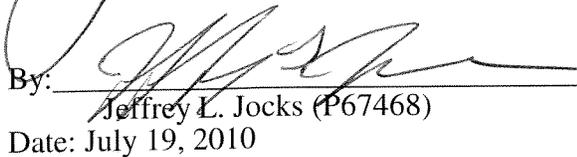
the environment contrary to the Michigan Environmental Protection Act (MCL 324.1701, *et seq*);  
and

5) Reverse the Court of Appeals decision in *Anglers of the AuSable v Mich Dep't of Environmental Quality, et al, supra*, because it incorrectly extended *Preserve the Dunes* to hold that the DEQ's authorization by a Certificate of Coverage to discharge wastewater that was determined to "impair" Kolke Creek and Lynn was not subject to the citizen suit provision of the Michigan Environmental Protection Act (MCL 324.1701, *et seq*); and order that the DEQ was subject to Plaintiffs' Michigan Environmental Protection Act (MCL 324.1701, *et seq*) claim and reinstate the trial court's order holding that the DEQ's authorization of conduct that will "pollute or impair" the environment violated the MEPA; and

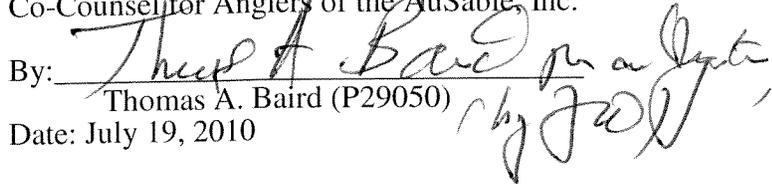
6) Grant such alternative relief as is appropriate under MCR 7.302(D).

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Attorneys for Anglers of the AuSable, Inc.

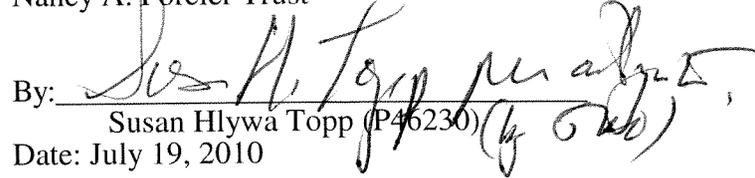
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