

STATE OF MICHIGAN
IN THE SUPREME COURT

Anglers of the AuSable, Inc., a Michigan
nonprofit corporation; Mayer Family Investments,
LLC, a Michigan limited liability company; and
Nancy A. Forcier Trust,

Plaintiffs/Cross-Appellants,

v

Michigan Department of Environmental
Quality, a department in the Michigan
Executive Branch; Steven E. Chester,
Director of the Michigan Department of
Environmental Quality; and Merit Energy
Company, a Delaware corporation,

Defendants/Cross-Appellees.

138863
Supreme Court No.: ~~138864~~

COA Case No.: 279306

Otsego County Circuit Court
Case No.: 06-11697-CE (M)

DEFENDANT/APPELLEE
MERIT ENERGY COMPANY'S
RESPONSE TO
PLAINTIFFS/APPELLANTS'
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Defendant/Cross-Appellee Merit Energy Company ("Merit") states that this Court may review by appeal a decision of the Court of Appeals pursuant to MCR 7.301(A)(2), although the asserted grounds for doing so in this case are insufficient. Further, as a general rule, our Courts do not entertain moot issues or decide moot cases. *East Grand Rapids School District v Kent County Tax Allocation Board*, 415 Mich 381, 390; 330 NW2d 7 (1982). Appellate courts should not declare principles or rules of law that have no practical legal effect on the case before them. *Federated Publication, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

COUNTER STATEMENT OF QUESTIONS PRESENTED

While Merit argues that all of these issues are moot as set forth in its Motion to dismiss dated March 16, 2010, which was denied, this Response will center on the questions presented below:¹

I. WHETHER MERIT COULD HAVE BEEN CONVEYED OR GRANTED THE RIGHT TO DISCHARGE WATER ONTO LAND OWNED BY THE STATE?

Merit answers: "Yes"

Plaintiffs answered: "No"

The Court of Appeals answered: "Yes"

The Circuit Court answered: "Yes"

II. WHAT TEST SHOULD HAVE BEEN APPLIED TO DETERMINE WHETHER AND THE EXTENT TO WHICH MERIT PROPOSED TO DISCHARGE WATER?

Merit answers: "Yes"

Plaintiffs answered: "No"

The Court of Appeals would answer: "Yes"

The Circuit Court would answer: "Yes"

III. WHETHER MICHIGAN CITIZENS V NESTLE WATERS, 479 Mich 280 (2007), AND MICHIGAN CITIZENS V NESTLE WATERS, 269 Mich App 25 (2006), WERE PROPERLY DECIDED?

Merit answers: Standing was never disputed by the parties and should not be considered in this appeal. The Supreme Court decision in *Nestle* does not require review. The Court of Appeals in *Nestle* properly found that the reasonable use balancing test governs water law disputes in Michigan.

¹ This Court's January 29, 2010 Order granting leave to appeal contains four issues. One of the issues is whether the Plaintiffs have a cause of action against the Defendant/Appellee Michigan Department of Environmental Quality ("MDEQ") under the Michigan Environmental Protection Act, MCL 324.1701(1), *et seq*, which has no bearing on Defendant/Appellee Merit Energy Company's ("Merit") historical positions in this litigation. This Court also asked the parties to brief whether *Preserve the Dune v DEQ*, 471 Mich 511, 684 NW2d 847 (2004) was properly decided. *Preserve the Dunes* is only implicated in this appeal with regards to Plaintiff's claims against the MDEQ.

Plaintiffs answered: "No"

The Court of Appeals did not entertain this issue, although it relied on the Court of Appeals decision in *Nestle*.

The Circuit Court did not entertain this issue, although it relied on the Court of Appeals decision in *Nestle*.

STATEMENT REGARDING STANDARD OF REVIEW

The Plaintiffs challenge the Court of Appeals' ruling that the easement granted to Merit from the Michigan Department of Natural Resources ("MDNR") as now terminated was adequate to convey the riparian right to drain the treated water into Kolke Creek. The scope of an easement is an issue reviewed de novo. *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). A trial court errs as a matter of law if it fails to apply the plain and unambiguous language of an agreement. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003).

The Plaintiffs also challenge the Circuit Court's analysis of the common law of riparian rights as applied to the facts of this case which is now moot. This Court reviews de novo, as a question of law, the proper scope and application of the common law. *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc., aff on other grounds*, 269 Mich App 25, 53; 709 NW2d 174 (2006) ("*Nestle*").

INTRODUCTION

Defendant-Appellee Merit Energy Company ("Merit") does not seek a permit for a surface water discharge to Kolke Creek, nor does Merit need or require a Michigan Department of Nature Resources and Environment ("MDNRE," formerly known in part as the Michigan Department of Natural Resources or "MDNR") easement for the possible transport and discharge of treated water from an installed cleanup system. The cleanup system, which is being used by Merit to remediate contamination at the Hayes 22 Central Production Facility ("CPF"), has been built, and the current method of discharging treated effluent involves discharge to infiltration basins in accordance with a MDNRE groundwater permit and discharge to a disposal well. The result of this appeal will no longer have any effect on the system's design or operation. All of these issues are now moot because of termination of the MDNR easement and issuance of a new groundwater discharge permit.

The termination of the MDNR easement and decision to rely on different alternatives for discharge and forego any future request to discharge to Kolke Creek eliminates the need to consider Merit's historical right to discharge treated water pursuant to easement or to consider Plaintiffs' further argument that the "reasonable use balancing test" should not apply in deciding whether or the extent to which treated groundwater could be discharged into Kolke Creek. Further, since Merit no longer has a permit to discharge nor an easement to convey treated wastewater to Kolke Creek, whether the Plaintiffs may have had a valid cause of action against the MDEQ for the past issuance of a surface water discharge permit, which Merit has no intention or capability of seeking in the future, presents "nothing but abstract questions of law which do not rest upon existing facts or rights." *Glidenmeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920). Finally, the separate question of whether *Nestle, supra*, and *Preserve the*

Dunes, supra, were properly decided are not relevant or dispositive in this case. In light of this, Merit has decided to devote only a minimum amount of resources to this appeal, and it largely reiterates the positions it took in the lower courts.

COUNTER STATEMENT OF FACTS

Contrary to representations in Plaintiffs' briefing, this case has nothing to do with exporting water from the Great Lakes Basin. (Plaintiffs' Brief on Appeal, p 24). This case was not about a groundwater withdrawal diminishing a surface water body or a residential drinking well. (*Id.* at p 15). This case also was not about the Plaintiffs' standing which has never been contested in this matter. (*Id.* at p 42). This case was not about draining a water body to create economic growth. (*Id.* at p 23). This case was about determining a method of discharge for the groundwater found under the Hayes 22 CPF after pollution composed primarily of benzene, toluene, ethyl benzene, and xylene ("BTEX") was removed.

When Merit Energy acquired certain assets from Shell Western Exploration and Production, Inc., including the Hayes 22 CPF, it assumed responsibility for the cleanup of pollution that was present underneath it. Merit entered into a Transfer Settlement Agreement ("TSA") with the MDEQ promising to clean the pollution at the site. At the time of the 2004 transfer, quarterly groundwater testing showed that the plume resulting from the Hayes 22 CPF had moved as certain wells that did not originally show any contamination had BTEX levels above criteria.² Two residential wells had already been contaminated by BTEX in the Hayes 22 plume at the time that Merit evaluated its response under the TSA.³ Concerns existed that the plume would keep migrating vertically and horizontally beyond 3000 feet southwest from the

² Appx 6A.

³ Appx 6A.

CPF.⁴ If the contamination continued to migrate, other residential wells were also potential downgradient receptors.⁵

Due to the size of the plume, the thickness of the aquifer, and the proximity of the plume to residential wells, Merit and the MDEQ decided that the only feasible and prudent alternative was to use pump and treat remediation using an air stripper with ultimate discharge of the treated wastewater to a surface water body.⁶ The proposed pump-and-treat system was necessary to gain hydraulic control of the plume and stop its spread into other residential wells.⁷

The genesis of the prior dispute among the Plaintiffs, Merit, and the MDEQ was the logical and prudent decision to discharge treated water to nearby Kolke Creek. Merit and the MDEQ previously favored discharge to Kolke Creek because discharge to alternative surface water bodies such as Lake Tecon, Frenchman Creek, the Manistee River, Arrowhead Lake, or Lake Manuca were not prudent due to longer piping distances, access issues, and the destruction of higher quality forest land. *Anglers of the AuSable v DEQ*, 283 Mich App. 115, 120, 770 NW2d 359 (2009). Plaintiffs on the other hand took and have always taken the position that not one drop of water should be placed into Kolke Creek. Plaintiffs maintained that the discharge, as proposed, would harm their property.

Ultimately, this case was resolved by a modification of the groundwater discharge permit and Corrective Action Plan ("CAP") applicable to the cleanup of the Hayes 22 site. The modified permit and CAP together allow for the discharge of the treated groundwater into a rapid infiltration basin located near the Hayes 22 and a salt water disposal well on the Hayes 22 and eliminate any requirement to consider other methods of discharging treated water. In reliance on

⁴ Appx 6A.

⁵ Appx 6A.

⁶ Appx 7A.

⁷ Appx 6A.

this modification of the permit and CAP, Merit terminated its easement when the MDNR removed the discharge structure and sealed the pipeline that was intended to carry the treated water to Kolke Creek.⁸

However, the modifications to the CAP were not without costs. Due to soil properties and land area restrictions, the MDEQ only granted Merit a permit to discharge up to 400 gallons per minute ("gpm") into the proposed infiltration basins.⁹ Merit also is continuing to discharge up to 100 gpm into a former disposal well. This combined discharge volume, which is lower than the 700 gpm surface water discharge originally contemplated by the CAP, will likely extend the time required to clean up the plume emanating from the Hayes 22 which previously threatened surrounding neighborhoods. Further, the construction of the basins required the clear cutting of 40 acres of forestland.¹⁰

Plaintiffs now urge this Court, without any remaining controversy between the parties, to review this matter further and create a per se rule against any discharge of water into a waterbody unless that water originated in the watershed. Adopting this position would have severe consequences for this state. If taken to its logical extreme as Plaintiffs in their Brief are doing, entities and municipalities for example that have National Pollution Discharge Elimination System ("NPDES") Permits in locations along the Rouge or Detroit River in the Detroit Metropolitan area would be unable to discharge because their water in most cases is derived from the Detroit Water and Sewerage District which draws water for use and consumption from Lake Huron. Or to offer a more immediate example, the Plaintiffs have

⁸ Appx 2B- 25B.

⁹ Appx 24.

¹⁰ Appx 26B- 30B.

submitted two water withdrawal permits that they believe could not have been permitted absent the reasonable use balancing test.¹¹

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT THE MDNR CONVEYED RIPARIAN RIGHTS TO MERIT TO DISCHARGE TREATED EFFLUENT INTO KOLKE CREEK BY EASEMENT.

This Court has no basis for finding that the Court of Appeals erred in recognizing that riparian rights are assignable and that Merit secured riparian rights to discharge treated water into Kolke Creek through an easement granted by the Michigan Department of Natural Resources (“MDNR”).

Plaintiffs' challenge the sufficiency of the actual easement granted by the MDNR to Merit in this case. (Plaintiffs' Brief on Appeal, pp 29-31). The Court of Appeals correctly reversed the Circuit Court's erroneous holding that the easement granted from the MDNR to Merit for construction of the pipeline was not adequate to convey the riparian right to drain the treated water into Kolke Creek.¹² The Court of Appeals found that the Circuit Court's ruling was at odds with the language of the easement. *Anglers supra*, 129. The Court of Appeals decided:

The easement in this case expressly provided Merit Energy the "right to place, construct, operate, repair, and maintain" the pipeline over the state-owned land at issue. The term "operate" clearly and unambiguously refers to the operation of the pipeline that will discharge treated water into Kolke Creek. Further, supporting this plain meaning is the easement's own requirement that Merit Energy notify the DNR of the release of any toxic or hazardous substance resulting from the operation of the pipeline. Additionally, attached to the easement is a condition requiring Merit Energy to submit "operating instructions" requiring visual inspection of the water line and discharge point on a regular basis. Thus, the term "operate" clearly encompasses the discharge of treated water. (*Id.* at 130).

¹¹ Appx 31B- 47B.

¹² Appx 15A.

As noted by the Court of Appeals, Plaintiffs' argument that the easement is inadequate to allow the discharge also defies binding precedent that an easement does not have to contain the particular words "riparian rights," but rather "[w]here the language of a legal instrument is plain and unambiguous, it is to be enforced as written." *Little, supra*, 700. If the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement. *Id.*

The Circuit Court however, did not properly analyze the previously issued easement's language, or alternatively the extrinsic evident in the record to determine the easement's scope. The Circuit Court's opinion mischaracterized the easement as encompassing only the "construction and maintenance" of a pipeline, when in fact the express language of the easement stated:

The STATE OF MICHIGAN by the DEPARTMENT OF NATURAL RESOURCES... acting under the authority of its Director, and by virtue of the authority conferred by Act No. 451, P.A. 1994, does hereby Convey and Quit-Claim to MP Michigan LLC [Merit]... and to its successors and assigns the easement and *right to place, construct, operate, repair, and maintain* Pipeline across the following parcels of land situated in the Township of Hayes, County of Otsego, State of Michigan.... (emphasis supplied)

However, as noted by the Court of Appeals in this case, the express terms of the prior easement clearly included the *operation* of treated water pipeline rather than just its construction and maintenance.¹³ (*Anglers, supra*, p 130).

In addition, the summary attached as Exhibit A to the MDNR easement plainly depicted the discharge of the pipeline into the upland above Kolke Creek. *Id.* Likewise, Exhibit B, entitled "Special Right-Of-Way Construction, Restoration, and Maintenance Conditions," stated:

¹³ Appx 106A-122A.

Operating Instructions: A complete list of Grantee's field personnel's operating instructions shall be submitted to Grantor's representative, and the Department of Environmental Quality representative. Such instructions shall include visually inspecting the water line and discharge point on a regular basis. *Id.*

Even if additional evidence was needed, the easement application, which was admitted as Exhibit O, plainly showed that the intent of the easement was to allow discharge of the treated water under the COC into Kolke Creek and even mentions the NPDES permit under which discharge will occur. *Id.* The application stated:

MP Michigan, LLC [Merit], of 13727 Noel Road, Suite 500, Dallas, Texas 75240, requests a pipeline easement required for access to the treated water discharge point at Kolke Creek, approved under NPDES General Permit No. MIG 0800000. One 8-inch line will be installed in the state easement, from a connecting private easement, to transport a treated water stream from the remediation system to be constructed at the Hayes 22 Central Production Facility. *Id.*

The MDNR also requested an alternatives analysis to be performed before it issued the easement required to discharge the treated water into Kolke Creek. This analysis is reflected in studies admitted into evidence at trial as exhibits W and X. Further, MDNR staff even went to the discharge site to make sure that the area was suitable for discharging the treated water in 2005, while evaluating whether to approve the easement. Therefore, the easement requested of and granted by the MDNR to Merit for the "construction, maintenance, and operation" of a pipeline to Kolke Creek contemplated and included the use of that pipeline for the discharge of treated water under the COC.

The record leaves no doubt that Merit received riparian rights to discharge treated water into Kolke Creek. The Circuit Court erred as a matter of law, as the Court of Appeals found, when the Circuit Court ruled that the easement was deficient on its face, without giving effect to the plain language of the easement. *Anglers, supra*, p 130.

Plaintiffs throughout this case have cited the plurality opinion in *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967), to the effect that "riparian rights are not alienable or severable, divisible or assignable apart from the land which includes therein, or is bounded by a natural watercourse." Plaintiffs cite *Thompson* to essentially maintain that an easement cannot be written to include the exercise of a riparian right. (Plaintiffs' Brief on Appeal, pp 30-31). However, this is not the law.

Here, the State of Michigan through the MDNR is a riparian owner along Kolke Creek, and it has the right to grant an easement to conferring riparian rights, unless it is unreasonable to utilize its riparian rights for the proposed discharge. By asserting that Merit did not have the right to discharge on MDNR property pursuant to a validly executed easement, Plaintiffs were essentially trying to use their downstream riparian rights to prevent the MDNR from exercising control over property which it owns in fee. This is contrary to Michigan riparian law.

In *Dumont v Kellogg*, 29 Mich 420 (1874), the Michigan Supreme Court considered and rejected the argument now advanced by Plaintiffs in this case:

[T]hat the lower proprietor must be allowed the enjoyment of its full common law rights as such, not diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state as if no proprietor above him existed. Such a rule would not be the law so long as equality of right between the several proprietors is recognized, for it is manifest it would give to the lower proprietor's superior advantages over the upper, and in many cases give him in effect a monopoly of the stream.

Also, in *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902), the Michigan Supreme Court reiterated the proposition that a downstream owner cannot assert his riparian rights to unreasonably restrain the upstream owner's use of his property:

It would be unreasonable and contrary to the universal consent of mankind, to debar each riparian proprietor from the application of

the water to domestic, agricultural, or manufacturing purposes, provided the use of it be made so as to work no material injury or annoyance to his neighbor, and there will, no doubt, be, in the exercise of a proper use of water, some evaporation or decrease of it, - some variation in the weight and velocity of the current; but the de minimis non curat lex applies, and the right of action by the proprietor below would not necessarily flow from such use; it would depend on the nature and extent of the injury in the manner of using the water.

To the extent that Plaintiffs argue that *Thompson supra*, precludes the grant of riparian rights to noncontiguous tracts by easement, this position was not found in *Thompson* and was specifically rejected in *Little v Kin*, 249 Mich App 502; 644 NW2d 375 (2002), *aff'd*, 468 Mich 699, 664 NW2d 749 (2003). The plurality opinion in *Thompson*, relied upon by Plaintiffs, recognized in fact that "easements, licenses and the like for a right of way for access to a watercourse do exist and often are granted to nonriparian owners." *Thompson, supra* 686. Further, the Michigan Court of Appeals in *Little* "established [without limitation] the critical principle that rights normally afforded exclusively to riparian landowners may be conferred by easement." *Little, supra* at 515. Decisions since *Little* have upheld *Little's* analysis that riparian rights can be conveyed by easement and that such easements are only limited by the intent of the parties. See *Dyball v Lennox*, 260 Mich App 698, 680 NW2d 522 (2004).

Michigan's riparian law, in short, stands for the exact opposite proposition that Plaintiffs assert. *Id.* Michigan common law does not limit the use of a watercourse to riparian owners; instead, it allows persons to use watercourses as long as they "can obtain access to them without trespass, so far as they do not interfere with the reasonable use of the pond by others, or with the public rights, unless in cases where the legislature has otherwise directed." *Beach v Hayner*, 207 Mich 93, 96; 173 NW 487 (1919). There is simply no basis in law for Plaintiffs' assertion that an easement cannot convey riparian rights. *Anglers, supra*, p 131.

Nor does Plaintiff offer any Michigan law or compelling reason that the riparian right to discharge water into Kolke Creek was dependent on whether water emanates strictly from a source within a given watershed.¹⁴ Such a rule would prohibit numerous permitted discharges.¹⁵ Plaintiffs-Appellants have cited no Michigan case law supporting this argument. (Plaintiffs' Brief on Appeal, p 31).

II. THE CIRCUIT COURT AND COURT OF APPEALS PROPERLY HELD THAT THE REASONABLE USE BALANCING TEST GOVERNS WHEN APPLYING THE COMMON LAW OF RIPARIAN RIGHTS.

Plaintiffs assert that the Circuit Court and the Court of Appeals erred in ruling that the "reasonable use" balancing test reaffirmed by the Michigan Court of Appeals in *Nestle* is applicable to this case. Plaintiffs' argue that the "reasonable use" balancing test has no basis in Michigan law. (Plaintiffs' Brief on Appeal, p 9). This position is contrary to case law. As stated in *Nestle*:

[A] reasonable use balancing test is consistent with the Michigan authorities governing water use. Beginning with *Dumont* and *Schenk* and concluding with *Maerz*, Michigan courts have consistently avoided strict rules that permit one water user to utilize water at the expense of an adjacent user. Instead, while 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 uses. Consequently, in order to recognize the interconnected nature of water sources and fully integrate the law applicable to water disputes, we adopt the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users.

¹⁴ The surface water divided between the Au Sable and Manistee Basins is very close to the Hayes 22 CPF, so close that there may be some doubt as to which watershed the CPF is in. This fact points out the absurdity of basing legal principles of water usage on conditions such as watersheds which may not be obvious or certain.

¹⁵ For example, an industrial discharger in Detroit may discharge process water initially secured from Lake Huron, Detroit's source of water, which after industrial usage is discharged by NPDES permit into tributaries like the Detroit River or River Rouge.

Nestle, supra 67. The *Nestle* Court unquestionably found that the reasonable use balancing test was and is generally applicable to disputes between water users and was not limited to a dispute between a groundwater user and a riparian. In fact, *Dumont*, a case that the *Nestle* court heavily relies on, involved a dispute between riparians. *Dumont v Kellogg, supra*. Further, the Michigan Court of Appeals in *Kernen v Homestead Development Company*, 232 Mich App 503, 511; 591 NW2d 369 (1999), ruled that the holder of an NPDES permit can discharge into a natural watercourse subject to the "reasonable use" doctrine of Michigan riparian law. Therefore, the Court of Appeals in this case properly applied the "reasonable use" balancing test to this case as set forth in *Dumont, Nestle, and Kernen. Anglers, supra*, p 136.

Plaintiffs also suggest that the Court of Appeals improperly relied on obiter dictum in the *Nestle* case suggesting that the "reasonable use" balancing test was applicable to disputes between riparians. (Plaintiffs' Brief on Appeal, p 27). This argument simply ignores the Court of Appeals' express reliance on *Dumont*, a Michigan Supreme Court case involving a dispute between riparians. *Anglers, supra*, p 136.

Plaintiffs next suggest that the proper test was some distinct "reasonable use" doctrine as set forth in *Dumont, supra* and *Hulbert, supra*. (Plaintiffs' Brief on Appeal, pp 12). However, close examination of Michigan cases shows that the reasonable use tests in *Nestle, Dumont*, and *Hulbert* are one and the same. In summarizing riparian law, the *Nestle* Court found:

In our increasingly complex and crowded society, people of necessity interfere with each other to a greater or lesser extent. For this reason, the right to the enjoyment of water cannot be stated in terms of an absolute right. The reasonable use balancing test is best adapted to this reality. It recognizes that virtually every water use will have some adverse effect on the availability of this common resource. For this reason, it is not merely whether one suffers harm by a neighbor's water use, nor whether the quantity of the water available is diminished, but whether under all the circumstances of the case the use of the water by one is reasonable

and consistent with a correspondent enjoyment of right by the other. *Nestle, supra* 69.

The reasonable use test, as acknowledged in *Nestle* is a case by case assessment of competing water uses to “ensure a fair participation in the use of water for the greatest number of users.” *Id.* at 69. In applying the test, a court should “attempt to strike a proper balance between protecting the rights of the complaining party and preserving as many beneficial uses of the common resource as is feasible under the circumstances.” *Id.*

These principles of fair use and wide participation are equally present in the balancing tests articulated in *Dumont* and *Hulbert*. In *Hulbert*, the City of Battle Creek attempted to prosecute a riparian lease holder for swimming in a lake the city utilized as a reservoir. *Hulbert, supra* 158. The Michigan Supreme Court in *Hulbert* held that the city, as a downstream riparian user, did not have the power to prohibit a reasonable upstream use of the water. *Id.* at 165. In articulating the reasonable use test, the *Hulbert* Court stated:

[T]he enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration; so that a use which, under the circumstances, is held reasonable, under different circumstances would be held unreasonable.

Id.

Likewise in *Dumont*, the reasonable use balancing test is articulated in terms of fair use and wide participation. The *Dumont* Court stated:

Each proprietor is entitled to such use of the stream, so far as it is reasonable, comfortable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the stream above and below.

Dumont, supra. There is simply not a substantive difference in the reasonable use test articulated by the *Dumont, Hulbert,* and *Nestle* courts.

Finally, Plaintiffs implausibly argue that there is a separate category of cases involving disputes between riparian owners on the same watercourse and nonriparians, or where one water is diverted out of the watershed for use on or for the benefit of nonriparian land that are handled under a “no material diminishment” test. (Plaintiffs' Brief on Appeal, p 25). Michigan law simply does not contain such a test, nor does public policy demand it. As set forth above, and as recognized by the Circuit Court and the Court of Appeals, Michigan law is clear that riparian rights may be transferred by easement under the reasonable use test. *Little, supra* 515. Further, Michigan cases such as *Dumont, Hulbert, Kernen,* and *Nestle,* all recognize that the reasonable use balancing test is the appropriate way to evaluate a water use that alters the flow of a watercourse.

Even if *arguendo* some Michigan riparian cases at one time used a *per se* rule prohibiting water use to benefit nonriparian parcels, those cases (despite Plaintiffs' apparent argument) are inconsistent with the "reasonable use" balancing test that is and should remain the law in Michigan. The *Nestle* Court reasoned:

While we acknowledge that, at least in the context of riparian rights, prior courts have determined that uses that did not benefit the riparian land were unreasonable *per se*, see n 34 of this opinion, we believe that such a *per se* rule is incompatible with modern use of the balancing test. Instead, we hold that the location of the use is but one of the factors that should be considered in balancing the relative interests.

Nestle, supra 72. Therefore, Michigan law no longer applies, if it once did, a *per se* rule in evaluating water uses that benefit nonriparian parcels. Uses in Michigan are governed by the reasonable use balancing test. *Id.*

In short, the Court of Appeals in this case consistently explained:

Nestle relied upon the Second Restatement of Torts in applying the reasonable use balancing test to a ground water dispute, *id.* at 71 n 46, citing 4 Restatement of Torts, 2d, § 850A, p 220, and the factors set forth in that Restatement section pertain to the reasonable use of water generally - ie., without specific limitation to groundwater disputes. Further, although *Nestle* expressly adopted and applied the reasonable use balancing test to a dispute between groundwater and riparian users, *Nestle* indentified this test as the one "first stated in Dumont[.]" *Id.* at 68. The *Dumont* test was not limited to groundwater cases. *Dumont, supra* at 423-425. In light of this, it cannot be said that *Nestle* ignored the doctrine of stare decisis or that its explanation of the reasonable use balancing test constituted mere dicta. Consequently we conclude that because it was only the *Nestle* Court's application of the reasonable use balancing test that pertained to a groundwater dispute, its explanation and analysis of the reasonable use balancing test is instructive here. *Anglers, supra*, p 136.

Plaintiffs' arguments fail to show that the Circuit Court and Court of Appeals erred in recognizing the applicability of the reasonable use balancing test in deciding whether riparian rights would be violated by the previously proposed discharge of treated water. Although Merit has always contended that the Circuit Court improperly applied this test, the Circuit Court and Court of Appeals did not err in deciding the standard that should govern.

III. THIS COURT SHOULD NOT REVIEW MICHIGAN CITIZENS V NESTLE WATERS, 479 Mich 280 (2007), AND IT SHOULD UPHOLD MICHIGAN CITIZENS V NESTLE WATERS, 269 Mich App 25 (2006).

Plaintiffs argue at this Court's invitation that *Michigan Citizens v. Nestle Waters*, 479 Mich 280 (2007) was wrongly decided. However, the issue in *Nestle*, the plaintiff's standing to protect water bodies in which they could not show a unique interest, was never an issue in this case. In this case, the Plaintiffs own property or have members that own property adjacent to Kolke Creek. There is simply not a controversy in this case between the parties involving standing. Further, this Court's decision in *Lansing Schools Education Association v Lansing*

Board of Education, ___ Mich ___, ___ NW2d ___ (2010), issued July 31, 2010, has already overruled this case.

To the extent that Plaintiffs argue as part of this review of precedent that this Court should overturn the Court of Appeal's decision in *Nestle*, as set forth above, the reasonable use balancing test articulated in *Nestle* is consistent with Michigan case law and should not be disturbed. Under the longstanding doctrine of stare decisis, "principles of law deliberately examined and decided by a court of competent jurisdiction should not lightly be departed." *Lansing Schools, supra*, citing *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996). Further, Plaintiffs have not shown that there "is a special or compelling justification" to overturn the reasonable use balancing test. *Lansing Schools, supra*, at 7. "Overturning precedent requires more than a mere belief that a case was wrongly decided". *Id.* Plaintiffs cannot demonstrate that the reasonable use test as adopted in *Dumont*, applied in *Hulbert* and followed in *Nestle* and this case results in an intolerable and untenable rule, causes special hardship or inequity, results in serious detrimental prejudice to the public interest, or constitutes an abrupt departure from previous precedent.

There is no reason for this Court to disturb those decisions. If this Court overturns the Court of Appeals' decision in *Nestle* it will unsettle the common law of riparian property rights by abandoning the "reasonable use" test in favor of a vague "per se" test that suits riparian landowners to the exclusion of all others. The reality is that the "reasonable use" rule reflects sound public policy. In this case, Merit proposed to use Kolke Creek to clean up existing groundwater contamination, as the Circuit Court aptly noted that use is not inherently unreasonable.¹⁶ Plaintiffs are arguing for a standard that will discourage reasonable uses. Almost by definition, the Plaintiffs' proposed total prohibition against off-site use of water means that no

¹⁶ Appx 18A.

entity or individual could ever add or subtract one drop of water from a water body unless that drop originated and remained on a riparian tract of land.

Water resources like mineral, agricultural, animal and other natural resources are subject to conservation efforts, but in a modern, complex and evolving society and economy, it is unrealistic to maintain every one of our state's water bodies in a totally natural pristine state. *Nestle, supra* 69. Water is a natural resource that is regulated by federal, state, and local governments; however, the Plaintiffs here would ask this Court to provide a private landowner with the ability to stop the use of a water body that runs over his or her property even if that use complies with every one of these regulations. Giving such a power is not only contrary to the cases cited in depth above, but runs counter to the spirit of conservationist that is embodied in the State's Constitution. Michigan Constitution of 1963 art. IV, §52.

A balancing of "factors, such as offsetting substantial harm to riparian property or values by private commercial benefits or public or social benefits to the State" is exactly the procedure that is expounded by the Michigan Environmental Protection Act (MEPA), which has its roots in the State Constitution. The legislature passed the Michigan Environmental Protection Act in 1970 to fulfill its constitutional obligation under the Michigan Constitution of 1963 art. IV, §52; *Michigan State Highway Comm'n v Vanderkloot*, 392 Mich 159, 184; 220 NW2d 416 (1974). Plaintiffs are now arguing for an reinterpretation of the common law that flies in the face of the policy goals set forth in the Michigan Environmental Protection Act and Michigan's Constitution by giving landowners the power to contest any discharge of water into a water body even if it does not "pollute, impair, or destroy" any natural resource.

The *Nestle* Court found that the state's common law of riparian property rights supported the "reasonable use" balancing test. *Nestle, supra* pp 55-56. The balancing of competing

interests is compelled by the state Constitution which is in harmony with the state of the common law. This "reasonable use" test is the majority rule in United States jurisdictions and is endorsed by Restatement § 850. *Nestle, supra* at 59. The *Nestle* Court, after recognizing that this reasonable use test had been applied to a dispute between riparians by this Court, decided that the "reasonable use" test should also be applicable to a dispute between a riparian property owner and a groundwater user. *Id.*

Plaintiffs additionally misrepresent the Court of Appeal's holding below to this Court by stating that it has changed the law so that "any person or entity can acquire land in Michigan and claim a right to export water subject to future regulations. (Plaintiffs' Brief on Appeal, p 24). This case has never been about exporting water out of the Great Lakes Basin nor has it been about diverting the course of a stream. In fact, this case when in controversy involved a proposal that would have increased the volume of water in a stream rather than diverted water from it. The Court of Appeals merely followed this Court's holding in *Dumont* as noted in the *Nestle* decision as they applied to the groundwater cleanup system at issue. The lower courts' decision that the system could only discharge a reasonable amount of water into a water body is wise public policy which allows the evaluation of each case on its merits. Plaintiffs would change the law and prohibit the use of Michigan's waters by anyone but riparian landowners no matter how reasonable the proposed use. This is not prudent public policy. Courts have correctly concluded that Michigan's law of riparian rights is flexible and can accommodate a number of reasonable uses of the state's waters. This principle should be upheld by this Court, assuming this matter is decided.

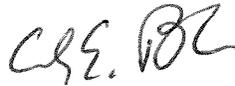
RELIEF REQUESTED

Defendant-Appellee, Merit Energy Company, respectfully requests that this Court, if it chooses to decide those moot issues, affirm the decision of the Court of Appeals and grant all other just and proper relief.

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Dated: August 31, 2010

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