

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
[Murray, P.J., and Markey and Wilder, J.J.]

ANGLERS OF THE AUSABLE, INC., a
Michigan nonprofit corporation; MAYER
FAMILY INVESTMENTS, LCC, 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
CORPORATION, a Delaware Corporation

Defendants-Appellees,

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

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

Otsego Circuit No. 06-11697-CE(M)

**APPELLEE MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENT'S BRIEF ON APPEAL**

****ORAL ARGUMENT REQUESTED****

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Dated: September 7, 2010



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STATEMENT OF QUESTIONS

- I. It is a settled principle of law that riparians can grant easements to non-riparians authorizing activities that the riparians themselves could otherwise undertake. The easement granted to Appellee Merit Energy Corporation authorized the operation of a pipeline whose purpose was the discharge of treated wastewater onto State land, and ultimately into Kolke Creek. Did the Court of Appeals correctly determine that the easement granted the right to discharge water into Kolke Creek and that such an easement was not prohibited by law?

Appellant's answer: "No."

Appellee's answer: "Yes."

- II. Disputes between riparians have long been subject to a "reasonable use" test. This test has evolved over the last century and a half as it has been applied to different factual scenarios. The Court of Appeals', in *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, held that a "reasonable use balancing test" should be applied in disputes between riparian and groundwater users. The *Nestle* Court also determined that a "reasonable use balancing test" was consistent with the evolving standard governing riparian disputes. Did the Court of Appeals correctly determine that the standards outlined in *Nestle* should be applied in this case?

Appellant's answer: "No."

Appellee's answer: "Yes."

- III. The sole action undertaken by the Michigan Department of Environmental Quality was an administrative decision to issue a permit authorizing Merit's discharge of water. In addition to filing a petition for review in circuit court pursuant to the Administrative Procedures Act challenging the permit, Appellants filed a complaint under Michigan Environmental Protection Act (MEPA). The Court of Appeals applied this Court's decision in *Preserve the Dunes, Inc v Mich Dep't of Environmental Quality*, in holding that appellants' MEPA lawsuit against the MDEQ should be dismissed because issuing of a permit was not conduct that could pollute, impair, or destroy natural resources under MEPA. Was this Court's decision in *Preserve the Dunes* correct, and was it properly applied by the Court of Appeals below?

Appellant's answer: "No."

Appellee's answer: "Yes."

IV. This Court also ordered the parties to brief whether the Court's decision in *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, was correctly decided. That case addressed standing under MEPA and determined that MEPA's "universal" standing provision violated separation of powers. After the order in this case, the Court issued its decision in *Lansing Schools Ed Assoc v Lansing Bd of Ed*, overruling *Nestle*. Based on this Court's ruling in *Lansing Schools Ed Assoc* is this issue now moot?

Appellant's answer: "Not addressed."¹

Appellee's answer: "Yes."

¹ Appellants' Brief on Appeal was filed July 19, 2010, before the Court's decision in *Lansing Schools*.

INTRODUCTION

The Court directed the parties to address four questions: (1) whether Appellee Merit Energy Corporation could be conveyed, by easement, the right to discharge water from riparian property owned by the State; (2) what test should be applied in determining whether and to what extent Merit could discharge water in light its impacts on other riparians; (3) whether Appellants Anglers of the Au Sable, Inc, Mayer Family Investments, LLC and Nancy A. Forcier Trust (Anglers) could bring an action against the Michigan Department of Environmental Quality² (MDEQ) under the Michigan Environmental Protection Act (MEPA)³ based solely on issuance of a permit authorizing Merit's activities; and (4) whether this Court's decisions in *Michigan Citizens for Water Conservation v Nestle Waters*⁴ (standing under MEPA) and *Preserve the Dunes v DEQ*⁵ (actionable conduct under MEPA) were correctly decided.

While addressing these issues, much of Anglers' brief is focused on whether the 2005 decision of the Court of Appeals in *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*⁶ was correctly decided.⁷ *Nestle* involved a large scale groundwater withdrawal by *Nestle* for a bottled water operation. It was ultimately determined that the withdrawal impacted nearby surface waters, including a stream and nearby lakes. The Court of Appeals held that in a dispute between groundwater and riparian users the test should be whether

² All statutory functions and authorities of the Michigan Department of Environmental Quality (MDEQ) were transferred to the new Michigan Department of Natural Resources and Environment by Executive Order 2009-45, effective January 17, 2010.

³ Part 17, Michigan Environmental Protection Act, of the Natural Resources and Environmental Protection Act, MCL 1701 *et seq.*

⁴ *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280; 737 NW2d 447 (2007).

⁵ *Preserve the Dunes, Inc v Mich Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004).

⁶ *Michigan Citizens for Water Conservation v Nestle Waters aff'd on other grounds*, 269 Mich App 25, 53; 709 NW2d 174 (2006).

⁷ Appellants' Brief on Appeal, pp 9-25.

the use at issue was reasonable in light of other uses by balancing a variety of factors – what it called a "reasonable use balancing test."⁸ In the course of its ruling, the Court of Appeals surveyed the law governing different water use disputes (between riparians, between groundwater users, and between riparian and groundwater users) and determined that the tests for these disputes had converged to the point where courts were essentially applying the same reasonable use standard.⁹

Anglers is free to argue that the *Nestle* court's analysis of the standard to be applied in disputes between riparians – which the Court of Appeals below found "instructive"¹⁰ was erroneous. But Anglers should not be allowed to use this case as a vehicle to re-litigate/appeal the *Nestle* case itself. This Court already heard the appeal in *Nestle* three years ago (declining to address this issue), and the case now before the Court does not involve a dispute over the impacts to riparians from a groundwater withdrawal, or the broader policy implications of large scale water withdrawals and diversions of water from the Great Lakes Basin.¹¹

Instead, the case at hand involves only issues arising from alleged impacts to other riparians from the discharge of water by Merit pursuant to an easement from the State. The legal and policy issues arising from large scale water withdrawals that Anglers would like to raise may be important, and deserving of serious consideration in a case involving those issues. But this is not an appeal of the *Nestle* decision and those issues are not implicated in this case.

The remaining issues raised by Anglers fall within the four questions the Court directed the parties to brief. The answers to those questions are:

⁸ *Nestle*, 269 Mich App at 69.

⁹ *Nestle*, 269 Mich App at 54-69.

¹⁰ *Anglers of the AuSable v DEQ*, 283 Mich App 115, 136; 770 NW2d 359 (2009).

¹¹ Appellants' Brief on Appeal, pp 1-2, 24.

1. The easement the State granted to Merit, by its terms, authorized the discharge of treated water into wetlands on State land, and ultimately to Kolke Creek. It is well-established that riparians can grant an easement to non-riparians allowing them to undertake activities that are otherwise exclusively the province of riparian property owners.

2. The standard to be applied in evaluating disputes between riparian owners (or grantees of those rights) is reasonable use. The *Nestle* court used the term "reasonable use balancing test" to describe the "umbrella" test it determined should apply to all water use disputes (between riparians, between groundwater users, and between riparians and groundwater users). This was based on the court's determination that historically divergent tests had converged into a reasonableness standard based on balancing very similar factors. In adopting the "reasonable use balancing test", the *Nestle* court relied on the core riparian law cases and determined it was consistent with the evolving standards. The reasonable use balancing test was the correct standard to apply in this case.

3. Anglers did not have a cause of action against MDEQ under MEPA because issuing a permit authorizing an activity is not actual conduct that will pollute, impair, or destroy natural resources. *Preserve the Dunes* correctly determined that administrative action is not conduct subject to suit under MEPA, and the Court of Appeals properly applied that principle here. This does not mean that MDEQ permitting decisions are immune from challenge. The statute requires state agencies to consider alleged pollution, impairment, or destruction of natural resources in making permitting decisions, and those decisions are reviewable by the courts.

4. In *Lansing Schools Ed Assoc v Lansing Bd of Ed*¹² this Court overturned its decision in *Nestle* and other standing cases. The question of whether *Nestle* was correctly decided is now moot.

¹² *Lansing Schools Ed Assoc v Lansing Bd of Ed*, 2010 Mich LEXIS 1657 (July 31, 2010).

COUNTERSTATEMENT OF PROCEEDINGS AND FACTS

Appellee MDEQ accepts Appellants Anglers' statement of proceedings and facts, as supplemented by Appellee Merit's statement of proceedings and facts.

ARGUMENT

I. The Court of Appeals correctly determined that the easement document expressly provided for Merit to discharge water on State land and ultimately into Kolke Creek. Such an easement is not *per se* precluded by Michigan law, which recognizes that riparians can grant easements or licenses to non-riparians to exercise rights otherwise limited to riparians.

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*.¹³ The rights of an easement holder are defined by the easement agreement.¹⁴

B. Analysis

1. The Court of Appeals correctly determined that the terms of the easement document granted Merit the right to discharge water on State property, where it ultimately flowed into Kolke Creek.

The Court did not direct the parties to address the question of whether the language of the easement document conveyed Merit the right to discharge the treated wastewater on the State land, where it ultimately flowed to Kolke Creek. In addition, Anglers did not address this issue in its Brief on Appeal and, therefore, appears to have abandoned this issue. To the extent the Court decides to address this issue, Appellee MDEQ will rely on the arguments made by Appellee Merit in its Brief on Appeal.¹⁵

2. Michigan courts have recognized that riparian owners can grant nonriparians, through an easement, the authority to engage in activities that can otherwise only be exercised by a riparian.

The Court of Appeals correctly determined that the State, through the former Department of Natural Resources, as a riparian owner along Kolke Creek had the right to grant an easement

¹³ *People v Petty*, 469 Mich 108, 113; 665 NW2d 444 (2001).

¹⁴ *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571; 484 NW2d 129 (1992).

¹⁵ Appellee Merit's Brief on Appeal, pp 5-7.

to Merit conferring the authority to conduct activities on its property that would otherwise be limited to riparians:

While full riparian rights and ownership may not be severed from riparian land and transferred to nonriparian backlot owners, Michigan law clearly allows the original owner of the riparian property to grant an easement to backlot owners to enjoy certain rights that are traditionally regarded as exclusively riparian. *Little v Kin*, 249 Mich App 502; 644 NW2d 375 (2002) *aff'd*, 468 Mich 699; 644 NW2d 749 (2003). Traditionally, riparian owners are permitted to drain their land into an adjoining watercourse, *Saginaw Co v McKillop*, 203 Mich 46, 52; 168 NW 922 (1918), and rights granted to nonriparians by easement are not limited to access or ingress and egress, *Dyball v Lennox*, 260 Mich App 698, 706; 680 NW2d 522 (2003), citing *Little I*, *supra* at 514-516. Thus, the DNR, as a riparian owner, could lawfully convey the easement at issue to Merit Energy.¹⁶

The Court of Appeals in *Little v Kin*¹⁷ - one of decisions quoted above - surveyed the relevant law, including *Thompson v Enz*,¹⁸ and *Thies v Howland*¹⁹ and held that riparians could convey the right to exercise certain of their rights to nonriparians:

Thus, while recognizing that riparian ownership rights may not be transferred apart from riparian land, the Supreme Court established *the critical principle that rights normally afforded exclusively to riparian landowners may be conferred by easement.*²⁰

That is not to say that a riparian could sell land abutting a lake, reserve the riparian rights, and then attempt to separately convey the riparian rights to a third party. This Court made clear in *Thompson* 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."²¹ In other words, since the very foundation of riparian rights is ownership in land abutting water, those rights can't be completely severed from the land. But this Court also made clear in *Thompson* that

¹⁶ *Anglers of the AuSable*, 283 Mich App at 131 (quoting *Little*, 249 Mich App at 513).

¹⁷ *Little v Kin*, 249 Mich App 502; 644 NW2d 375 (2002) *aff'd*, 468 Mich 699; 644 NW2d 749 (2003).

¹⁸ *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967).

¹⁹ *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985).

²⁰ *Little*, 249 Mich App at 511 (emphasis added).

²¹ *Thompson*, 379 Mich at 686.

"easements, licenses and the like for a right of way for access to a watercourse do exist and often are granted to nonriparian owners."²² In that situation a riparian is not completely conveying his rights to a third party, but is conveying a portion of the rights, in the riparian land retained by the riparian.

It is also axiomatic that the riparian owner cannot convey greater rights than he possesses. In other words, a riparian cannot convey rights to conduct activities the riparian itself could not conduct. And under long-established riparian law, those rights, in turn, are defined in relation to the rights of all other riparians on the water body at issue.²³ So, for example, a riparian owner might be able to grant an easement for a nonriparian to dock one boat off of his property, but could probably not lawfully grant an easement allowing multiple boats because even the riparian would not be able to do it without potentially interfering with other riparians' use.

Anglers does not seriously challenge the principle recognized in *Little* that riparians can authorize nonriparians to conduct certain riparian activities on their property.²⁴ Anglers also does not challenge the general principle that a riparian can discharge water from its property. Instead, Anglers primarily argues that granting the easement to Merit was unlawful because it would be unreasonable for the State to discharge water on its property if the water originated on nonriparian property.²⁵ Those arguments are addressed in the following Argument.

²² *Thompson*, 379 Mich at 686.

²³ *Dumont v Kellogg*, 29 Mich 420, 424 (1874).

²⁴ Anglers argues at pp 30-31 of its brief that *Thompson* and *Little* only apply in situations where a larger riparian parcel is subdivided into smaller lots and the backlots are granted easements to use the water. While this is certainly the most common situation where litigation arises, nothing in those decisions limits the principle to those situations.

²⁵ Appellants' Brief on Appeal, pp 30-31.

The Court of Appeals correctly held that Michigan law allows a riparian to convey to a nonriparian the right to conduct activities that are otherwise exclusively riparian rights. But whether those rights can be granted depends on whether the riparian itself could undertake the activities under the appropriate standards.

II. Anglers seeks to revisit the portion of the Court of Appeals decision in *Nestle* concerning the test to be applied to conflicts between riparian and groundwater users. This effort to "re-appeal" a four year old decision should be rejected. The relevant inquiry is the question the Court directed the parties to address: What test should be applied in evaluating the underlying dispute between riparians? The Court of Appeals properly relied on the *Nestle* "reasonable use balancing test" for evaluating conflicts between riparians.

A. Standard of Review

The appropriate common-law standard to apply to conflicts between riparian owners is a question of law that is reviewed *de novo*.²⁶

B. Analysis

1. The Court should reject Anglers effort to treat this case as an appeal of the portion of the Court of Appeals decision in *Nestle* concerning the impact of a groundwater withdrawal on riparian owners.

Over a quarter of Anglers' brief is devoted to arguing that the standard for evaluating conflicts between riparian and groundwater users adopted by the Court of Appeals in *Nestle* should be overturned.²⁷ *Nestle* involved a large scale groundwater withdrawal by Nestle for its bottled water operation. Due to the interconnection of the ground and surface water, the withdrawal was impacting a nearby stream, lakes, and wetlands. The Court of Appeals held that in a dispute between groundwater and riparian users the test should be whether the use at issue

²⁶ See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Moning v Alfonso*, 400 Mich 425, 436; 254 NW2d 759 (1977) (reasoning that because the common-law of negligence was created by judges, the courts must decide the common-law rule).

²⁷ Appellants' Brief on Appeal, pp 9-25.

was reasonable in light of other uses by balancing a variety of factors – what it called a "reasonable use balancing test."²⁸

Whatever the merits of Anglers arguments, and the importance of the legal and policy issues implicated by the impact of large scale groundwater withdrawals, this case does not involve a dispute between a groundwater user and a riparian or the withdrawal of water. The portion of the *Nestle* decision applying the "reasonable use balancing test" to disputes between groundwater and riparian users was not relied upon by the Court of Appeals in the decision below, and there are no facts in this case that provide any possible nexus for reviewing that ruling.

There is simply no basis for Anglers to request that the Court overturn that portion of the *Nestle* case addressing the test to be applied in conflicts between riparian and groundwater users.

2. **Conflicts between riparians should be evaluated using what is described in *Nestle* as a "reasonable use balancing test." The Court of Appeals decision in *Nestle* did not fundamentally alter the standards historically applied to riparian disputes. Contrary to Anglers assertions, there was never a brightline standard prohibiting a riparian from discharging water originating from a nonriparian or out-of-watershed property.**

There is no dispute among the parties regarding the underpinnings of the reasonable use doctrine. The owner of property adjoining a watercourse, a riparian, has the right to use the water. But that right is defined by reference to other riparians, and their co-equal rights to use of the same water. Over a century ago, Michigan adopted the "reasonable-use" rule for conflicts between riparian owners in *Dumont v Kellogg*:

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, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury

²⁸ *Nestle*, 269 Mich App at 67-68.

is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress.²⁹

The factors that have been applied to determine whether a use is reasonable are varied and demonstrate the elasticity typical in most common law tests:

No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; and *all other facts which may bear on the reasonableness of the use.*³⁰

Anglers, however, points to language from *Dumont*,³¹ *Hoover*,³² and *Kennedy v Niles*³³ in arguing that brightline rules have been created within this otherwise elastic standard. First, Anglers points to language in *Dumont* that it says is the genesis of a *per se* unreasonable rule, i.e., where no balancing is required.³⁴ One is where "a stream has been diverted from its natural course and turned away from the proprietor below."³⁵ The other is "interference by a stranger who, . . . diminishes the flow of the waters."³⁶ Second, Anglers relies on two sentences in *Hoover*: "Both resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed."³⁷ Finally, Anglers relies on rather obtuse language in *Kennedy*: "If a wrongful use is made of the water of a running stream by a common proprietor, as if he finally diverts the water, such use is by common consent presumed to be

²⁹ *Dumont*, 29 Mich at 424.

³⁰ *People v Hulbert*, 131 Mich 156, 170; 91 NW 211 (1902) (emphasis added). Also quoted in *Hoover v Crane*, 362 Mich 36, 40; 106 NW2d 563 (1960) and *Thompson*, 379 Mich at 687-688.

³¹ *Dumont*, 29 Mich at 422.

³² *Hoover*, 362 Mich at 42.

³³ *Kennedy v Niles Water Supply Co*, 173 Mich 474, 475; 139 NW 241 (1913).

³⁴ Quoted fully in Appellants Brief on Appeal, p 10.

³⁵ *Dumont*, 29 Mich at 422.

³⁶ *Dumont*, 29 Mich at 422.

³⁷ *Hoover*, 362 Mich at 42.

injurious to other common proprietors, and therefore adverse."³⁸ From these three statements

Anglers concludes:

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 475-477; *Hoover*, *supra* at 42. This is especially true if the non-riparian property is located in another watershed.³⁹

Anglers then attempts to expand these "rules" to cover discharges of water taken from nonriparian land. But it can't point to a single case where the discharge of water from a nonriparian parcel on riparian land was considered *per se* unreasonable. Nor does it provide any logical reason for extension of these rules to discharges. Moreover, the *Nestle* court's rejected these *per se* rules as "inconsistent 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."⁴⁰

Under either the reasonable use balancing test or the historical reasonable use test, the standard to be applied would be balancing the various factors quoted from *Hulbert*, *supra*. The fact that the discharge originated on nonriparian land would only be one of many factors to consider.

³⁸ *Kennedy*, 173 Mich at 475.

³⁹ Appellants' Brief on Appeal, p 26.

⁴⁰ *Nestle*, 269 Mich App at 72, n 49.

III. The Court of Appeals correctly applied *Preserve the Dunes* in concluding Appellants have no MEPA cause of action against the MDEQ where the agency's conduct consists of issuing a permit

A. Standard of Review

The issue of whether a cause of action exists under MEPA is a question of statutory interpretation that is reviewed *de novo*.⁴¹

B. Analysis

1. Anglers could not bring a MEPA action against the MDEQ where the agency's conduct consisted of issuing a permit that itself would not harm the environment

The Court of Appeals determined the trial court erred by failing to dismiss the MDEQ because the agency's issuance of the Certificate of Coverage⁴² was not "conduct" that is likely to pollute, impair or destroy natural resources under MEPA.⁴³ In reaching that conclusion, the Court of Appeals relied on the plain language of MEPA and this Court's decision in *Preserve the Dunes*. A review of the relevant MEPA provisions demonstrates the Court of Appeals' decision was correct and that this Court should not overrule *Preserve the Dunes*.

Section 1701(1) of MEPA identifies who can sue and be sued in a civil action brought under MEPA: "The attorney general or any person" may maintain an action 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."⁴⁴ Section 1703(1) specifies the type of conduct a defendant must have undertaken to be sued. In establishing the Plaintiffs' evidentiary burden of making a prima facie showing, Section 1703(1) states a plaintiff must show "that the

⁴¹ *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009).

⁴² A Certificate of Coverage is the authorization used for certain types of discharges to water.

⁴³ *Anglers of the AuSable*, 283 Mich App at 372-73.

⁴⁴ MCL 324.1701(1).

conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources[.]”⁴⁵

In this case, the Court of Appeals emphasized “it is the actual discharge of treated water into Kolke Creek and Lynn Lake that plaintiffs assert would harm the environment.”⁴⁶ The court concluded the MDEQ’s issuance of the Certificate of Coverage is not conduct that is likely to pollute, impair, or destroy natural resources. Instead, the agency’s actions are administrative decisions that do not themselves harm the environment. Quoting this Court’s decision in *Preserve the Dunes*, the Court of Appeals noted that “[a]n improper administrative decision, standing alone, does not harm the environment.” Further, “[w]here a defendant’s conduct itself does not offend MEPA, no MEPA violation exists.”⁴⁷

Other decisions of this Court illustrate the type of government conduct that, in contrast to a permitting decision, is likely to pollute, impair or destroy the environment and for which a government entity can be sued under MEPA. In *State Highway Comm’n v Vanderkloot*, the State Highway Commission initiated condemnation proceedings to acquire more than eleven acres of an alleged rare and unique wetland so the Commission could construct portions of a highway in Bloomfield Township.⁴⁸ This Court emphasized that a MEPA lawsuit is applicable to conduct by the state that is likely to pollute, impair, or destroy natural resources or the public trust

⁴⁵ MCL 324.1703(1).

⁴⁶ *Anglers of the AuSable*, 238 Mich App at 129. Appellants note that the method of treating the contaminated groundwater under the Correction Action Plan was not in dispute at trial. The disputed issues concerned the method, location and nature of discharging the groundwater that the MDEQ approved by issuing the Certificate of Coverage. Appellants’ Brief, at 4, n. 12.

⁴⁷ *Anglers of the AuSable*, 283 Mich App at 128 (quoting *Preserve the Dunes*, 471 Mich at 519).

⁴⁸ *State Highway Comm’n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974).

therein: "Without question, the planning and construction of the state's highway system by the Commission falls within these categories."⁴⁹

In *Ray v Mason County Drain Comm'r*, landowners sought to enjoin the Mason County Drain Commissioner from proceeding with a program to control flooding that involved widening, deepening, and straightening county drains in an area that contained a unique "quaking forest," swamps and potholes.⁵⁰ The project by the Drain Commissioner also involved dredging and the placing tons of dredged spoils as far as 30 feet from the channels. In discussing the shifting evidentiary burdens under MEPA, this Court noted that once the plaintiffs presented a *prima facie* case, the burden shifted to the defendant to show "that the environment has not or will not be polluted, impaired or destroyed *by his conduct*."⁵¹ It was the Drain Commissioner's conduct itself that was the proper subject of a civil action under Section 1701(1) of MEPA.

Although an agency's decision to issue a permit can not be challenged in a complaint filed under MEPA, the agency's decision is not, as Justice Kelly wrote in her dissent in *Preserve the Dunes*, "insulate[d] . . . from judicial review" or "from the scrutiny of [MEPA]."⁵² To the contrary, an agency's alleged failure to follow MEPA in issuing a permit is subject to judicial review by an appeal to circuit court.

As a general matter, judicial review of agency decisions is available by one of three routes: (1) an appeal to circuit court pursuant to the Administrative Procedures Act (APA) after a contested case⁵³; (2) an appeal to circuit court pursuant to Section 631 of the Revised

⁴⁹ *Vanderkloot*, 392 Mich at 184.

⁵⁰ *Ray v Mason County Drain Comm'r*, 393 Mich 294, 299; 224 NW2d 883 (1975).

⁵¹ *Ray*, 393 Mich at 311 (emphasis supplied).

⁵² *Preserve the Dunes*, 471 Mich at 539 (J. Kelly, dissenting).

⁵³ MCL 24.302.

Judicature Act (RJA)⁵⁴; or (3) the review process set forth in the statute applicable to the agency's decision.⁵⁵

In addition, judicial review of an agency's permitting decision may include review of whether the agency applied MEPA correctly. Section 1705(2) of MEPA provides that government agencies are to consider MEPA in their permitting decisions, and that such consideration is subject to judicial review:

In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.⁵⁶

In other words, a person seeking judicial review of an administrative proceeding concerning a permit may assert that the agency failed to correctly apply MEPA.

Indeed, that is precisely what happened in this case. Appellants Mayer Family Investments and Nancy A. Forcier filed Petitions for Contested Case Hearings in which they alleged the Certificate of Coverage violated MEPA.⁵⁷ The hearing referee dismissed the petitions, and appellants then filed a "Complaint and Petition for Review" in the Otsego County Circuit Court seeking review of the dismissal and alleging new common law and statutory violations. The circuit court separated the petition for review and remanded it for review by the MDEQ director. The director affirmed the dismissal.⁵⁸ On appeal, the circuit court reversed,

⁵⁴ MCL 600.631.

⁵⁵ MCL 24.302. *See also Preserve the Dunes*, 471 Mich at 519 (discussing judicial review of administrative decisions under three statutory schemes).

⁵⁶ MCL 324.1705(2).

⁵⁷ Appendix at 1b, 6b, 14b, and 19b.

⁵⁸ *Anglers of the AuSable*, 283 Mich App at 122 and n. 6.

concluding that the "[MDEQ] approval of Merit's COC is illegal . . . because the proposed discharge and the proposed volume of discharge is likely to violate MEPA."⁵⁹

This procedural history demonstrates appellants obtained judicial review of their claim that the MDEQ's Certificate of Coverage violated MEPA. They did so correctly, pursuant to an APA appeal. What appellants cannot do is to file a separate complaint under Section 1701(1) of MEPA alleging again that the MDEQ's issuance of the Certificate of Coverage violates MEPA. The appropriate procedural vehicle for judicial review of the MDEQ's alleged failure to follow MEPA is the APA appeal appellants pursued.

Moreover, under the plain language of Section 1703(1), a MEPA complaint can be filed against only those defendants whose "conduct" has "polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources[.]" As this Court correctly concluded in *Preserve the Dunes*, Section 1703(1) establishes that a complaint under MEPA may be filed when the conduct of the defendant, by itself, is likely to pollute, impair or destroy the environment: "An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA."⁶⁰ Conduct that does not itself harm the environment is not actionable in a MEPA civil action.

⁵⁹ Appendix at 41b. The Court of Appeals denied Merit's delayed application for leave to appeal. 2008 Mich App LEXIS 2647 (Sept. 24, 2008). The Supreme Court similarly denied Merit's application for leave to appeal. 483 Mich 887 (2009).

⁶⁰ *Preserve the Dunes, Inc v Mich Dep't of Environmental Quality*, 471 Mich at 519.

2. Anglers' arguments to overrule or narrowly interpret *Preserve the Dunes* should be rejected because they ignore MEPA's plain language and are unworkable

Anglers urge this Court to overrule *Preserve the Dunes* and interpret "conduct" under Section 1703(1) to include additional actions that are "directly related" to conduct that harms the environment.⁶¹ Anglers do not attempt to identify the nexus they believe should exist for activities to have a sufficient 'direct relationship' to conduct that pollutes, impairs, or destroys natural resources. Should a direct relationship include a bank that makes a loan for a project that involves the filling of sensitive wetlands? Should it include a consultant who prepares the design plans for the project? Or a company that leases equipment needed for the project? All of these entities are engaged in activities that are arguably "directly related" to conduct that will pollute, impair or destroy the environment. Under Anglers view of MEPA, they should all be subject to a lawsuit under Section 1701(1). Anglers' proposed expansion of MEPA – that a person who engages in any action that is "directly related" to conduct that itself pollutes, impairs, or destroys natural resources is subject to being sued under MEPA – is ill-conceived and unworkable. Moreover, it is contrary to the plain language of the statute that requires the defendant to have engaged in "conduct" that "has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources[.]"⁶² This Court should decline appellants' invitation to overrule *Preserve the Dunes*.

This Court should also reject appellants' request to reverse the Court of Appeals based on an overly narrow interpretation of *Preserve the Dunes*. According to Anglers', this Court should

⁶¹ Appellants' Brief at 36.

⁶² MCL 324.1703(1).

distinguish between agency conduct that is "an internal administrative consideration" and "a permit or authorization action," allowing MEPA actions to be brought based on the latter.⁶³

Preserve the Dunes involved a MEPA civil action in which the plaintiff challenged the issuance of a sand dune mining permit long after the time for an appeal to circuit court had expired. The plaintiff claimed the Department of Environmental Quality erred when it determined the permittee was eligible for a mining permit. Yet nothing in this Court's decision provided any basis for distinguishing between the agency's decision to issue the permit and – to use appellants' phrase – "an internal administrative consideration." In fact, whether an applicant is eligible for a permit is an integral and central part of an agency's permitting decision. Anglers offer no meaningful way to distinguish between "internal administration considerations" and "permit actions" because there is none. Neither is conduct that itself harms the environment.

3. The administrative procedures in Sections 1704 and 1705 are supplementary to existing administrative and regulatory procedures; they do not allow a MEPA plaintiff to file a civil action against a person whose conduct does not harm the environment

When MEPA was enacted in 1970, it established new administrative procedures in which (1) an agency (upon the direction of a court pursuant to Section 1704) is to determine the legality of a person's conduct and (2) an agency conducting licensing proceedings is, pursuant to Section 1705, to determine alleged pollution, impairment, or destruction of natural resources. These procedures, as stated in Section 1706, are supplementary to existing administrative and regulatory procedures.

⁶³ Appellants' Brief at 41.

According to Anglers, however, these procedures somehow allow a plaintiff in a MEPA civil action to challenge a permit (rather than filing an APA or RJA appeal in circuit court) and allow a MEPA plaintiff to circumvent the requirement that a MEPA defendant's conduct must itself harm the environment. A review of Sections 1704, 1705 and 1706 demonstrates that Anglers' argument must be rejected.

Under Section 1704(2), "[i]f administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court [presiding over a civil action filed pursuant to Section 1701] may direct the parties to seek relief in such proceedings." If the court directs the parties to seek relief in administrative proceedings, "the court retains jurisdiction of the action pending completion of the action to determine whether adequate protection from pollution, impairment, or destruction is afforded."⁶⁴

Section 1705(2) provides that an agency shall determine alleged pollution, impairment, or destruction of natural resources in licensing proceedings and shall not authorize conduct if a feasible and prudent alternative is available. Section 1705(2) states:

In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.⁶⁵

In addition, Section 1705(1) provides that the attorney general or any other person may intervene in administrative proceedings and assert that the conduct at issue is likely to have the effect of polluting, impairing or destroying natural resources. Section 1705(1) states:

⁶⁴ MCL 324.1704(2).

⁶⁵ MCL 324.1705(2).

If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.⁶⁶

Finally, Section 1706 states "[t]his part is supplementary to existing administrative and regulatory procedures provided by law."⁶⁷

Taken together, Sections 1704, 1705 and 1706 make clear that, as a supplement to existing administrative and regulatory procedures, administrative agencies are to evaluate proposed conduct under MEPA either in (1) an administrative proceeding in which pollution, impairment, or destruction is alleged or (2) upon the direction of a circuit court in a MEPA case. Nothing in these provisions allows a plaintiff to circumvent the procedural requirements for challenging a permit – that is, an appeal under the APA, RJA, or other applicable statute – by filing a MEPA complaint.

4. This Court's decision in *West Michigan Environmental Action Council v Natural Resources Comm'n* is distinguishable or was effectively overruled by *Preserve the Dunes*

Anglers maintain that the Supreme Court should overrule *Preserve the Dunes* and should instead follow the Court's 1979 decision in *West Michigan Environmental Action Council v Natural Resources Comm'n (WMEAC)*.⁶⁸ That decision, however, did not analyze the particular kind of conduct a defendant must engage in to be subject to a MEPA suit. Instead, a threshold issue in *WMEAC* was whether *any* conduct by the Natural Resources Commission (NRC) was properly before the circuit court.

⁶⁶ MCL 324.1705(1).

⁶⁷ MCL 324.1706.

⁶⁸ *West Michigan Environmental Action Council v Natural Resources Comm'n (WMEAC)*, 405 Mich 741; 275 NW2d 538 (1979).

In *WMEAC*, the Department of Natural Resources had developed a management plan allowing oil and gas development in the southern one-third of the Pigeon River Country State Forest. It commenced negotiations with companies holding oil and gas leases in the Forest to have them agree to the management plan. The NRC entered into an agreement with three oil companies entitled "Stipulation Consent Order" that adopted the plan. Plaintiffs moved to intervene in administrative proceedings concerning the consent order. The NRC rejected the motion as premature because no permits to drill for oil had been issued. Plaintiffs then filed an action in circuit court under MEPA alleging the consent order was unlawful and would likely lead to impairment of wildlife in the Forest and sought an order restraining the state from issuing permits to drill in the Forest or from implementing the consent order. After plaintiffs filed suit, the State Supervisor of Wells granted permits to Shell Oil Company authorized the drilling of ten exploratory wells.⁶⁹

The main issue in the case was "whether plaintiffs have made a *prima facie* showing under [MEPA] that the drilling of ten exploratory wells in the Pigeon River Country State Forest will constitute a likely impairment or destruction of natural resources."⁷⁰ As a preliminary matter, however, the Supreme Court explained, "[t]he record below is unclear as to what conduct of defendants is alleged as being 'likely to pollute, impair, or destroy the air, water or other natural resources or the public trust therein.'" In particular, it was unclear whether the issuance of the permits to drill the exploratory wells was part of such conduct given the fact that the complaint addressed only the consent order. "Part the confusion resulted from plaintiffs' failure to amend their September, 1976 complaint to specifically attack the validity of the permits issued in August, 1977, despite their offer to do so at an October, 1977 pretrial conference."

⁶⁹ *WMEAC* at 748-49.

⁷⁰ *WMEAC* at 747.

Consequently, "there was uncertainty in the proceedings below as to whether the validity of the permits was ever properly put in issue before the court."⁷¹

The Supreme Court noted that all parties presented evidence on the likely impact from the well drilling and that the circuit court addressed the likelihood of harm to the environment from the drilling authorized by the permits. It therefore 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."⁷²

Notably, this Court did not discuss or analyze whether the issuance of permits by a government is the kind of conduct for which a defendant can be sued under MEPA – the specific issue that was analyzed at length in *Preserve the Dunes*. Nowhere in the *WMEAC* opinion is there any discussion of the distinction between a defendant's conduct that itself harms the environment and the issuance of a permit that authorizes activities that, when actually undertaken, may harm the environment.

Alternatively, if this Court concludes that *Preserve the Dunes* created a conflict with *WMEAC*, Anglers submit that *Preserves the Dunes* was correctly decided and should not be overruled for the reasons discussed previously. Should the Court determine any conflict between the two decisions needs to be clarified or resolved, it should apply *Preserve the Dunes* in this case and reinforce that opinion's conclusion that only wrongful conduct that itself harms the environment is actionable under MEPA.

⁷¹ *WMEAC* at 750-51.

⁷² *WMEAC* at 751.

IV. In light of the Supreme Court's recent ruling in *Lansing Schools Ed Assoc v Lansing Bd of Ed*, it is unnecessary to address whether *Michigan Citizens for Water Conservation v Nestle Waters North America Inc* was correctly decided

In its order of January 29, 2010, the Supreme Court ordered the parties to brief whether *Michigan Citizens for Water Conservation v Nestle Waters North America Inc* was correctly decided.⁷³ On July 31, 2010, this Court issued its opinion in *Lansing Schools Ed Assoc v Lansing Bd of Ed* which overruled *Nestle*.⁷⁴ In light of the Supreme Court's recent ruling in *Lansing Schools Ed Assoc*, it is unnecessary to address whether *Nestle* was correctly decided.

⁷³ *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007).

⁷⁴ *Lansing Schools Ed Assoc v Lansing Bd of Ed*, 2010 Mich LEXIS 1657, *34, n 18 (July 31, 2010).

RELIEF SOUGHT

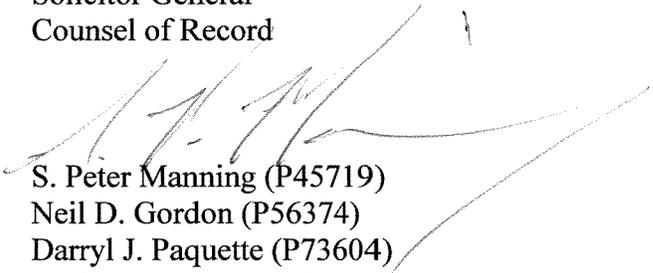
For the reasons stated above, Appellee MDEQ respectfully requests that the Court affirm the decision of the Court of Appeals in the following respects:

1. The Court of Appeals determination that the State's grant of an easement to Merit for the discharge of water on the State's riparian property was not *per se* unreasonable.
2. The Court of Appeals determination that the "reasonable use balancing test" for disputes between riparians was appropriately applied by the Circuit Court.
3. The Court of Appeals determination that MDEQ is not subject to claims under MEPA when it issues a permit or other authorization for another party to conduct activities.

Respectfully submitted,

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Dated: September 7, 2010

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