

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-Appellants,

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

COA Docket No. 279301, 279306,
280265, 28066
(Consolidated)

v

LC Case No. 06-11 697-CE(M)
Hon. Dennis F. Murphy

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

James M. Olson (P18485)
Scott W. Howard (P52028)
Jeffrey L. Jocks (P67468)
OLSON, BZDOK & HOWARD, PC
Attorneys for the Anglers of the AuSable
420 East Front Street
Traverse City, MI 49686
(231) 946-0044

Thomas A. Baird (P29050)
Co-Counsel for Anglers of the AuSable
11618 Jarvis Highway
Dimondale, MI 48821
(517) 337-5599

Susan Hlywa Topp (P46230)
TOPP LAW OFFICE
Attorneys for Mayer Family Investments
& Nancy A. Forcier Trust
P.O. Box 1977
Gaylord, MI 49734
(989) 731-4014

Tonatzin Alfaro-Maiz (P36542)
Pamela Stevenson (P40373)
Environmental, Natural Resources &
Agricultural Div, Dept. of Attorney General
Attorneys for DEQ/Chester
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Charles E. Barbieri (P31793)
Zachary W. Behler (P70026)
FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Merit Energy Co.
313 S. Washington Square
Lansing, MI 48933
(517) 371-8155

Brian J. Considine (P53783)
DAWDA MANN MULCAHY & SADLER PLC
Attorneys for *Amicus Curiae*
Michigan Council of Trout Unlimited
39533 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48304
(248) 642-3700

AMICUS CURIAE BRIEF OF
MICHIGAN COUNCIL OF TROUT UNLIMITED

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**STATEMENT OF JURISDICTION, JUDGMENTS APPEALED FROM
AND RELIEF SOUGHT**

The Michigan Council of Trout Unlimited ("Michigan TU") incorporates herein and relies upon the Statement of Jurisdiction and Relief Sought set forth in Plaintiffs'/Appellants' Brief on Appeal.

STATEMENT OF QUESTIONS PRESENTED

- I. Should this Court overturn its standing jurisprudence governing actions under the Michigan Environmental Protection Act ("MEPA") as set forth in *Mich Citizens for Water Conservation v Nestle Waters North America*, 479 Mich 280; 737 NW2d 447 (2007) because it is contrary to this Court's recent decision in *Lansing Schools Ed Assn v Lansing Board of Ed*, ___ Mich ___; ___ NW2d ___; 2010 Mich LEXIS 1657 (July 31, 2010) and the Michigan Constitution and because the ruling significantly erodes the ability of groups like Michigan TU to protect their use and enjoyment of lakes, streams and wetlands in Michigan?

The Trial Court would answer: unknown

The Court of Appeals would answer: unknown

Plaintiffs Anglers, Mayer, and Forcier Trust answer: "Yes."

Defendant Merit answers: unknown

Defendant DEQ's answer: unknown

Amicus Curiae Michigan TU answers: "Yes."

- II. Should this Court overturn its decision in *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004) as being contrary to the Michigan Constitution or, in the alternative, limit its decision and reverse the Court of Appeals' dismissal of the Anglers' MEPA suit against the DEQ where the DEQ's involvement in this matter constituted more than an "administrative decision"?

The Trial Court would answer: "No."

The Court of Appeals would answer: "No."

Plaintiffs Anglers, Mayer, and Forcier Trust answer: "Yes."

Defendant Merit answers: "No."

Defendant DEQ's answer: "No."

Amicus Curiae Michigan TU answers: "Yes."

III. Should the Court of Appeals' decision in this matter be reversed because the DNR's easement did not grant riparian rights to Merit and because the Court of Appeals relied on its erroneous decision in *Mich Citizens for Water Conservation v Nestle*, 269 Mich App 25; 709 NW2d 174 (2005) to allow Merit to discharge contaminated wastewater that will adversely affect the AuSable River system and because it will set a precedent that will adversely impact Michigan TU's and its members' use and enjoyment of coldwater resources in this State?

The Trial Court would answer: "No."

The Court of Appeals would answer: "No."

Plaintiffs Anglers, Mayer, and Forcier Trust answer: "Yes."

Defendant Merit answers: "No."

Defendant DEQ would answer: "No."

Amicus Curiae Michigan TU answers: "Yes."

STATEMENT OF PROCEEDINGS AND FACTS

In addition to what is set forth in the recitation of proceedings and facts as set forth in the Anglers' Brief on Appeal (which the Michigan Council of Trout Unlimited ("Michigan TU") incorporates herein) on September 24, 2009 Michigan TU filed a Motion for Permission to File an Amicus Curiae Brief in support of Anglers of the Ausable, Inc.'s ("Anglers") Application for Leave to Appeal in this matter. In its January 29, 2010 Order, this Court granted Michigan TU's Motion and granted the Anglers' Application for Leave. Having been granted permission by this Court to appear as amicus curiae in this matter, Michigan TU files this Amicus Brief in support of Anglers' Brief on Appeal.

ARGUMENT

A. *Introduction*

"Eventually, all things merge into one, and a river runs through it. The river was cut by the world's great flood and runs over rocks from the basement of time. On some of the rocks are timeless raindrops. Under the rocks are the words, and some of the words are theirs. I am haunted by waters."

Norman Maclean, "A River Runs Through It"

In many ways, the above quote describes this State and its residents. Unlike other states, we are surrounded by the largest freshwater lakes in the world and numerous rivers and streams (mostly spring fed) traverse our upper and lower peninsulas. The lakes, rivers and streams in this State are unique resources and Michigan residents understand this; our homes are built around them, our economy depends on them and we center our leisure and family time around them. Even the State's "Pure Michigan" tourism ad campaign relies on these precious resources. They are also the reason why Michigan has been at the forefront of many environmental issues: wetlands protection, water withdrawals, invasive species, and climate change. Our overriding concern for these resources is also shown in our demand that the Federal government take steps to prevent Asian Carp from entering the Great Lakes and the shock and dismay that is felt when an oil filled pipeline spills millions of gallons of crude oil into one of its major waterways. We realize that we have a unique resource in this State and a lot to lose if they are degraded. Borrowing from the words of Norman Maclean, Michigan residents are truly "haunted by waters."

In light of this, it is no wonder that protection of the State's natural resources has such a prominent position in the Michigan Constitution:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest in the health, safety and general welfare of the public. 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).

This is also why the Michigan Legislature, as directed by the Constitution, enacted a groundbreaking environmental protection statute - the Michigan Environmental Protection Act ("MEPA"), MCL § 324.1701 *et seq.* MEPA is a unique statute that has since been emulated by other states and countries as a way of protecting natural resources by making residents "citizens general".

Given the emphasis on the protection of our State's unique natural resources, it is not surprising that Trout Unlimited, an organization dedicated to protecting, conserving and preserving coldwater fisheries, was founded over 50 years ago in Grayling along the banks of the AuSable River. Trout Unlimited is now a national organization comprising 450 chapters and approximately 150,000 members.

Michigan TU and its chapters expend considerable time and effort to protect the State's water resources - not only for the use and enjoyment of its members, but for all Michigan residents. When the Michigan legislature was drafting the recently enacted groundwater withdrawal statute, Michigan TU fought for changes that protect coldwater fisheries. When a privately owned dam failed for the third time in 40 years and destroyed miles of trout habitat, Michigan TU was the entity that filed suit against the owners and spearheaded the negotiation of a settlement between the owner and the State that will result in the removal of the dam. Now, with Asian Carp threatening to destroy Michigan lakes and streams, Michigan TU is leading the charge to get the federal government to take action to prevent Asian Carp from entering Lake Michigan.

Although Michigan TU has made great strides in protecting Michigan's natural water resources, its efforts have been significantly limited by this Court's recent decisions governing standing under MEPA. Moreover, if the principles relating to riparian rights that the trial court

and the Court of Appeals relied upon in this matter are upheld, Michigan TU's and its members' ability to protect their use and enjoyment of coldwater resources in Michigan will be nearly eviscerated.

Thus, Michigan TU's interests in this appeal are many and deeply rooted. The AuSable River and its headwaters are a unique natural resource that greatly impacts the lives of those people who rely on it to live and who enjoy the tranquility and peace of mind it brings as it meanders through the center of the State. Michigan TU's members use and enjoy the AuSable River and its tributaries for fishing and recreation and are actively engaged in conserving, protecting and restoring the fishery habitat therein. Furthermore, its members have expended considerable time, money and effort on conservation projects in the AuSable River system, as well as other streams in the lower and upper peninsulas.

However, this appeal is about much more than just the AuSable River. It is about protecting a well-established legal process from being usurped by a State agency and its close relationship with a corporate polluter. The legal precedents established by the Court of Appeals will, if allowed to stand, give any State agency and its staff the power with no 'checks and balances' to willfully and adversely affect coldwater fisheries and other natural resources in Michigan and trample on longstanding rights governing the use and protection of the riparian waters. Allowing Merit (or any other corporation for that matter) to use a river based upon the Court of Appeals' reasoning is the beginning of a slippery slope that will give other commercial interests the ability to assert a right to engage in similar uses. Eventually, other equally valuable uses of an aquatic resource will be slowly squeezed out of the picture. In the end, Michigan TU and other citizens of the State will have no power to stop an agency and its corporate partner who run rough-shod over well-established and settled environmental laws.

B. Discussion

- 1. This Court should overturn its ruling on standing under the Michigan Environmental Protection Act as set forth in *Mich Citizens for Water Conservation v Nestle Waters North America*, 479 Mich 280; 737 NW2d 447 (2007) because it is contrary to this Court's recent decision in *Lansing Schools Ed Assn v Lansing Board of Ed*, ___ Mich __; ___ NW2d __ 2010 LEXIS 1657 (2010) and the Michigan Constitution and has significantly eroded the ability of groups like Michigan TU to protect their use and enjoyment of lakes, streams and wetlands in Michigan.**

In the words of Justice Weaver, the majority's decision in *Nestle* was truly a tragic day for Michigan. *Nestle*, 479 Mich at 318. The reason the *Nestle* decision was tragic is because it was a continuation of a steady undermining of the Michigan Constitution's mandate on the Court to protect the natural resources of this State. The *Nestle* decision extended the majority's interpretation of Federal "case or controversy" principles, which began in *Lee v Macomb County Bd. of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001) and was advanced in *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608; 684 NW2d 800 (2004). Rather than adhere to the principles of judicial restraint, the majority established an extreme rule not found anywhere in MEPA or the Michigan Constitution; to have standing to assert a cause of action under MEPA, a plaintiff must show that he or she actually uses the area that the defendant's actions are adversely affecting. The Court started with injury-in-fact and ended up with an even stricter "use in fact" requirement. The end result is that the *Nestle* majority established a rule of exclusion. A person only has standing under MEPA to protect a valuable (albeit private) natural resource if that person has the income to afford access to that lake. Rather than make the courts accessible to all on an equal footing, the *Nestle* majority shut the doors to all but a few who are lucky enough to be landed gentry.

The *Nestle* doctrine of MEPA standing, however, should be overturned because the principles on which it is based have been rejected by this Court in *Lansing Board of Ed*. In *Lansing Board of Ed*, the teacher-plaintiffs sued the Lansing Board of Education on the basis that

the Board failed to comply with its duties under MCL §380.1311a(1) to expel students who physically assaulted teachers. The trial court dismissed the case on the grounds the teachers lacked standing and the Court of the Appeals, relying on this Court's decision in *Lee*, affirmed. In reversing the Court of Appeals, this Court overruled the standing doctrine established in *Lee* and *Cleveland Cliffs* on the grounds that the doctrine, which was based on the Federal Constitution's Article III "case and controversy" requirement, "lacks a basis in the Michigan Constitution and is inconsistent with Michigan's historical approach to standing." *Lansing Board of Ed*, 2010 Mich LEXIS 1657, *1. In reaching this conclusion, the Court correctly noted that,

...there is no textual basis in the Michigan Constitution for concluding that standing is constitutionally required, and there are important differences between the two constitutions. The Michigan Constitution provides for the separation of powers between the legislative, judicial and executive branches and vests the courts with the judicial power. The federal constitution similarly vests the judicial power in the courts. Unlike the Michigan Constitution, however, the federal constitution enumerates the cases and controversies to which the judicial power extends, and the federal standing doctrine is largely derived from this art III case-or controversy requirement....Additionally, strictly interpreting the judicial power of Michigan courts to be identical to the federal court's judicial power does not reflect the broader power held by state courts.

Id. at *17-18. (Internal citations omitted). Because of the absence of a rationale for adopting the Federal Article III standing requirements, this Court held:

We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Id. at *34-35.

Although the facts in *Nestle* are distinguishable from those in *Lansing Board of Ed*, the standing doctrine that the *Nestle* majority relied on to limit MEPA is the same that this Court rejected in *Lansing Board of Ed*. Therefore, *Nestle* should be overturned and standing under MEPA should be based upon the long-standing historical approach this Court re-established in *Lansing Board of Ed*: whenever the Legislature has created a legal cause of action, a plaintiff has standing. In the context of MEPA, the Legislature was quite explicit:

The attorney general or **any person** may maintain an action in the circuit court for declaratory and equitable relief against any person for the protection of the air, water and other natural resources and the public trust in these resources from pollution, impairment or destruction.

MCL §324.1701(1). Accordingly, under MEPA **any person** has the right to maintain an action to protect the air, water and other natural resources and the public trust in these resources.

Overturning the *Nestle* decision and returning standing to "any person" also furthers the mandate in Article 4, §52 of the Constitution. Article 4, §52 of the Michigan Constitution is quite explicit; the protection of natural resources in Michigan is a paramount public concern. Further, the Constitution states that it is obligatory that the Legislature provide for the protection of the air, water and other natural resources. The use of the word "paramount" should not be overlooked by this Court when analyzing standing under MEPA. "Paramount" is defined as "superior to all others, supreme."¹

The mandate established by Article 4, §52 and the Legislature (through MEPA) applies to this Court. As noted by this Court in *People v Bricker*, 389 Mich 524, 529; 208 NW2d 172, 175 (1973), when the public policy of the State is expressed in the State Constitution, it is a mandate not only upon the Legislature but also upon the Supreme Court which has a duty to enforce that mandate. Also, as this Court has stated in the past, "Nothing is clearer under our constitution than that the Legislature, when it has enacted a statute within its constitutional authority and,

¹ Merriam-Webster Online Dictionary. <http://www.merriam-webster.com/dictionary/paramount>

thus, has established public policy, [it] must be obeyed even by the courts." *Sington v Chrysler Corp*, Mich 144, 169; 648 NW2d 624 (2002).

Moreover, this Court should acknowledge that the *Nestle* decision established a doctrine that defies practical workability and results in a serious detriment to public interests when relied upon. (See, *Lansing Board of Ed*, 2010 Mich LEXIS at 30.) The Court's focus on the area "used" by the plaintiff completely ignores what happens in the real-world. Oftentimes, the effects of a localized degradation of natural resources are not felt in areas that are "used" by a plaintiff until it is too late for a MEPA suit to be effective in protecting the natural resource. Some of the worst cases of damage to the State's natural resources have occurred as a result of activity that initially started entirely on private property. The dumping of hazardous wastes can be intensive and localized to private land for many years until it is suddenly washed into a river or hits the water table and migrates to other areas. The clear cutting of a forest can result in impacts that are felt outside the private property only when a storm event washes huge volumes of sediment into a stream. The improper operation and maintenance of a private dam on private water may occur for many years until a sudden event causes sediment to destroy a downstream trout fishery. In each of these situations it could be argued that a MEPA action could not be brought because the plaintiff did not use the natural resources in the area where the initial impairment was occurring. Although the plaintiff might be able to assert the claim when the natural resources it was using were finally impaired, it would be too late to be effective.

The *Nestle* standing requirement also impairs the public's ability to use MEPA to protect natural resources the public may have used (or could have used) but are no longer able to because the property on which the resource is located has been effectively privatized. An example of this scenario is presented by mineral exploration on public lands where wetlands, lakes and streams are located. Although the public may have used the stream for recreational

purposes in the past and could use them in the future, as soon as the land is leased for exploration, the public is denied access to the property. If the mining activities subsequently result in the degradation of the stream's water quality, the public could find itself barred from asserting a MEPA claim because it cannot access the stream and, therefore, does not "use" it to confer standing.

Similarly, given the majority's decision, how would a MEPA plaintiff ever be able to claim standing to challenge the disposal of toxic or radioactive waste in a landfill or a salt mine? These may appear to be unlikely scenarios, but wastes are routinely disposed in this State and proposals to use the State's salt mines to store radioactive wastes are frequently considered. In both circumstances, it could be argued that because the MEPA plaintiff is not using the landfill or salt mine, the plaintiff does not have standing to protect his or her use and enjoyment of the river or stream resources that are near and "interconnected" to those areas.

Overruling *Nestle* would not cause undue hardship or inequity. The *Nestle* decision has not become so embedded or fundamental that it will result in real world dislocations if it is overruled. It is highly unlikely that persons or corporations have relocated to this State solely because of a perception that the *Nestle* decision protects them from MEPA lawsuits and allows them to right to pollute or impair natural resources contrary to the Constitution's mandate. It is also unlikely that persons or corporations have purchased property in Michigan with the intent of excluding people from the area so it can be polluted and the natural resources adversely affected outside the purview of MEPA. In any event, these are not the type of reliance interests that this Court should seek to protect.

Furthermore, this Court should not be persuaded by arguments that it would be contrary to the principles of stare decisis to overturn *Nestle*. As noted by this Court in *Sington*, 467 Mich at 161 stare decisis is "not to be applied mechanically," rather, it is the Court's "duty to re-

examine a precedent where its reasoning . . . is fairly called into question." (Citing, *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000)). Stare decisis is a principle of policy rather than an inexorable command, and this Court is not bound to follow precedent that is unworkable or badly reasoned. *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 39; 732 NW2d 56, 62 (2007). Prior to the *Lee/Cleveland Cliffs/Nestle* line of cases, Michigan's standing jurisprudence was not based on Article III "case and controversy" principles. The *Lee/Cleveland Cliffs/Nestle* line of cases ignored stare decisis to radically change our standing precedent and, therefore, it is disingenuous for those to argue that the Court is now barred by stare decisis from correcting the errant path that was taken earlier.

2. This Court should overrule *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004) or, in the alternative, limit the ruling in that case and reverse the Court of Appeals' dismissal of the Anglers' MEPA suit against the DEQ where the DEQ's involvement in this matter constituted more than an "administrative decision."

a. *Preserve the Dunes* should be overturned.

There is nothing in the plain language of MEPA that can even remotely be construed as preventing it from being applied to administrative decisions of State agencies. In fact, the Legislature expressly intended that MEPA apply to administrative decisions. MCL §324.1706 provides that MEPA is supplementary to existing administrative and regulatory procedures. The word "supplementary" does not imply that MEPA is somehow inferior to other administrative procedures but, rather, is something that completes or is in addition to² other administrative procedures. Moreover, this Court itself recognized that MEPA does not require exhaustion of administrative remedies before a plaintiff files suit. *Preserve the Dunes*, 471 Mich at 514.

Given the clear policy in Michigan of the primary importance of protecting natural resources and the expression in MCL §324.1706 of the Legislature's intent that MEPA even

² Merriam-Webster Online Dictionary. <http://www.merriam-webster.com/dictionary/supplement>

apply to administrative actions, it was erroneous for the majority in *Preserve the Dunes* to rule that MEPA does not allow a plaintiff to challenge the DEQ's issuance of a permit. Clearly, the majority of this Court was unhappy with what it imagined would be the adverse economic effects that such a construction would have on business in Michigan.

Suppose an oil company decided to invest in oil exploration in Michigan in reliance on a DEQ-issued permit. Under the dissent's view, MEPA would authorize a challenge at any time to flaws in the permitting process....It can never rely on a permit to do business. What sane investor would take such a risk? As gas prices soar, few people in Michigan would thank this Court for "protecting" the environment in this radical fashion.³

Preserve the Dunes, 471 Mich at 523.

However, such concerns should have been irrelevant to the Court sitting as a judicial body. This majority's focus was contrary to the well established principle that the courts have a duty to enforce public policy that is found in the laws enacted by the Legislature (*Bricker*, 389 Mich at 529) and must refrain from acting as a super-legislative body even where the plain meaning of a statute results in what appears to be a poor outcome.⁴ Although a statute may produce results the court thinks are irrational or it philosophically disagrees with, it is the Legislature's responsibility to change the law - not the Judiciary's. Because it is clear that the majority was attempting to act as a super legislature contrary to well founded principles, this Court should overrule *Preserve the Dunes*. Although this may result in plaintiffs using MEPA to challenge permits issued by State agencies, the proper course of action for the State agencies and public to follow is to have the Legislature address this through the legislative process.

³ The Court expressed similar concerns regarding MEPA standing in *National Wildlife Federation*, 471 Mich at 649-650 ("Under this view . . . "any person", for example could seek to enjoin "any person" from mowing his lawn . . . for using too much fertilizer on his property . . . for improper grilling practices, excessive use of aerosol sprays and propellants, or wasteful lawn watering.")

⁴ See *Detroit v Detroit Police Officer's Assoc*, 408 Mich 410, 504; 294 NW2d 68, 106 (1980)(In short, we do not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations. We sit as a court to determine whether there is a rational basis for the legislative judgment. If there is, then that judgment must be sustained. It is not this Court's role to decide whether the Legislature acted wisely or unwisely in enacting this statute. We will not substitute our own social and economic beliefs for those of the Legislature, which is elected by the people to pass laws.)

b. The Court of Appeals' interpretation of and reliance on *Preserve the Dunes* in this case is clearly erroneous and, if left uncorrected, will seriously undermine the Legislatures' effort to satisfy its constitutionally directed mandate in Article 4, §52 of the Michigan Constitution

Plaintiffs/Appellants' underlying claim against the DEQ was based upon the DEQ's issuance of a Certificate of Coverage ("COC") that allowed Merit to discharge enormous volumes of wastewater into the headwaters of the AuSable River pursuant to a National Pollutant Discharge Elimination System General Permit No. MIG0800000 (the "General Permit"). Plaintiffs/Appellants alleged, and the trial court found, that the proposed discharge would violate the Michigan Environmental Protection Act. Although the Court of Appeals upheld the trial court finding of an underlying MEPA violation, it dismissed the MEPA claim against the DEQ because, in its opinion, *Preserve the Dunes* required such result because the DEQ's "review of Merit Energy's corrective action plan and issuance of the COC constituted an administrative decision." *Anglers of the AuSable, Inc v Dept of Environmental Quality*, 283 Mich App 115; 770 NW2d 359 (2009). However, a careful examination of the Court's opinion in *Preserve the Dunes* reveals that the Court's decision was much narrower.

Preserve the Dunes is atypical in that it involved an unusual set of facts and a statutory permitting process unlike others in the State. As a result, the Court's inquiry was very limited.

The only issue before the Court in *Preserve the Dunes* was:

...whether MEPA authorizes a collateral challenged to the DEQ's decision to issue a sand mining permit under the Sand Dune Mining Act (SDMA) ...in an action that challenges flaws in the permitting process unrelated to whether the conduct involved has polluted, impaired or destroyed, or will likely pollute, impair, or destroy natural resources protected by MEPA.

Preserve the Dunes, 471 Mich at 511. The reason for the Court's narrow inquiry was because the SDMA⁵ permitting process itself was narrow. As the Court noted, "...the SDMA does not contain an antipollution standard. Consequently, it is not within the exception created by MCL

⁵ Sand Dune Mining Act, MCL § 324. 63701 *et seq.*

§324.1701(2). *Nemeth* therefore, does not support the argument that a violation of the SDMA may serve as a prima facie violation of MEPA." *Preserve the Dunes*, 471 Mich at 516-517 (citing *Nemeth v Abonmarche Development, Inc*, 457 Mich 16; 576 NW2d 641 (1998)).

Moreover, in direct contrast to this case, the Court in *Preserve the Dunes* pointed out that the trial court determined that the defendant had, in fact, rebutted the plaintiff's prima facie case on the plaintiff's general MEPA violation claim (thus, no wrongful conduct by the defendant) but did not consider that on the MEPA claim based upon violations of the SDMA. (*Preserve the Dunes*, 471 Mich at 518, fn 5). Thus, this was the rationale for the Court's ruling that "[w]here a defendant's conduct itself does not offend MEPA, no MEPA violation exists" (*Preserve the Dunes*, 471 Mich at 519) and that "[a]n improper administrative decision, standing alone, does not harm the environment." *Id.*

When the circumstances of this case are viewed as a whole, it is evident that the facts of this case are clearly distinguishable from the facts in *Preserve the Dunes*. First, the DEQ authorized Merit's discharge pursuant to a General Permit issued pursuant to Michigan's Pollution Discharge Elimination System (MCL §324.3101 *et seq.*). This statutory scheme, unlike the SDMA, has specific pollution standards and antipollution processes in the form of effluent limits and requirements to use specific technologies to achieve such effluent limits. In fact, the COC and General Permit issued to Merit had specific limits on the amount of wastewater discharged, effluent limits for gasoline and petroleum products and required the use of a specific antipollution device (air stripper)⁶ and Plaintiffs/Appellants challenged the DEQ's issuance of the COC and General Permit under MEPA in the underlying administrative proceedings and the Trial Court's review of those proceedings.

⁶ Amended Complaint and Petition for Review, ¶¶ 36-40.

Second, the Trial Court in this matter concluded (and the Court of Appeals affirmed) that the discharges from the pipeline constituted a MEPA violation. Therefore, in this case, unlike in *Preserve the Dunes*, the defendants' conduct (DEQ's and Merit's) does violate MEPA and, accordingly, this was not a case of an "improper administrative decision standing alone." The MEPA claim against the DEQ involves an administrative decision AND wrongful conduct on the part of DEQ and Merit. The Court of Appeals, however, omitted from its analysis this very important distinguishing characteristic, and the result is that the Court of Appeals has gone one step further than the ruling in *Preserve the Dunes* by establishing a de facto rule that "administrative decisions" EVEN WITH wrongful conduct are not subject to MEPA claims. This is directly contrary to this Court's decision in *West Mich Environmental Action Council v Natural Resources Com'n*, 405 Mich 741; 275 NW2d 538 (1979) and, if not reversed or clarified by this Court in this matter, will totally insulate agencies like the DEQ from MEPA claims and undermine the ability of groups like Michigan TU and Anglers of the AuSable to protect the natural resources and the environment from pollution, impairment or destruction.

Third, assuming arguendo that *Preserve the Dunes* established a rule that MEPA only applies to conduct and insulates purely administrative decisions it is clear from the facts of this case that the DEQ's involvement is not merely an administrative decision. It is so inextricably intertwined with the permittee's conduct and resulting natural resources damages that it amounts to "conduct." The issuance of the COC was the culmination of a protracted and deliberate pattern of conduct by the DEQ to achieve DEQ's goal of getting the groundwater beneath the CPF site cleaned up. Had there been no responsible party or, in the instance of refusal by a responsible party, the DEQ would have had the option to do the cleanup under Part 201 itself and

recover the cost.⁷ The DEQ can take similar action under MCL §324.61519. In either scenario, the DEQ itself would have been facing the exact situation that Merit now faces. The only reason that Merit is involved, and not the DEQ, is because Merit wanted to purchase the site from Shell Oil and the DEQ wanted the site cleaned up. Therefore, the parties entered into a settlement agreement pursuant to Mich Admin R 324.206(8) and Mich Admin R 324.1014 directing Merit to take the corrective action that the DEQ wanted performed. The DEQ essentially ordered Merit to clean the CPF site up as a condition of authorizing the sale of the site from Shell to Merit. Moreover, as a result of that order, Merit arrived at a cleanup strategy that was approved by the DEQ and necessarily involved the issuance of the COC in question.

This Court should not allow the Court of Appeals' interpretation and application of *Preserve the Dunes* to stand. As this Court noted in *Ray v Mason County Drain Commissioner*, 393 Mich 294, 305; 224 NW2d 883 (1974), "Not every public agency proved to be diligent and dedicated defenders of the environment." Virtually every proposed natural resources impact in Michigan is reviewed by a State agency. The reason that MEPA was enacted was to allow groups like Michigan TU to police the agencies and ensure that they are diligent and dedicated defenders of the environment. The Court of Appeals' MEPA analysis, however, will seriously undermine that goal.

⁷ Amicus curiae is aware of the parties' arguments regarding the application of Part 201 of the Natural Resources and Environmental Protection Act ("NREPA") (MCL § 324.20101 *et seq.*) versus Part 615 of NREPA (MCL § 324.61501 *et seq.*) in this matter. The trial court and Court of Appeals affirmed that the DEQ proceeded under Part 615 rather than Part 201. However, the DEQ could have proceeded under Part 201 if it wanted to but it did not do so in this case.

3. **The Court of Appeals' decision in this matter should be reversed because the DNR's easement did not grant riparian rights to Merit and because the Court of Appeals relied on its erroneous decision in *Mich Citizens for Water Conservation v Nestle*, 269 Mich App 25; 709 NW2d 174 (2005) to allow Merit to discharge contaminated wastewater that will adversely affect the AuSable River system and because it will set a precedent that will adversely impact Michigan TU's and its members use and enjoyment of coldwater resources in this State.**
 - a. **The DNR's easement did not convey riparian rights to Merit.**

The rule in Michigan is well settled: if the language of an easement is clear and ambiguous, extrinsic evidence may not be admitted to reinterpret the plain words of the instrument. "Where the language of a legal instrument is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted." *Little v Kin*, 468 Mich 699, 700; 644 NW2d 749 (2003); See also *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 42; 700 NW2d 364 (2005). The terms for a written instrument are ambiguous "if its words may reasonably be understood in different ways. ... Courts are not to create ambiguity where none exists. ... Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided." (citations omitted) *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998).

As written, the easement provides only for the "right to place, construct, operate, repair, and maintain a Pipeline." The easement contains no express language giving Merit riparian rights or giving Merit the specific riparian right to discharge water into Kolke Creek. Nevertheless, the Court of Appeals concluded that "the term 'operate' clearly and unambiguously refers to the operation of the pipeline that will discharge treated water into Kolke Creek." *Anglers*, 283 Mich App at 130. This conclusion of the Court of Appeals is a 'constrained construction' of the language in the easement. Nowhere in the easement is the term 'operate' defined, and the clauses providing for the notification of any release of toxic or hazardous material, the submission of operating instructions, and the reference diagram do not lead one to

logically conclude that riparian rights have been granted through the term 'operate'.⁸ There is also no indication that the pipeline cannot 'operate' without being able to discharge the water into Kolke Creek.⁹

The Court of Appeals relied on *Little* in ruling that the easement granted riparian rights to Merit. However, the *Little* case is distinguishable because the easement expressly provided "for access to and use of *riparian rights* to Pine Lake" in the language of the recorded instrument. (emphasis added) *Little*, 468 Mich at 700. Quite apart from *Little*, the language in the easement in the instant case does not explicitly list "riparian rights" as among those property rights conveyed to Merit.

To uphold the decision of the Court of Appeals would defeat the fundamental purpose of recording statutes: putting subsequent purchasers, adjacent property owners, and the general public on notice. MCL §565.1 *et seq.* requires the recordation of the transfer of any interest in real property and voids any property interest as to subsequent purchases if the interest is unrecorded. "The purpose of the recording law is that the true state of the title be represented, i.e. in the public records. ... The purpose, further, is to protect an innocent purchaser." (citations omitted). *Harr v Coolbaugh*, 337 Mich 158, 167; 59 NW2d 132 (1953). This policy is especially important when the property interest includes riparian rights, the exercise of which can have a very real and meaningful impact on fellow riparian owners.

As written on its face, the easement contains no indication that riparian rights have been granted to Merit. The pipeline easement could as easily be viewed as an easement for pipeline to convey gas or other liquids - to or from Kolke Creek. "Operate" a pipeline does not give any

⁸ *Anglers* 283 Mich App, at 130: The COA cite these provisions as evidence of the plain meaning of 'operate'. See also *Anglers' Application for Leave to Appeal*, pp. 43-45.

⁹ See *Tr Ct Op*, at 9: "The facts here do support a finding that, initially, the discharge is surface water. Both Coates and Ringwelski testified that the water will flow out of the pipeline and into a catch basin, then 'bubble up' into a rip rap."

more meaning to the document than if the easement said "operate" a manufacturing facility. While the Court of Appeals, having the entire factual record and circumstances before it, may be able to divine that the plain meaning of the term "operate" includes the right to discharge water into Kolke Creek, this meaning would likely not reveal itself to an innocent third party reviewing the written instrument at the office of the county clerk otherwise not privy to this dispute.

Moreover, this Court has rejected attempts to grant riparian rights to owners of property that does not abut a river or lake. In *Theis v Howland*, 424 Mich 282; 380 NW2d 463 (1985) this Court examined a plat dedication which reserved the "joint use" of a public walkway which abutted the waterway and separated plaintiff lot owners' property from the water's edge. After concluding that the lot owners' property was in fact riparian (because the easement for the walkway did not disturb owners' fee interest stretching to the water's edge), the Court held that "The term 'joint use' standing alone does not evidence an intent to grant a right to construct docks, a right which normally is reserved to riparian owners." *Id.* at 294. Similarly, the term 'operate' in the easement in this case does not evidence an intent to grant the riparian right to discharge water in Kolke Creek. Where the phrase "joint use" was limited to the use of the walkway, so too should the language "operate ... Pipeline" be limited to the operation of the pipeline, i.e. not strain the plain meaning of a term to include riparian rights.

In *Dyball v Lennox*, 260 Mich App 698; 680 NW2d 522 (2003), the Court of Appeals was faced with an easement on strip of land abutting a waterway "for the purpose of ingress and egress to and from the premises in which they may have an interest to the water's edge." *Id.* at 700. The court ruled that the language was plain and unambiguous, and "does not grant defendant the rights enjoyed by riparian owners." *Id.* at 708.

Thompson v Enz, 379 Mich 667; 54 NW2d 473 (1967) is another case that is particularly relevant to this matter. In that case, a riparian owner dug a canal to give back lot owners riparian

rights to a lake. After surveying the law in other states, this Court held, "[R]iparian rights are not alienable, severable, divisible or assignable apart from the land which includes therein, or is bounded by a natural water course." *Id.* at 685-686.

Based upon the foregoing, even if the DNR explicitly stated in the easement that it was giving Merit riparian rights to discharge to Kolke Creek, Merit would not have acquired riparian rights. Merit does not own any property abutting the AuSable or its tributaries. It is essentially an owner of a "back lot" and the extension of the pipeline is similar to the artificial channel from the lake to back lots in *Thompson*.

The decision of the Court of Appeals sets a dangerous precedent which encourages the drafting of vague, boilerplate easements that purport to grant riparian rights to non-riparians. This will seriously undermine the position of future riparian owners along the AuSable and other streams in Michigan, such as the members of Trout Unlimited, who will rely on these publicly recorded easements to inform them of the nature of their own riparian rights, which may be materially affected by riparian owners upstream.

b. The Court of Appeals should not have relied on *Mich Citizens for Water Conservation* because it is not consistent with Michigan riparian law.

The Court of Appeals' decision in *Mich Citizens for Water Conservation* fundamentally altered a century of riparian law outlined by this Court in cases such as *Dumont v Kellogg*, 29 Mich 420 (1874); *Thompson v Enz*, 379 Mich 667; 54 NW2d 473 (1967); and *Theis v Howland*, 424 Mich 282; 380 NW2d 463 (1985).

As explained above, Merit never had, nor does it now have, riparian rights along Kolke Creek and the waters of Lynn Lake through the DNR's property. For all intents and purposes, Merit is a "stranger" to Kolke Creek. In *Dumont*, 29 Mich at 422, this Court noted that in a case of interference by a stranger, "who, by any means, or for any cause, diminishes the flow of the waters . . . this also is wholly wrongful and no question of the reasonableness of his action . . .

can possibly arise." Merit's proposal to discharge large volumes of contaminated wastewater constitutes "diminishing" the flow of a riparian owner's waters. Too much water or the discharge of contaminated waters can have the same detrimental effects as too little water on other riparians and those using the water for recreational purposes. Therefore, the Court of Appeals should not have even addressed the reasonableness of Merit's discharge.

At best Merit merely had a right of access to use the waters of the Creek and the Lake like those of the general public. In *Theis v Howland*, 24 Mich at 288, this Court explained that non-riparian owners and members of the public who gain access to navigable waterbodies have more limited rights: to use the surface of the water in a reasonable manner for activities such as boating (navigation), fishing and swimming. The discharging of wastewater is not one of the uses related to the public's right of access. (See, *Kernan v Homestead Development Co*, 232 Mich App 503, 512; 591 NW2d 369 (1998) ("However, even if riparian rules apply, defendant cannot pollute the water.")) Thus, under Michigan law, Merit's wastewater discharge would not be permitted. The Court of Appeals' decision, however, allows Merit to dispose of its wastes to the detriment of the riparian owners and other members of the public, including Trout Unlimited members, who enjoy fishing in the AuSable River, Bradford Creek and Lynn Lake, as well as protecting the fisheries therein from degradation.

The *Thompson* case also addressed uses by the public that were incidental to access easements. In analyzing what uses were permissible, the Court distinguished between those riparian uses which are for natural purposes (described as uses that were absolutely necessary for the existence of the riparian owner) and those uses which were for an artificial purpose (described as uses for commercial profit and recreation). *Thompson v Enz*, 379 Mich at 686. Uses for artificial purposes are correlative to a riparian owners exercise of his or her artificial uses. *Id.* Therefore, an artificial use must be:

(a) **only for the benefit of the riparian land** and (b) reasonable in light of the correlative rights of the other proprietors.

Id. at 686-687 (*emphasis added*). The Court established the following several factors that are to be considered when determining reasonableness:

First, attention should be given to the watercourse and its attributes, including its size, character and natural state Second, the trial court should examine the use itself as to its type, extent, necessity, effect on the quantity, quality, and level of the water, and the purposes of the users. . . . [and] [t]hird, it is necessary to examine the proposed artificial use in relation to the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights and interest of other riparian proprietors and also on the interest of the state, including fishing, navigation, and conservation.

An additional fact to be considered by the trial court in this litigation is whether the benefit to the defendant subdividers would amount merely to a rich financial harvest, while the remaining proprietors - who now possess a tranquil retreat from everyday living - would be forced to endure the annoyances which would come from an enormous increase in lake users.

Id. at 688-689.

Unfortunately, the Court of Appeals in this matter ignored one of the fundamental considerations in the *Thompson* analysis - that uses such as Merit's must be "only for the benefit of the riparian land." Merit's discharge can in no way be characterized as a benefit for the riparian land. In fact, portions of the DNR land have to be destroyed to construct the pipeline and the property itself can become contaminated by Merit's activities thereon. Because Merit's use was not for the benefit of the riparian land but rather for land miles away, the Court of Appeals' decision must be reversed.

Moreover, the Court of Appeals relied upon a new set of reasonableness factors that it established in *Mich Citizens for Water Conservation*. The new factors, which are contrary to the reasonableness analysis established by this Court and, therefore, should not have been followed by the Court of Appeals, include: "any other factor that may bear on the reasonableness of the

use." *Mich Citizens for Water Conservation*, 269 Mich App at 71. Specifically, the Court of Appeals in *Mich Citizens for Water Conservation* gave heavy weight to the economic benefits the bottling plant would bring to the local community. *Id.* at 74-75.

What the court in *Mich Citizens for Water Conservation* overlooked is that reliance on economic factors will always result in a finding of reasonableness at the expense of riparian owners. This is exactly what the court concluded: "Overall, under the facts of this case, the harms inflicted on the riparian plaintiffs and the community in general are significantly offset by the economic benefits to society and the local community. *Mich Citizens for Water Conservation*, 269 Mich App at 77.

By extending this flawed balancing test to this case, the Court of Appeals has imposed a test that gives substantial weight to the economic benefits of a commercial use of a lake or stream to the exclusion of the benefits of the uses of the riparian owners and ignores the harms caused by the commercial use. The end result of the Court of Appeals' erroneous analysis in the context of riparian jurisprudence is that whenever a commercial or industrial endeavor argues that its use of a lake or stream will produce jobs and bring money to the local economy, the use will be allowed at the expense of other riparian uses and the fisheries contained therein. This is contrary to the Constitutional mandate to protect Michigan's natural resources and runs counter to the public trust that underlies the protection of Michigan's lakes and streams.

c. Affirming the Court of Appeals' reliance on *Mich Citizens for Water Conservation v Nestle* would be contrary to our State's long standing policy of protecting the public trust.

The Court of Appeals' flawed economic balancing test is in direct contravention to one of this State's fundamental legal doctrines: the public trust doctrine. The public trust doctrine has a long and storied history, and has withstood the test of time as one of the most venerable tenets of all the common law. The doctrine first emerged under the rule of the Roman Emperor Justinian,

whose *Institutes* explained that the sea and the seashore were common to all by operation of natural law. *Glass v Goeckel*, 473 Mich 667, 677; 703 NW2d 58 (2003). Justinian's rule was adopted by the English Common Law, passed from England to the colonies, then to the Northwest Territory, and finally the public trust doctrine has come to rest as a cornerstone of riparian law in Michigan. *Id.* Under Michigan law, the title of the soil under navigable waters is vested in the riparian owner. *Collins v Gerhardt*, 237 Mich 38, 48; 211 NW 115 (1926). This title, however, does "not divest the State of its trustee capacity . . . The title allowed to be taken by the riparian owners [is] subordinate to the public rights, including the public right of fishing." *Id.*

The public trust doctrine provides that the State holds the navigable waterways in trust, and requires that the state safeguard that trust: "When lands are owned by the State for the public trust, it is the State's duty to protect the trust and not surrender the rights thereto." *People ex rel MacMullan v Babcock*, 38 Mich App 336, 351; 196 NW2d 489 (1972). Essentially, the "public trust protects navigable waters so as to preserve the valuable fish and game habitat and assure the public's right to fish and boat in the subject area." *Friends of the Crystal River v Kuras Properties*, 218 Mich App 457; 554 NW2d 328 (1996). The trust protects additional rights including the public's right to swim, fish, boat, and hunt. *People ex re MacMullan*, 38 Mich App at 351. In addition, the general public interest must be protected. *Id.* When the public trust is impaired, an analysis of the value of the waterway for public use is required. *Grosse Ile v Sullivan Dredging Co*, 15 Mich App 556, 567; 167 NW2d 311 (1969). However, the value for public use need not be substantial in order to demonstrate an impairment of the public trust. *Id.* The only time the State is authorized to allow private use of public trust land is when the private use will improve the public trust, or the private use will not substantially impair the trust lands

and the waters that remain. *Superior Public Rights, Inc v State Dep't of Natural Resources*, 80 Mich App 72, 84; 263 NW2d 290 (1977).

Although this Court limited its discussion in *Goeckel* to the public trust doctrine's impact on the Great Lakes, it is clear that the public trust doctrine extends to all navigable waterways in the State. *Bott v Commission of Natural Resources*, 415 Mich 45, 71; 327 NW2d 838 (1982). Furthermore, one of the most assiduously protected rights under the trust is the right to fish. *Collins*, 237 Mich at 49. This Court in *Collins* noted that "So long as water flows and fish swim . . . the people may fish at their pleasure in any part of the stream subject only to the restraints and regulations imposed by the State. In this right they are protected by a *high, solemn and perpetual* trust, which it is the duty of the State to forever maintain." *Id.*

The Court of Appeals' decision in this case was a complete rejection of the trust's "*high, solemn and perpetual*" purpose: namely, safeguarding the right of the public, and in particular members of Michigan TU and its chapters, to enjoy Kolke Creek, Bradford Creek, Lynn Lake, and the AuSable River for fishing. Furthermore, the granting of the Merit easement is in direct contravention of the State's responsibility to safeguard the trust. There is nothing in the public trust doctrine that limits the protection to riparian owners. The decision of the Court departed from centuries of precedent and traditional riparian law to give preferential treatment based on economic factors.

Given the mandates in Article 4, § 52 of the Constitution, MEPA and the Public Trust Doctrine, this Court is under a duty to ensure that Michigan's riparian water law precedent is correctly interpreted and applied so as to protect coldwater fisheries and the Public Trust in those resources. There is no precedent or statute that allows a court to place the harmful conduct of the user above the rights of riparians and other non-harmful uses such as fishing. The Court of Appeals abandoned their constitutional and common law mandated position as protector of the

environment in favor of economic interests. This Court should not do the same. If the Court of Appeals decision is allowed to stand, these waterways will be reduced from coldwater fisheries to sediment filled waterways with little to no natural fish habitats. The sheer amount of water that is discharged will sweep clean the hatchery locations, and result in a vast reduction in the amount and quality of fish in these waterways.

d. *Mich Citizens for Water Conservation v Nestle* should be applied, if at all, only to groundwater withdrawal cases.

An additional problem with applying *Mich Citizens for Water Conservation* is that it is distinguishable from the facts involved in the *Anglers'* case. *Mich Citizens for Water Conservation* involved a **groundwater withdrawal**. It did not involve a dispute between similarly situated riparian owners or even competing uses between a riparian owner and a non-riparian owner, as is the case here. This appeal involves competing rights to use watercourses - Kolke Creek, Bradford Creek, Lynn Lake and the AuSable River. Groundwater is water that has collected below the surface of the ground. Unlike watercourses, public and private entities rarely come into contact with groundwater and when they do, it is usually the result of it being physically withdrawn from the ground by human activity or when it seeps, unseen, into a river.

Riparian owners and users can be said to be defined by the watercourses which they have direct interaction with. Because a groundwater user cannot use groundwater until extraordinary means have been taken, it is illogical to apply a case that deals with groundwater usage to a matter involving the correlative rights and obligations of riparian users using the same water.

CONCLUSION AND RELIEF REQUESTED

Michigan TU and its individual TU members have been committed to preserving and protecting coldwater fisheries such as the AuSable River for more than thirty years. Given Michigan TU's rich history of protecting natural resources, the majority's decisions in *Nestle* and

Preserve the Dunes and the Court of Appeals' decision in this matter are an affront to its efforts to conserve, protect, and restore coldwater fisheries in Michigan.

As a result of the Court's decisions in *Nestle* and *Preserve the Dunes*, insurmountable hurdles have been thrown down in front of plaintiffs seeking to use MEPA to protect their use and enjoyment of Michigan natural resources. Michigan TU members and its chapters will be excluded from the courts to protect coldwater fisheries solely on the basis that the DEQ (now the DNRE) has "approved" certain conduct (even where the agency's decisions are harmful to the environment or are intertwined with another party's unlawful conduct) or because Michigan TU members are not using a specific area at a given time (despite being able to show in either situation that coldwater fisheries are being impaired).

Moreover, by extending the *Mich Citizens for Water Conservation* case to this matter, riparian jurisprudence in Michigan has been dramatically shifted in favor of commercial interests and economic factors at the expense of conservation of resources and other uses. Following the logic of the Court of Appeals, a project allegedly bringing jobs and money to the local economy will nearly always outweigh the protection of critical riparian habitat and other uses such as fishing and preservation activities - contrary to the Michigan Constitution's focus on conservation of natural resources. Unless the decision in *Mich Citizens for Water Conservation* is corrected, Michigan residents will be haunted by the courts rather than "haunted by waters" as they have been for decades.

For all the reasons set forth in this Brief as well as that filed by the Anglers of the AuSable, Michigan TU requests that this Court do each of the following:

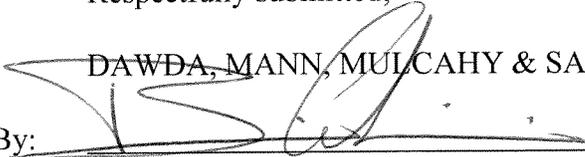
- Uphold our State's Constitutional mandate to protect our natural resources by applying the Court's recent decision on standing in *Lansing Schools Ed Assn v Lansing Board of Ed* to MEPA causes of action and holding that, under MEPA, any person has standing to

bring an action to protect this State's natural resources even if the harm being alleged is based upon the interconnectedness of the natural resources.

- Uphold the Constitutional mandate to protect the State's natural resources by overruling the decision in *Preserve the Dunes* and allowing MEPA actions to proceed against State agencies for final administrative decisions and/or approvals that impair natural resources or, in the alternative, reverse the Court of Appeals application of *Preserve the Dunes* in this matter where Merit's conduct was really an embodiment of the State's demands.
- Rule that the DNR's easement to Merit did not and could not confer upon Merit rights equivalent to those held by riparian owners along Kolke Creek and Lynn Lake.
- Overrule the Court of Appeals' reasonableness balancing test in *Mich Citizens for Water Conservation* as being contrary to Michigan riparian law and the protection of the public trust in the State's water resources and/or reverse the Court of Appeals' application of the test developed in that case to the within matter which does not involve groundwater withdrawals.

Respectfully submitted,

DAWDA, MANN, MULCAHY & SADLER, PLC

By: 

Brian J. Considine (P53783)
Attorneys for Amicus Curiae
Michigan Council of Trout Unlimited
39533 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48304
(248) 642-3700

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