MICHIGAN ENVIRONMENTAL LAW JOURNAL

Vol. 29, No. 2, Spring 2011, Issue 82

Message From the Chair

by: Charlie Denton, Barnes & Thornburg LLP

The sense of momentum of our Environmental Law Section is exemplified by this electronic version of the *Michigan Environmental Law Journal*. There are however many other positive activities, such as continuing education programs, membership outreach to law students, website and social media developments, and lots more! Probably the best way to stay tuned to the Environmental Law Section is through our website: www.michbar.org/environmental.

These many and varied environmental law activities are evidence of an excited and hardworking group of Michigan environmental lawyers. If you are not yet a member of our Environmental Law Section, but are benefiting from this *Michigan Environmental Law Journal* or any of our other invaluable content (like the Environmental Law Deskbook), then you really should become a member. Information on joining our Environmental Law Section is available at: www.michbar.org/environmental/mission.cfm. For those of you who are already members, think about how you can become more involved – contact any of our committee chairs and ask if there are programs, articles, meetings or other ways you can jump on board.

We look forward to seeing all of you at our Environmental Law Section's annual meeting on September 15, at the Hyatt Regency in Dearborn, and our 30th Anniversary celebration event on October 6, at the University Club in Lansing.

Environmental Law Section 30th Anniversary Celebration Update

The program committee is planning a thoughtful and entertaining event honoring the past 30 years of environmental law and the lasting impact it has made on the state of Michigan. The October 6 afternoon program, held at the University Club in Lansing, will be followed by a cocktail reception featuring the musical parody troupe "A Habeas Chorus". From local issues to national and international events, from judges to lawyers to politicians to celebrities, AHCL bills itself as an equal-opportunity lampooner!

Ticket price is $65. Bring a guest and get two tickets for $100!

Upcoming Events

A Luncheon with Michigan Attorney General Bill Schuette
Thursday, May 19, 2011
11:30 a.m.–1:30 p.m. (lunch will be served at Noon)
The University Club, Ballroom
3435 Forest Rd.
Lansing, MI 48910
$20 for sponsoring sections; $40 for non-members

The Administrative & Regulatory Law Section of the State Bar of Michigan, in partnership with the Environmental and Public Corporation Law Sections presents Michigan Attorney General Schuette. He will discuss hot topics involving the Department of Attorney General with an opportunity for questions and answers immediately following. Register:

ELS Annual Summer Program
Date: Friday, June 24, 2011
Time: TBD
Location: Lansing

Maya Fischhoff, Assistant Director of the Environmental Science and Policy Program at Michigan State University, is working with the Committee on a tour of MSU research facilities and a brief presentation updating the Section on current areas of environmental research at the school.

SBM Annual Meeting
Date: September 14-16, 2011
Location: Hyatt Regency, Dearborn, Michigan
Registration will open in July, 2011

ELS Annual Meeting Program
Date: Thursday, September 15
Time: 1:30 p.m.-4:45 p.m.
Location: Hyatt Regency, Dearborn, Michigan

ELS Annual Business Meeting
Date: Thursday, September 15
Time: 5:00 p.m. – 6:30 p.m., dinner afterward
Location: Hyatt Regency, Dearborn, Michigan

Michigan Environmental Law Section's 30th Anniversary
Date: Thursday, Oct. 6, 2011
Time: 2:00 p.m. – 4:30 p.m., cocktail reception afterward
Location: The University Club, Michigan State University
$65 for one ticket or $100 for two

Joint Environmental Conference, co-sponsored by the ELS and the AWMA
Date: November 9, 2011
Time: TBD
Location: TBD
Program details will be announced as they become available.

Recent Section Activity

Air Quality Regulations Seminar

Dan Wyant, director of the Michigan Department of Environmental Quality, addresses questions from the attendees of the 4/12/11 MMA seminar, Air Quality Regulations in 2011: Greenhouse Gasses and Beyond, held at the MMA Headquarters in Lansing.

On April 12 the State Bar of Michigan Environmental Law Section partnered with the Michigan Manufacturers Association to present an outstanding seminar discussing updates on the most urgent air quality regulatory issues facing Michigan manufacturers in 2011. The seminar featured discussions led by industry experts on climate change, greenhouse gas developments and MACT Standard developments.

Featured speaker Dan Wyant, director of the Michigan Department of Environmental Quality, answered questions and delivered this message: "The vision for the Department of Environmental Quality is for Michigan to be leaders in environmental stewardship, for DEQ to be a full partner in Michigan's economic recovery, and for the DEQ to excel at customer service."
View the Program materials

Michigan's New Energy Development Webinar
The Energy Committee presented a great webinar on April 12, on Michigan's new energy development. It provided a nice overview of the laws that apply to new energy projects. View the program materials:
View the Program Materials

Help Promote Section Events and Activity!

Connect with the Environmental Law Section on Facebook and LinkedIn

If you've got a Facebook page and/or are using LinkedIn, become a member of the Michigan Environmental Law Section's **Facebook** page and our **LinkedIn** group page to keep informed of environmental law seminars, forums, education, and networking.

The Michigan Bar Journal May 2011 Issue—Water Law

The Michigan Bar Journals' May 2011 Water Law theme issue features two articles contributed by the Water Committee. One addresses the current status of the Great Lakes Compact and water withdrawal legislation; the other addresses the Asian carp situation. Read the Issue Online

News from the MDEQ – An Interview With MDEQ Director Dan Wyant

(Dan Wyant took over as Director of the Department of Environmental Quality at a critical time in DEQ's history. He graciously agreed to answer the following questions posed by MELJ editors regarding how he intends to confront the important issues DEQ now faces.)

MELJ Question: How do you foresee the implementation of the recent changes to Part 201? Specifically, under what kind of circumstances could you see yourself disagreeing with a written decision of the Response Activity Review Panel?

Director Wyant: Instances where I disagree with a written recommendation of the Response Activity Review Panel (Panel) are likely to be quite rare. I believe that the members of the Panel will be highly qualified and will give significant attention and consideration to the matter(s) being brought before them. There are, however, instances where I may disagree with the Panel's recommendation(s), some of those being:

- If the recommendation of the Panel is outside its authority – a matter of policy or law, rather than a technical issue. For example, if a recommendation is based on the Panel's opinion about the liability of a party for conducting response actions at a facility, that would be outside its authority.
- If the recommendation of the Panel is in conflict with the statute, rules and/or applicable or relevant and appropriate requirements. For example, if the Panel recommends disregarding certain cleanup criteria, I may disagree with the Panel's recommendation.
- If the written recommendation of the Panel does not include the specific scientific or technical rationale for the recommendation.
- If the written recommendation is not consistent with the motion that was passed by a majority of its members at the Panel meeting at which the matter(s) were discussed.

- If the recommendation of the Panel contradicts earlier recommendations made by the Panel even though the facts presented to them were very similar or identical.

MELJ Question: The Governor's January 4 Executive Order re-dividing the DEQ and DNR notwithstanding, do you see any opportunities for both departments, as well as the MDA, to collaborate and provide efficient services to and on behalf of Michigan residents, businesses, and property owners?

Director Wyant: There are two important ways in which the DEQ, the DNR, and the Department of Agriculture and Rural Development (MDARD) are working to provide both efficient and cost effective services for Michigan citizens. First, each department is undertaking a 'lean process' review of selected programs and business processes, with the objective of providing more timely services at a lower cost to Michigan taxpayers. The most recent 'lean process' review completed in the DEQ involves the Air Emissions Renewable Operating Permit (ROP) Program, which is supported solely by the fees charged to the permit applicants. This review of the ROP Program has resulted in recommendations to streamline the program by reducing the number of steps in the permit application review process and reducing the time involved in several of the remaining steps in this process. The DEQ currently is developing the implementation plan to incorporate these recommended changes into the ROP permit application review process.

Second, the Directors of the DEQ, the DNR and the MDARD (Quality of Life Executive Management Team) are collaborating in developing several 'shared services' arrangements that will provide a lower cost approach to providing administrative support functions than if each department provided its own administrative support in a given area. In these shared services arrangements, the 'host' department provides an administrative support service to one or both of the other two departments. For example, the DNR is providing purchasing services and state fleet management services for the DEQ. In each of these service areas, there is sufficient capacity in existing staff positions for the DNR to provide these administrative services for both departments, resulting in a savings for both the DEQ and the DNR, as vacant positions did not need to be filled. Additional shared service arrangements are being implemented in field office administration and facilities management, environmental criminal investigations, information technology support, and marketing, with savings in the number of staff needed compared to each department providing these services with their own resources. The result is that the administrative support cost for the departments' programs will be lower.

MELJ Question: The state had a swift, and by most accounts, quite successful response to the recent leak of hazardous chemicals from a natural gas well in Benzie County. However, given the recent rush in leasing and the potential for a significant up-tick in natural gas drilling throughout the state using the relatively new hydraulic fracturing, or "fracking," techniques, do you intend to initiate a review of Michigan law as it relates to drilling regulations and groundwater aquifer protection, and how transparent do you anticipate such a review being from a public involvement standpoint?

Director Wyant: Existing statutes provide the DEQ with adequate authority to deal with hydraulic fracturing issues. While hydraulic fracturing has been used for decades in Michigan, recent deep shale gas developments entail larger-scale operations. The DEQ has taken several actions under our current regulatory authority to address these developments. Although oil and gas operators are exempt from Michigan's water withdrawal statute, the DEQ requires oil and gas permittees to perform the same water withdrawal impact assessment as any other large volume water user. We require all waste fluids to be contained in steel tanks and injected into deep disposal wells. The DEQ is working with the industry on the submittal of information on frack chemicals as well as reporting of fracking fluid volumes and pressures. In reviewing permit applications, DEQ staff evaluates records of all other wells in the vicinity to assure there are no avenues for migration of frack fluids or gas into aquifers or other strata. The DEQ has also initiated hearings to address well spacing for the new deeper shale gas wells.

MELJ Question: Do you expect to continue the positions of the previous administration regarding climate change, including the Climate Action Plan announced in 2009? If not, what changes are you considering?

Director Wyant: Each of the recommendations should be reviewed to see where there is an economic benefit, savings, or growth opportunity. We should not simply dismiss wholesale the Climate Action Plan. Rather, the best practices for

the future of our state should be identified, and we should look for ways to implement those practices that will return a benefit to our state without stifling economic growth.

Many of the recommendations dealing with energy efficiency, transportation, land use, agriculture, forestry, and waste management have the potential to save money or generate revenue within the state. For example, credits are now being sold in California for forestry and energy projects from landfills in Michigan. Also, there are now aggregated agricultural projects in Michigan returning money to farmers through the Chicago Climate Exchange. We will look at these types of recommendations and evaluate how they fit into our vision of being environmental stewards and full partners in Michigan's economic growth.

***MELJ Question*:** If the state eliminates tax credits and other financial incentives for Brownfield redevelopment, would DEQ still be able to effectively promote the remediation and reuse of Brownfield properties?

Director Wyant: The elimination of Brownfield redevelopment and other tax credits is part of Governor Snyder's approach to getting the State's financial house in order. The potential loss of Brownfield tax credits could have an impact on Brownfield redevelopment, but the DEQ looks forward to participating in the development of an alternative to the credits and relying more on other available tools to support the reuse of contaminated properties.

The budget process will give us direction on tax credits, but Brownfield redevelopment will remain a priority for the DEQ no matter what. Our goal is to help entrepreneurs and developers redevelop properties and get them back into circulation.

(Dan Wyant has been named Director of the DEQ by Governor Rick Snyder. Dan previously served as president and chief operating officerof the Edward Lowe Foundation, which promotes entrepreneurship and helps second-stage business owners accelerate growth for their companies, a position he held since 2005. Prior to that, he served as director of the Michigan Department of Agriculture under both Governor John Engler and Governor Jennifer Granholm. Dan also serves on the Board of Directors of the Nature Conservancy, Michigan, and holds a bachelor's degree in food systems management from Michigan State University and an MBA from American University in Washington, D.C.)

Great Lakes States' Asian Carp Fight Continues

by: Robert P. Reichel, Assistant Attorney General,
Environment, Natural Resources and Agricultural Division,
Michigan Department of Attorney General

"Asian carp pose the greatest immediate threat to the Great Lakes ecosystem . . . "

"The prevention of an inter-basin transfer of bighead and silver carp from the Illinois River to Lake Michigan is paramount in avoiding ecological and economic disaster."

No, those are not quotes from Michigan Attorney General Bill Schuette or his predecessor, Mike Cox. They are published statements by the two federal agencies most directly responsible for the current inadequate efforts to prevent an Asian carp invasion of the Great Lakes: the United States Fish and Wildlife Service (USFWS)[1] and the United States Army Corps of Engineers (Corps)[2] , respectively. While these federal agencies, and the Illinois Department of Natural Resources—through the Asian Carp Regional Coordinating Committee (ACRCC) that they formed and largely direct—continue to tout their "Asian Carp Control Strategy Framework,"[3] those efforts fall short of what is needed to effectively prevent Asian carp from establishing reproducing populations in the Great Lakes.

[1] See *Michigan v United States Army Corps of Engineers*, 2010 U.S.Dist. LEXIS 127376; 41 ELR 40041 (N.D. Ill. 2010) at *13, n.7.
[2] *Id*, at *13, n.6.
[3] See http://www.asiancarp.org/Documents/FrameworkDec15-2010.pdf

As detailed elsewhere in this issue (*Asian Carp, Chicago Canal Litigation, and The Great Lakes and Mississippi River Inter-Basin Study*), Michigan, joined by several other Great Lakes States have filed, and are continuing, litigation that seeks to prevent such an invasion before it occurs. In 2010, after the U. S. Supreme Court rejected Michigan's requests to exercise original jurisdiction in its dispute with Illinois, the Corps, and the Metropolitan Water Reclamation District of Greater Chicago (District), the States of Michigan, Wisconsin, Minnesota, Ohio and Pennsylvania (States) filed a new civil action against the Corps and the District in the U. S. District Court for the Northern District of Illinois, *Michigan et al v U.S. Army Corps of Engineers,* et al (File No. 1:10-cv-04457). The complaint[4] asserts two claims. First, the States allege that the Corps and the District, by maintaining and operating their respective facilities (including the locks and sluice gates) in the Chicago Area Waterway System (CAWS) in a manner that allows Asian carp to migrate from the Illinois River system into the Great Lakes, are maintaining a common law public nuisance. Second, the States allege that the Corps has made a series of unlawful, arbitrary and capricious decisions related to the Asian carp threat and seek review of those decisions under the Administrative Procedures Act (APA). The complaint seeks declaratory and injunctive relief.

Contrary to some oversimplifications in the popular media, the case is *not* simply, or even primarily, about closing two sets of navigational locks (the Chicago Lock, downtown, near Navy Pier and the O'Brien Lock on the south side of Chicago on the Calumet River). Rather, the States' motion for preliminary injunction has two basic components. The first requests a mandatory injunction requiring the Corps and the District to take a series of additional interim measures to physically block the movement of Asian carp through the CAWS into Lake Michigan. These include temporarily closing locks except as needed to protect public health and safety (e.g. to prevent flooding), installing screens in sluice gates (water level control structures) to impede fish passage, installing block nets to deter Asian carp from swimming through other portions of the CAWS where no physical barriers now exist, increasing environmental DNA (eDNA) monitoring, and strategically applying the fish poison rotenone in areas where Asian carp are most likely to be present.

Second, the States seek a preliminary injunction requiring the Corps to expedite a congressionally mandated feasibility study of options for permanently preventing the movement of Asian carp and other aquatic invasive species between the Mississippi River and Great Lakes basins. The Corps only recently began "scoping" the Great Lakes Mississippi River Interim Study (GLMRIS) and does not intend to complete it until 2015 or later. The States requested an order requiring the Corps to complete the portion of the study relevant to the CAWS within 18 months, since: (a) it is a necessary step in developing a permanent remedy; (b) the risk of an Asian carp invasion will continue, and increase over time, particularly if the Corps continues to rely upon a combination of its "electrical barrier" system[5] and conventional fish netting; and (c) unless the study is accelerated now, it will likely come too late to fashion and implement an effective, permanent remedy.

The underlying complaint also seeks a permanent injunction, requiring the Corps and the District to develop and implement plans to permanently physically separate the Mississippi and Great Lakes basins at strategic locations in the CAWS. Only such a *hydrologic* separation of the basins can reliably prevent the movement of aquatic invasive species – including, but not limited to, Asian carp – in either direction, through the CAWS.[6]

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[4] See 2010 U.S. Dist. Ct. Pleadings; 2010 U.S. Dist. Ct. Pleadings LEXIS 4514 (July 19, 2010).

[5] The Corps itself has admitted that the electrical barriers are "experimental and [a] temporary fix" to the problem. See http://www.lrc.usace.army.mil/pao/ANS_DispersalBarrierEfficacyStudy_Interim_I_Final.pdf at p.34.

[6] There is a growing consensus among scientists and stakeholders that permanent physical separation of the basins in the CAWS is needed. *See*, e.g. testimony of Tim Eder, Executive Director of the Great Lakes Commission, Subcommittee on Water and Power Senate Committee on Energy and Natural Resources July 14, 2010, available at http://energy.senate.gov/public/_files/EderTestimonyFinal.pdf. The Great Lakes Fisheries Commission sponsored an initial study of such separation. *See* Brammier, et al, "Preliminary Feasibility of Ecological Separation of the Mississippi River and the Great lakes to Prevent the Transfer of Aquatic Invasive Species" (2008) available at http://www.greatlakes.org/Document.Doc?id=473. Additional studies of specific options for separation are currently being conducted by the Great Lakes Commission (*See* http://www.glc.org/ans/chicagowaterway.html.)

Several parties successfully moved to intervene. The City of Chicago, the Coalition to Save Our Waterways (an unincorporated association of various businesses that wish to avoid any disruption of commercial navigation on the CAWS) and Wendella Sightseeing Company (an operator of tour boats that transit the Chicago Lock) intervened as defendants. The Grand Traverse Band of Ottawa and Chippewa Indians intervened as a plaintiff.

The district court proceedings to date have focused almost exclusively on the States' motion for preliminary injunction. The parties' extensive written submissions on that motion included multiple rounds of briefs as well as numerous affidavits and declarations. The Court allowed the parties to supplement those written materials with two and a half days of live testimony in September, 2010. The States subpoenaed Dr. David Lodge, an aquatic biologist at the University of Notre Dame and one of the nation's leading experts in invasive species. Together with colleagues at the Center for Aquatic Conservation and under contract to the Corps, he developed risk assessments on the migration of invasive species through the CAWS and adapted eDNA surveillance technology for the early detection of Asian carp.[7] Analyses of water samples collected in 2009 and 2010 for Asian carp eDNA indicated that at least some Asian carp were far closer to the Corps' electric barrier system, and Lake Michigan, than previously assumed by Illinois and federal officials. In fact, 60 separate samples collected *past* the "barrier" between late 2009 and May 2010 tested positive for Asian carp eDNA.

Based on his expertise in the biology of invasive species, the available information concerning the expanding populations of Asian carp in Illinois waterways, the May 2010 capture of a live bighead carp less than six miles from Lake Michigan, and the pattern and distribution of the eDNA data, Dr. Lodge concluded:

> I think there is a risk, a very urgent and imminent risk of invasion [of Lake Michigan] given the demonstrated presence of bighead carp with unimpeded access to Lake Michigan and the indication from eDNA that the same situation applies to silver carp.[8]

Dr. Lodge also testified that since "the more individuals that enter the lake, the more likely it is that a population will become established . . . "[9] there "remains an urgent need to reduce the probability that both silver or bighead carp individuals can enter Lake Michigan."[10] The States also submitted similar written testimony from Dr. Tammy Newcomb, a Michigan Department of Natural Resources fisheries biologist and expert on the Great Lakes. Even the majority of an expert risk assessment panel convened by the USFWS to advise the Corps concluded in February, 2010, that there was an "imminent threat that Asian carp . . . will establish a sustainable population in Lake Michigan in the near future."[11]

The defendants did not rebut Dr. Lodge's testimony, but nonetheless persuaded the district court that the threat of harm to the Great Lakes was not sufficiently likely and imminent to warrant preliminary injunctive relief. Among other things, they emphasized that there was not yet evidence of Asian carp reproduction (i.e. juvenile fish) beyond, or even near the electrical barriers. The district court apparently assumed that Asian carp must first begin breeding in the CAWS

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and the Natural Resources Defense Council (See Rebuilding Chicago's Stormwater and Wastewater Systems for the 21st Century: Understanding Hydrologic Conditions in the Region Technical Report, October 2010 available at http://docs.nrdc.org/water/files/wat_10102001a.pdf.)

[7] Jerde, et al. "*Aquatic Invasive Species Risk Assessment for the Chicago Sanitary and Ship Canal*, (July, 2010) available at http://edna.nd.edu/Environmental_DNA_at_ND/Publications_and_Reports_files/FINAL%20Risk%20Assessment%20CSSC%20%284-22-2010%29.pdf. Dr. Lodge's team later published the results of their eDNA testing for Asian carp in a peer-reviewed scientific journal. *See*, Jerde, et al. "Sight-unseen detection of rare aquatic species using environmental DNA." *Conservation Letters* 00 (2011) 1-8, available at http://edna.nd.edu/Environmental_DNA_at_ND/Publications_and_Reports_files/2011%20Conservation%20Letters%20Jerde%20et%20al%20full.pdf.

[8] Transcript, p 91.

[9] Transcript, p 100.

[10] Lodge declaration, ¶49.

[11] Transcript, p 391.

itself before they could successfully invade Lake Michigan,[12] but this assumption is not supported by the record. The Corps' biological expert, Mr. Duane Chapman, testified that Asian carp are quite mobile and move long distances to select habitats conducive to their survival and growth. Dr. Newcomb also testified that rapid rates of Asian carp movements are well documented. Consequently, Asian carp can, and likely will, swim through the CAWS out into the Great Lakes ecosystem without first reproducing in the CAWS.

The defendants also convinced the district court that there was "no evidence" that Asian carp had breached the Corps' electrical barrier system.[13] But that finding is clearly erroneous given the record evidence, including the unrebutted testimony by Drs. Lodge and Newcomb that the most probable explanation of the eDNA data was the failure of the barrier system to completely prevent the passage of Asian carp.

The district court also critically erred in accepting the Corps' assertion that Asian carp are present above the barriers "only in low numbers – numbers that are effectively being assessed and managed by the aggressive inter-agency efforts and that do not present an imminent threat to establish a successful breeding population."[14] The only expert testimony on this subject showed that the methods being used by the ACRCC to assess the presence of Asian carp, electrofishing and netting, even when intensively applied, can detect only a very small percentage of Asian carp that are present. Indeed, Mr. Chapman himself compared the use of these techniques to locate Asian carp in the 78-mile long CAWS to searching for a needle in a haystack and emphasized that "in any case capture of one fish probably means there are many uncaptured fish."[15] And, while neither the defendants nor the court defined "small numbers," there were several lines of evidence in the record that even less than 100 Asian carp individuals entering Lake Michigan would be sufficient to trigger establishment of a sustainable population.[16]

The district court also erroneously relied upon selective quotations from Mr. Chapman's testimony expressing "uncertainty" about the "harm" to the Great Lakes from Asian carp.[17] While Mr. Chapman emphasized his opinion that there were "many unknowns," his central thesis was that: (a) if Asian carp began reproducing in the Great Lakes, it would likely take years for the population to expand to "large numbers" that would be obviously "problematic;" and (b) this anticipated lag in population expansion would provide an opportunity to *possibly* develop some new, unspecified methods of controlling or reducing Asian carp populations.[18] But neither Mr. Chapman, nor any other witness rebutted testimony by Drs. Lodge and Newcomb that biological invasions, once established, are likely irreversible.

Ironically, other elements of Mr. Chapman's own testimony starkly illustrate the danger and error of the court's apparent conclusion that an imminent threat will be proven only when many more Asian carp are netted in the CAWS or in Lake Michigan.

> [U]ncertainty in risk assessment of invasive species is always going to exist. In the case of Asian carps where *low numbers cannot be sampled effectively, current status is also going to be in question until the fish reach high densities*. No amount of fishing or even of eDNA sampling will prove that the fish do not exist in numbers that are below detection but are potentially ecologically significant in terms of eventual population establishment. [19]
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> We have no way to assess the presence of bighead and silver carp in a body of water like Lake Michigan. *Even if there were hundreds of fish in the lake, catching one would be unlikely.*[20]

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[12] *Michigan v United States Army Corps of Engineers*, at *87-88.
[13] *Id*, at *89-90.
[14] Id, at *87-88.
[15] States' Appendix, p 209.
[16] States' Brief, pp 47-51..
[17] *Michigan v United States Army Corps of Engineers*, at *96.
[18] Chapman declaration, ¶¶22, 24.
[19] Chapman declaration, ¶27 (emphasis added).
[20] Chapman declaration, ¶25 (emphasis added).

By the time Asian carp reach high densities – detectable by netting – in the CAWS or in the Great Lakes, it will be too late to prevent or reverse the invasion.

The district court denied the States' preliminary injunction motion in its entirety. It concluded that the States had shown only a "modest" likelihood of success on the merits of the public nuisance and APA claims and that there was insufficient evidence that imminent, irreversible harm was likely.[21] While the court discussed all of the preliminary injunction factors with regard to the portion of the motion seeking additional interim barriers to fish passage, its opinion did not evaluate, or make any findings of fact or conclusions of law regarding, the second preliminary injunction requested – acceleration of the GLMRIS feasibility study.

The States appealed the district court order denying the preliminary injunction to the Seventh Circuit.[22] They raise two issues on appeal. First, the States argue that the district court committed legal error, relied upon clearly erroneous finding of fact and abused its discretion in completely denying their request for a preliminary injunction requiring additional interim actions to block the movement of Asian carp through the CAWS. The district court's conclusion that the States showed only a modest likelihood of success on the merits was legally flawed in two respects: (a) it erroneously held that the States were required to show an "imminent," not merely "significant," threat of harm as an element of their public nuisance claims; and (b) it concluded that the traditional reluctance of a court to enjoin as a public nuisance conduct authorized by law should be applied to bar the States' nuisance claim. Moreover, as noted above, viewing the record in its entirety, the district court's conclusion that imminent harm was not likely rested on a series of clearly erroneous factual findings.

Second, the district court legally erred in failing to make findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a)(2) concerning the States' request for a preliminary injunction requiring the Corps to expedite preparation of the feasibility study. The request to accelerate the feasibility study requires a completely different "balance of harms analysis" than the request to place physical barriers in the CAWS. Additionally, the court did not address the irreparable harm – the likely inability to timely implement an effective permanent remedy – if the feasibility study is not expedited.

On appeal, the defendants reiterated their successful arguments in the district court and have advanced as additional alternative grounds for affirming the district court order certain "threshold" legal arguments. These include arguments that: (a) the States' public nuisance claim against the Corps is barred by sovereign immunity; (b) the federal common law of public nuisance has been displaced by federal statutes and/or executive actions; and (c) the States' APA claim is not legally cognizable.

Appellate briefing was recently completed. Oral argument is scheduled for May 5, 2011 in Chicago.[23]

While a mandatory preliminary injunction is an extraordinary remedy, and federal appellate courts are generally reluctant to disturb a district court's exercise of discretion regarding such injunctions, the States strongly believe that this is an exceptional case that merits extraordinary relief. Public rights in the unique resources of the Great Lakes face a mounting threat of grave and irreversible harm from an Asian carp invasion. Given the enormous interests at stake, Attorney General Schuette and his Wisconsin, Minnesota, Ohio, and Pennsylvania colleagues remain committed to vigorously continuing the legal fight against that threat.

Court of Appeals Validates MDEQ's Broad Rulemaking Authority Under Part 31 of NREPA

[21] *Michigan v United States Army Corps of Engineers*, at *109.

[22] *State of Michigan et al v United States Army Corps of Engineers*, et al, Case No. 10-3891.

[23] On March 31, 2011, the district court entered an order denying part and granting in part the defendants' motion to stay all proceedings pending disposition of the interlocutory appeal. *Michigan v United States Army Corps of Engineers*, 2011 U.S. Dist LEXIS 35282 (N.D. Ill. 2011). The order stays further briefing in the district court but allows limited discovery, pending appeal. A status hearing has not yet been scheduled.

by: Kelly M. Drake, Miller, Canfield, Paddock and Stone, P.L.C.

In a published decision released March 29, 2011, the Michigan Court of Appeals held that Part 31 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*., gives the Michigan Department of Environmental Quality (DEQ) much broader authority to control and even prevent water pollution than the Environmental Protection Agency (EPA) has under the federal Clean Water Act (CWA), 33 USC 1251 *et seq*. In Michigan Farm Bureau v Dep't of Environmental *Quality*,[1] the Court upheld DEQ regulations regarding concentrated animal feeding operations (CAFOs) that were nearly identical to EPA regulations that had been struck down by a federal appeals court.[2] This decision illustrates that a state with an approved National Pollutant Discharge Elimination System (NPDES) program is not simply acting under authority delegated from EPA, but is acting pursuant to authority created under the state's own statute (in Michigan, Part 31 of NREPA).

The administrative rule at issue in the case is Mich Admin Code R 323.2196, which states that "[a]ll CAFO owners or operators shall apply either for an individual NPDES permit, or a certificate of coverage under an NPDES general permit[.]" 2003 AACS R 2196(1)(b). The rule provides an exemption from the permit requirement for CAFO owners and operators who have "received a determination from the department, made after providing notice and an opportunity for public comment, that the CAFO has 'no potential to discharge[.]'" Rule 323.2196(1)(b).

Rule 2196 was modeled on federal regulations promulgated by the EPA in 2003 under the CWA. The 2003 federal rule likewise required all CAFOs either to obtain an NPDES permit or demonstrate that they had no potential to discharge pollutants into regulated waters.[3] That rule was struck down by the United States Court of Appeals for the Second Circuit in 2005 in *Waterkeeper Alliance, Inc v Environmental Protection Agency* [4] as being outside the scope of EPA's statutory rulemaking authority. The Second Circuit concluded that the CWA gave the EPA authority only to promulgate rules addressing *actual* discharges of pollutants, not *potential* discharges.[5]

Relying in part on *Waterkeeper*, a group of farming associations and CAFO operators filed an action in circuit court challenging Rule 2196, arguing that the DEQ did not have authority to promulgate a regulation requiring them to seek and obtain a NPDES permit because they did not actually discharge any pollutants into the waters of Michigan.[6] The plaintiffs moved for summary disposition, arguing that Rule 2196 violated the language of the CWA, as interpreted in *Waterkeeper*.[7] The plaintiffs also asserted that Rule 2196 exceeded the scope of the DEQ's statutory rulemaking authority under Part 31 of NREPA and that the rule was arbitrary, capricious and inconsistent with legislative intent.[8] The DEQ opposed the motion.[9] The circuit court denied the plaintiffs' motion for summary disposition and granted summary disposition to the DEQ.[10] As described below, the Court of Appeals affirmed.

As an initial matter, the Court clarified that state law governed the legal questions at issue in the case.[11] The Court noted that under the CWA, the EPA granted Michigan the authority to administer its own NPDES program, rather than simply delegating authority to the state to administer the federal program. Accordingly, Michigan's NPDES program is governed by state law rather than federal law.

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[1] ___ Mich App ___; 2011 WL 1136490 (Mar 29, 2011).
[2] *Waterkeeper Alliance, Inc v Environmental Protection Agency, 399 F3d 486 (2nd Cir 2005).*
[3] 68 Fed Reg 7176 (Feb 12, 2003).
[4] 399 F3d 487 (2nd Cir, 2005).
[5] In response to the *Waterkeeper* decision, EPA revised the language so that only those CAFOs that "discharge or propose to discharge" were required to apply for NPDES permits.The rule was finalized in 2008. 73 Fed Reg 12321, 12324 (Mar 7, 2008); 73 Fed Reg 70418 (Nov 20, 2008). On March 15, 2011, the United States Court of Appeals for the Fifth Circuit struck down the revised rule. *National Pork Producers Council v EPA*, F3d ; 2011 WL 871736 (5th Cir, Mar 15, 2011).
[6] *Farm Bureau*, slip op at 6.
[7] *Farm Bureau*, slip op at 8.
[8] Id.
[9] Id.
[10] *Farm Bureau,* slip op at 9-13.
[11] *Farm Bureau*, slip op at 14-15.

Turning to the substantive analysis, the Court applied the three-part test in *Luttrell v Dep't of Corrections* [12] for determining the substantive validity of an administrative rule: (1) whether the rule is within the subject matter of the enabling statute; (2) whether the rule complies with the legislative intent underlying the enabling statute; and (3) whether the rule is arbitrary or capricious. In addressing the first prong of the test, the Court looked to MCL 324.3103(2), which authorizes the DEQ to "promulgate rules as it considers necessary to carry out its duties under this part…." The Court viewed this as "a broad and general grant of rulemaking authority, authorizing the DEQ to promulgate any rules" needed to carry out its duties under Part 31.[13] The Court then noted that one of the DEQ's duties under Part 31 is to "take all appropriate steps to prevent any pollution the [DEQ] considers to be unreasonable and against public interest in view of the existing conditions of any lake, river, stream, or other waters of the state."[14] MCL 324.3106. The Court concluded that although the EPA is limited by the plain language of the CWA to regulating *actual* discharges of pollutants, the DEQ has "the responsibility of forestalling and rendering impossible any water pollution that it considers to be unreasonable and against the public interest, even before pollution ever occurs."[15] As a result, the Court determined that the reasoning of *Waterkeeper* did not apply in this case. The Court concluded that Rule 2196 furthers the DEQ's duty to prevent pollution "by *preventing* all CAFO discharges before they occur, except as otherwise allowed under the terms of an NPDES permit."[16] The Court continued: "Moreover, as the circuit court correctly noted, Rule 2196 applies only to CAFOs that have a real potential to discharge pollutants, providing a complete exemption for CAFOs which establish that they truly pose 'no potential to discharge.' In sum, because Part 31 of the NREPA confers upon the DEQ the duty to 'prevent any pollution' of the state's waters, MCL 324.3106, the DEQ had the statutory authority to promulgate Rule 2196 under the rulemaking provision of §3103(2)."[17]

The Court also held that Rule 2196 satisfied the other two prongs of the *Luttrell test*. The Court found that Rule 2196 complied with the Legislature's intent for the DEQ to prevent pollution of the state's waters, using much the same analysis as it did for the first prong of the *Luttrell* test.[18] Plaintiffs argued that the Legislature intended to limit DEQ's rulemaking powers to the regulation of actual or imminent discharges and pointed to several provisions of Part 31 that address actual discharges.[19] The Court rejected this argument. While conceding that many of the provisions Plaintiffs cited addressed present discharges, the Court noted that their argument completely disregarded the command in MCL 324.3106 that DEQ take steps to prevent pollution of the waters of the state.[20] The Court then applied the common meaning of the word "prevent," relying on a dictionary definition, and concluded that "§3106 confers upon the DEQ broad powers to preempt or forestall the pollution of the waters of this state before any pollutants are ever discharged in the first instance."[21] Plaintiffs also argued that Rule 2196 violated the Legislature's intent as expressed in §229(a) of Senate Bill 1086, which became 2006 PA 343.[22] That section, which was vetoed by the governor, would have prohibited DEQ from requiring a farm to obtain an NPDES permit unless it had been found by DEQ to have a regulated discharge of pollutants into waters of the state. [23] The Court concluded that because the language was vetoed by the governor and the Legislature did not override the veto, §229(a) could not be cited as evidence of the Legislature's intent.[24] Finally, the Court found that the rule was not arbitrary or capricious.[25]

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[12] 421 Mich 93, 100 (1984).
[13] *Farm Bureau*, slip op at 16.
[14] Id.
[15] *Farm Bureau*, slip op at 17.
[16] Id. (emphasis in original).
[17] Id. (internal citations omitted).
[18] *Farm Bureau*, slip op at 18-20.
[19] *Farm Bureau*, slip op at 18-19.
[20] *Farm Bureau*, slip op at 19.
[21] Id.
[22] Id.
[23] Id.
[24] *Farm Bureau*, slip op at 20.
[25] *Farm Bureau*, slip op at 21-23.

Although the Court in this case recognized broad authority for the DEQ to prevent pollution of the state's waters, that authority is limited by the very statute that grants the DEQ rule-making authority. MCL 324.3103(2) states in full: "The department shall enforce this part and may promulgate rules as it considers necessary to carry out its duties under this part. However, notwithstanding any rule-promulgation authority that is provided in this part, except for rules authorized under section 3112(6), the department shall not promulgate any additional rules under this part after December 31, 2006." The Court of Appeals did not address the second sentence of subsection 2, presumably because it did not apply in the instant case.[26] However, the second sentence significantly limits DEQ's ability to promulgate rules under Part 31 after 2006 and to exercise the broad authority enunciated by the Court of Appeals in this case. The Court's decision is not entirely without effect, however, because "rules promulgated under [Part 31] before January 1, 2007 shall remain in effect unless rescinded." MCL 324.3103(4).

Finally, this case highlights an interesting aspect of administrative procedure. Before filing this lawsuit, the plaintiffs requested a declaratory ruling from the DEQ pursuant to §63 of the Administrative Procedures Act (APA), MCL 24.210 *et seq*.[27] Specifically, the plaintiffs requested a ruling that Rule 2196 "'was not applicable to CAFOs that have not had and do not propose to have an actual discharge of pollutants….'" [28] The DEQ granted the plaintiffs' request and issued a ruling that "'large CAFOs must apply for and obtain coverage under Michigan's NPDES permitting system unless the DEQ makes a determination that the CAFO has sufficiently demonstrated "[n]o [p]otential to [d]ischarge" pursuant to [Rule 2196].'"[29]When the plaintiffs filed this action, the DEQ moved for summary disposition on the grounds that the plaintiffs had not exhausted their administrative remedies and were required to seek judicial review of the DEQ's declaratory ruling pursuant to Chapter 6 of the APA, MCL 24.310 *et seq*., which governs judicial review in contested cases.[30] The circuit court denied the DEQ's motion, concluding that the plaintiffs' request for a declaratory ruling was actually a challenge to the validity of the regulation, rather than a request for a ruling on the applicability of Rule 2196 to "an actual state of facts" within the meaning of §63 of the APA.[31] In a footnote, the Court of Appeals endorsed the circuit court's ruling without specifically affirming it.[32]

Asian Carp, Chicago Canal Litigation, and The Great Lakes and Mississippi River Inter-Basin Study

By: Katherine Storch, Attorney
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Background

Over the past century the Mississippi River and Great Lakes basins have been devastated economically and ecologically by the establishment of aquatic invasive species. In the Mississippi River basin, the most extensive damage has been attributed to the presence of large populations of Asian carp. These invasive species have developed large, self-sustaining populations because of their ability to outcompete native fish for food and habitat, which in turn impacts the balance of the ecosystem. The term "Asian carp" collectively refers to multiple species, but for our purposes Big Head and Silver carps are of the greatest immediate concern because they have established populations in the Mississippi River and have expanded their range to the Great Lakes region.

The importation and breeding of Asian carp in the United States began in the late 1960s. Because of their voracious consumption habits, they were initially considered a beneficial species to quickly and efficiently clean aquaculture ponds and sewage treatment lagoons. Attitudes toward the fish changed throughout the 1990s as the

[26] *Farm Bureau*, slip op at 20.
[27] Farm Bureau, slip op at 7.
[28] Farm Bureau, slip op at 6-7.
[29] Farm Bureau, slip op at 8.
[30] Id.
[31] Id.
[32] *Farm Bureau*, slip op at 7 n7.

Mississippi River flooding allowed the carp to escape their ponds and enter the River system. The carp soon migrated and colonized throughout the Mississippi, Missouri and Illinois River systems. Asian carp have taken over these rivers. They can grow to an average of four feet and weigh up to 100 pounds. Asian carp can consume up to 40 percent of their body weight per day, outcompeting native species.

The Great Lakes provide valuable ecological and economic benefits to the 33 million Americans and Canadians who live in the basin, including transportation for raw materials and finished goods, freshwater for industries, drinking water for communities, recreational opportunities for both residents and tourists, and a dynamic ecosystem supporting diverse communities of plants and animals. Economic analyses have found that the annual benefit from the Great Lakes recreational boating industry and commercial sport, and tribal fisheries exceeds $16.4 billion.[1] With no natural predators, the Asian carp could devastate the Great Lakes' multibillion dollar fishing industry. In addition to the economic and ecological threats Asian carp pose to Great Lakes fisheries, Asian carp also pose an actual physical threat to boaters. The silver species of Asian carp can leap out of the water creating a hazard for boaters, fisherman, and other recreational watercraft users as the fish crash into boats, injure people and damage equipment.

The Chicago Area Waterway System

The Chicago Area Waterway System (CAWS) is located in the greater Chicago area, and it is this man-made canal system that brought the Asian carp to the Great Lakes region. The concept of constructing the CAWS began in the mid-1880s, when Chicago was struck with a series of outbreaks of waterborne illness. Wastewater from metropolitan Chicago was discharged into the Chicago River which flowed into Lake Michigan. The city drew its drinking water from Lake Michigan, near the source of the Chicago River, causing the waste to be cycled into the drinking water system. To address this issue, engineers designed a plan to make the Chicago River flow in the opposite direction and away from the drinking water supply. Construction of the Chicago Sanitary and Ship Canal began in 1892 and the canal was opened in 1900. Before the construction of the canal there was no permanent natural connection between the Great Lakes and the Mississippi or Illinois Rivers.

In 1933, the system was completed with the construction of the Illinois Waterway, enabling barges with up to a nine foot draft to pass directly from Great Lakes harbors into the Mississippi river waterways. The CAWS now serves as the backbone of the drainage, wastewater, flood control and waterborne navigation system of the greater Chicago metropolitan area. The CAWS and the Illinois Waterway are also the hydrologic connection presenting the greatest risk for inter-basin transfer of Asian Carp. The engineered waterway provides a permanent passageway for the exchange of aquatic invasive species, such as zebra mussel and round goby into the Mississippi River and now Asian carp into Lake Michigan. In short, the problem of invasive species transfer cuts both ways between the Great Lakes and Mississippi basins.

The US Army Corps of Engineers (USACE), which operates the locks of the CAWS and exercises authority over navigable waters, has the responsibility "to identify an environmentally sound method for preventing the exchange of aquatic invasive species between the Mississippi River and Great Lakes basins."[2] In an attempt to stop the movement of Asian carp toward the Great Lakes, USACE has developed the Dispersal Barrier System comprised of three separate barriers which are designed to emit a low-voltage, pulsing electric current through steel cables secured to the bottom of the canal. The electric field is meant to deter both the upstream and downstream movement of Asian carp. Development of the three barriers has been slow and riddled with problems. Even though the electric barriers have been operational, environmental DNA (eDNA) has provided evidence that Asian carp are present beyond the barriers and close to Lake Michigan, if not already in the Lake itself.

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[1] Southwick Associates, *Sportfishing in America* (2007), available at http://www.asafishing.org/images/statistics/resources/SIA_2008.pdf. (accessed April 6, 2010).

[2] US Army Corps of Engineers, *Dispersal Barrier Efficacy Study, Interim 111A*: *Fish Dispersal Deterrents, Illinois & Chicago Area Waterways Risk Reduction Study and Integrated Environmental Assessment*. USACE, Chicago, p. 80, available at http://www.lrc.usace.army.mil/pao/02June2010_InterimIIIA.pdf (accessed April 6, 2010).

It is certainly possible that Asian carp could enter the Great Lakes through other pathways, but Great Lakes states agree that the precautionary principle should instruct management practices and policies directed at eliminating the threat of Asian carp invasion through the CAWS and to prevent irreversible environmental and economic damage. The harm that reproducing populations of Asian carp would cause to the Great Lakes requires federal, state and local agencies to develop more advanced monitoring, control and removal efforts with short-term and long-term strategies.

Litigation

United States Supreme Court

The CAWS was the subject of litigation in the Supreme Court's "Diversion Case"[3] dating back to the 1920s. The Diversion Case centered on the transfer of water from Lake Michigan, through the artificial canal, and down the Mississippi.[4] On December 21, 2009 the State of Michigan filed an action against the State of Illinois after eDNA results in November 2009 indicated that Asian carp may already be beyond Lockport Lock and the Dispersal Barrier, about 43 miles from Lake Michigan. Subsequent poisoning resulted in the finding of a dead Asian carp beyond the Lockport Lock. Michigan petitioned the Court to reopen the Diversion Case or, in the alternative, to hear a new action alleging public nuisance against the State of Illinois for allowing Asian carp to threaten the waters and fisheries of the Great Lakes. The complaint also sought judicial review of the actions of the USACE, a federal agency, pursuant to the Administrative Procedure Act. Wisconsin, Minnesota, New York, Ohio, Pennsylvania and the Province of Ontario filed supporting briefs. The States also petitioned the Court to issue a preliminary injunction, enjoining the federal and local authorities to protect the Great Lakes utilizing "the best available methods to block the passage of capture or kill bighead and silver carp," including the closure of connecting navigational locks.

On January 19, 2010 the Supreme Court denied Michigan's request for an injunction.[5] Although the Court failed to issue an opinion, the Court was apparently persuaded by the State of Illinois and the Metropolitan Water Reclamation District of Greater Chicago's arguments, namely that the Supreme Court should not get involved in the Asian carp crisis, federal, state and local governments are already doing everything possible to stop the spread of carp into the Great Lakes and last, that the risk of Asian carp entering the Great Lakes is exaggerated.[6]

Michigan filed a renewed motion for a preliminary injunction to close Chicago-area locks based on new information from eDNA tests showing evidence of Asian carp in Lake Michigan, which the federal government had failed to disclose to the Supreme Court until after the Court had ruled against Michigan. In addition, new research was provided to the Court that refuted Illinois' claimed economic costs of lock closure, especially when compared to the catastrophic economic harms if Asian carp reach the Great Lakes. Unpersuaded, the Supreme Court again denied Michigan's second request for an injunction.[7] The Court also denied Michigan's motion to reopen the "Diversion Case" on April 26, 2010, as well as the alternative motion for leave to file a bill of complaint.[8] These successive rulings effectively foreclosed the opportunity for the Great Lakes states to have the Asian carp issue heard before the United States Supreme Court.

Federal District Court

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[3] *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

[4] The Diversion Case has been re-opened over the years, and currently 3.2 billion gallons of Great Lakes water a day flow through the canal and out of the basin (diversion limited to 3,200 cubic feet per second).

[5] *Michigan v. Illinois*, __ U.S. __, 130 S.Ct. 1166, 175 L.Ed.2d 970 (2010).

[6] Taylor, John C. PhD & James L. Roach, Chicago Waterway System Ecological Separation: The Logistics and Transportation Related Cost impact of Waterway Barriers (February 2, 2010), available at http://www.glu.org/sites/default/files/carp/TR_chicago_canal_report_feb10.pdf (accessed April 6, 2010).

[7] *Michigan v. Illinois*, __ U.S. __, 130 S.Ct. 1166, 175 L.Ed.2d 970 (2010).

[8] *Michigan v. Illinois*, __ U.S. __, 130 S.Ct. 2367, 176 L.Ed.2d 765 (2010).

After being rebuffed by the Supreme Court, the States of Michigan, Minnesota, Ohio, Pennsylvania and Wisconsin filed a complaint in United States District Court for the Northern District of Illinois. The complaint raised claims and issues similar to those presented in the Supreme Court proceedings, asserting public nuisance and requesting judicial review of USACE actions under the Administrative Procedure Act. The States also moved for a preliminary injunction to close the locks and take other specific management actions. District Judge Robert M. Dow denied the motion for a preliminary injunction on December 2, 2010.[9] Judge Dow concluded that the States had not demonstrated that the potential for harm caused by Asian carp was either likely or imminent to the extent that judicial intervention in the form of an injunction was warranted. The Court was not persuaded of eDNA's ability to determine the location of actual fish and held that the amount of Asian carp found to date did not warrant immediate injunctive relief. Absent from Judge Dow's order was the number of Asian carp necessary for the Court to be persuaded that the threat to the Great Lakes is real and imminent.

Michigan appealed the denial of the injunction to the United States Court of Appeals for the Seventh Circuit. On March 31, 2011, Judge Dow denied Illinois' motion to stay the case pending the appeal. The litigation may therefore continue, but no new motions can be filed until the appeal is decided.

Great Lakes and Mississippi River Inter-Basin Study

Congress directed the USACE to conduct a Great Lakes and Mississippi River Inter-Basin Study (GLMRIS) to explore options and technologies that could be applied to prevent transfer of aquatic nuisance species between the Great Lakes and Mississippi River basins. In November 2010, a draft project plan was released. The study will follow two parallel tracks. The first track will focus on the CAWS to evaluate the challenges and options for enacting measures to prevent the transfer of all aquatic invasive species through the CAWS. The second track will identify and characterize the potential risk of invasive species exchange at all other water connections between the Great Lakes and Mississippi River basins.[10] Depending on continued Congressional authorization and funding, the USACE has projected that the final recommendations for the first track of the report will not be released before 2015 and is estimated to cost $25 million. The public comment period for GLMRIS scoping under the National Environmental Policy Act closed on March 31, 2011. USACE is currently processing the written comments and comments received during a series of 12 public meetings. USACE will then provide a summary of the comments and a scoping report.

The Threat of Privatization of the Great Lakes by Bottled Water Companies

by: Amanda Cole, associate, Loyst Fletcher, Jr. & Associates.

(First place award winner in the Environmental Law Section's 2010 writing competition for law students.)

> *Nestlé wants to convert water – the source of life – from a public to a private resource. Do we want to turn control of our water to special interests?*
>
> Michigan Citizens for Water Conservation newsletter,
> March 2007[1]

Bottled water has been in existence since the mid-19th century, but since the 1970's it has become one of the fastest growing industries in the world.[2] In the early 1970's, approximately one billion liters of bottled water annually were consumed worldwide; by 2006, this amount had risen to 200 billion liters, with an annual growth rate of 10%.[3]

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[9] *Michigan v. U.S. Army Corps of Engineers,* __ F.Supp.2d __, 2010 W.L. 5018559 (N.D. Ill. 2010), also available at http://asiancarp.org/wp-content/uploads/2010/12/Judge-Dow-Order.pdf

[10] http://glmris.anl.gov/.

[1] Dempsey, *Great Lakes for Sale* (Michigan: The University of Michigan Press, 2008), p 79.

[2] Barlow, *Blue Covenant: The Global Water Crisis and the Coming Battle for the Rights to Water* (New York: The New Press, 2008), p 82.

[3] *Id.*

Citizens of the United States alone consume 32 billion liters per year of bottled water, the most of any country in the world.[4]

Unsurprisingly, the Great Lakes, one of the largest freshwater supplies in the world, is directly in the crosshairs of this burgeoning industry. The proliferation of bottled water facilities in the Great Lakes basin unfortunately coincides with a period during which this water supply is quickly being depleted. For example, Lake Superior, the world's largest freshwater lake, was recently at its lowest level in 80 years and has receded more than 15 meters from the shoreline.[5] Four trillion liters per day are taken from the Great Lakes.[6] The Great Lakes are home to six quadrillion gallons; however, less than 1% is considered renewable (recharged by rain, snowfall, and groundwater), with the remaining 99% being from glaciers from the ice age.[7] Peter Annin, associate director of the Institutes for Journalism and Natural Resources, describes this depletion issue as follows: "Think of it like a giant water bank account that earns less than 1 percent interest per year. If you start pulling water from the principal, you may need another ice age to get it back." [8]

In response to this threat, the Great Lakes states recently entered into the Great Lakes-St. Lawrence River Water Resources Compact, which prevents diversions of the Great Lakes Basin waters and imposes consumptive use limitations. [9] The Compact, however, fails to sufficiently protect against the commoditization and export of Great Lakes water.

This essay analyzes the threat of bottled water companies privatizing Great Lakes water under the Great Lakes-St. Lawrence River Basin Water Resources Compact and the lack of remedies available under Michigan law to protect citizens' most important natural resource – water, the source of life.

I. Road to the Compact

A. Boundary Waters Treaty of 1909

In 1909, the United States and Canada signed the Boundary Waters Treaty, which was the first major agreement governing the management of Great Lakes waters.[10] The Treaty prohibits diversions of boundary waters "affecting the natural level or flow of boundary waters on the other side of the [border]line" without the approval of the International Joint Commission,[11] a commission with three commissioners from both the United States and Canada. [12]

The Treaty is ineffective for two reasons. First, boundary waters are defined as "the water from main shore to main shore of the lakes and rivers and connecting waterways . . . along which the international boundary between the United States and . . . Canada passes . . . ."[13] This means that Lake Michigan and any other waters that do not have an international border are excluded from the Treaty. Second, the size of the Great Lakes is too massive for an individual

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[4] *Id.*
[5] *Id*. at 4.
[6] Id. at 99-100.
[7] Annin, *The Great Lakes Water Wars* (Washington, DC: Island Press, 2006), p 13.
[8] *Id.*
[9] See generally Council of *Great Lakes Governors, Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement,* Dec 13, 2005, <http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf > (accessed June 7, 2009) [hereinafter *Agreement]*; Council of Great Lakes Governors, *Great Lakes-St. Lawrence River Basin Water Resources Compact,* Dec 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf (accessed June 7, 2009) [hereinafter Compact].
[10] *Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada* (signed Jan 11, 1909), 36 Stat 2448 [hereinafter *Boundary Waters Treaty]*.
[11] *Id*. at art III.
[12] *Id*. at art VII.
[13] *Id*. at prelim art.

diversion to have a measurable effect on the Great Lake's water levels.[14] However, though having little actual value, the Treaty's "role in managing Great Lakes water withdrawals and diversions has international and historic status,"[15] and it paved the way for more effective future policies and legislation.

B. Great Lakes Basin Compact

Prior to the Great Lakes-St. Lawrence River Basin Water Resources Compact, the Great Lakes Basin Compact was the only congressionally-approved compact regarding Great Lakes water management.[16] The Great Lakes Basin Compact was approved in 1968 and created the Great Lakes Commission, on which each of the eight Great Lakes states are represented.[17] The Commission has the power to research relevant water use data and to "recommend uniform or other laws, ordinances, or regulations relating to the development, use and conservation of the [Great Lakes] Basin's water resources . . . ."[18] These recommendations are not binding,[19] and in the wake of the new Great Lakes-St. Lawrence River Basin Water Resources Compact, the Commission has limited value. However, the Commission continues to work "[t]o promote the orderly, integrated, and comprehensive development, use, and conservation of the water resources of the Great Lakes Basin."[20]

C. Great Lakes Charter

Another step toward today's policy of restricting large-scale withdrawals was the Great Lakes Charter. In 1985, the Great Lakes states and provinces signed the Charter in order to provide a "good-faith agreement"[2421] of information and reporting commitments involving large diversions and consumptive uses.[22] The Charter requires consultation for withdrawals that meet certain size requirements, such as withdrawals that exceed an average of five million gallons per day for a 30-day period.[23] Since the Charter is a voluntary, non-binding agreement, the Charter's terms have had little impact.[24] However, many of the cooperative provisions from the Charter have been incorporated into the new Great Lakes Compact. [25]

D. Water Resources Development Act of 1986

In 1986, Congress enacted the Water Resources Development Act (WRDA), which provides in part:

> No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of

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[14] Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U Colo L Rev 405, 417 (2006).
[15] *Id*. at 416.
[16] *Id*. at 423.
[17] *Great Lakes Basin Compact*, Pub L No. 90-419, art IV, 82 Stat 414, 416 (1968).
[18] *Id.,* art VI(7) at 417.
[19] *Id.*, art VI(14) at 418 (". . . provided that no action of the Commission shall have the force of law in, or be binding upon, any party state.")
[20] *Id*., art. I, at 414.
[21] Petrash, *Great Lakes, Weak Policy: The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact and Non-Regulation of the Water "Products" Industry*, 39 U Miami Inter-Am L Rev 145, 154 (2007). See also *Council of Great Lakes Governors, Great Lakes Charter*, Feb 22, 1985, <http://www.cglg.org/pub/charter/index.html> (accessed May 30, 2009) [hereinafter *Charter*] ("The rights of each State and Province . . . are mutually dependent upon the good faith performance by each State and Province . . .").
[22] "It is the intent of the signatory States and Provinces that no Great Lakes State or Province will approve or permit any major new or increased diversion of consumptive use of the water resources of the Great Lakes Basin without notifying and consulting with and seeking the consent and concurrence of all affected Great Lakes States and Provinces."*Id*. at 2.
[23] *Id.* at 4.
[24] Hall, n 14 *supra* at 426.
[25] *Id.*

any of the Great Lakes, for use outside of the Great Lakes unless such diversion or export is approved by the Governor of each of the Great Lake [sic] States.[26]

Also, the WRDA forbids federally funded research concerning the feasibility of diverting Great Lakes water outside the basin without the unanimous consent of all of the Great Lakes governors. [27]

Although the WRDA gave some teeth to Great Lakes water diversion restrictions, it is far from perfect. The Act provides no guidelines for the governors to assist in deciding whether to approve or deny a diversion or study.[28] It also provides for no "judicial remedy to challenge a governor's decision, even by another Great Lakes state."[29] This means that states and individuals have no private right of enforcement.[30] Although it is generally constructive to put the Great Lakes states in collective control of the Great Lakes, the lack of decision-making standards and accountability to both other Great Lake states and private citizens can result in arbitrary approvals and denials of diversions.

E. Great Lakes Charter Annex of 2001

Despite the progress that had been made since the WRDA was enacted, the Great Lakes Governors and Premiers signed an Annex to the Great Lakes Charter in 2001.[31] The Annex reaffirms the commitments to the Charter and calls for "developing an enhanced water management system that is simple, durable, efficient, retains and respects authority within the Basin, and . . . protects, conserves, restores, and improves the Water and Water-Dependent Natural Resources of the . . . Basin."[32] Addressing the above-mentioned shortcomings of the WRDA, the Annex also sets forth directives for "enacting future binding agreements, setting an appropriate decision-making standard for assessing withdrawals, encouraging public participation, and reviewing projects under [the] WRDA." [33]

To implement the Annex directives, the Water Management Working Group and Advisory Committee was established.[34] This Committee proposed and negotiated agreements and resolved "numerous interstate and interprovincial issues . . . ."[35] These negotiations resulted in the Great Lakes - St. Lawrence River Basin Sustainable Water Resources Agreement and Compact. [36]

II. The Compact And Part 327

A. Great Lakes-St. Lawrence River Basin Water Resources Compact and Agreement

On December 13, 2005, the Great Lakes Governors and the Premiers gathered in Milwaukee, Wisconsin, and signed the Great Lakes-St. Lawrence River Basin Water Resources Compact and Agreement.[37] In order for a compact to

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[26] *WaterResources and Development Act*, 42 USC 1962d-20(d) (2000). This section only applies to diversions after Nov. 17, 1986. Id. at 1962d-20(f).

[27] *Id*. at 1962d-20(e). This prohibition does not apply to studies under the direction of the International Joint Commission pursuant to the Boundary Waters Treaty of 1909.

[28] Hall, n 14 *supra* at 429.

[29] *Id.*

[30] See *Little Traverse Bay Bands of Odawa Indians v Great Spring Waters of America, Inc*, 203 FSupp2d 853 (WD Mich 2002). In determining this issue, the Court looked to the four factors laid out in *Cort v Ash*, 95 US 66 (1975): (1) legislative intent, (2) consistency of remedy with underlying purposes of legislative scheme, (3) whether plaintiff was member of class for whose benefit statute was enacted, and (4) whether cause of action is one traditionally relegated to state law.

[31] Council of Great Lakes Governors, *The Great Lakes Charter Annex*, June 18, 2001, http://www.cglg.org/projects/water/index.asp(accessed May 31, 2009) [hereinafter Annex].

[32] *Id*. at 3.

[33] Petrash, n 21 *supra* at 155.

[34] Hall, n 14 *supra* at 434.

[35] *Id*.

[36] *Id*. at 435.

[37] See generally *Compact.*

become binding and effective, each involved state must pass legislation that adopts it, and then Congress must give its consent.[38] As of May 27, 2008, all eight Great Lakes states had enacted the Compact,[39] and on October 3, 2008, it was signed into law by the President.[40]

The Agreement and Compact collectively recognize that the Great Lakes Basin waters are public natural resources shared and held in trust by the States and are part of a single hydrologic system.[41] The purpose of the Compact is to prevent diversions of the Basin waters outside of the Basin, and to impose consumptive use limits within the Basin.[42] New diversions are banned under the Compact, subject to some exceptions,[43] and the approval of new or increased withdrawals and consumptive uses must adhere to a consistent standard of review.[44] Overall, "[p]olicy-makers, the public, and . . . environmental groups praise the Agreement and Compact, mostly citing its ban on large-scale diversions, but [they also] overlook or underestimate other implications." [45]

B. Great Lakes Preservation Act (Part 327)

Michigan has recently enacted legislation that affirms the requirements of the Compact and establishes state programs to manage large water withdrawals. The Great Lakes Preservation Act (Part 327) of the NREPA was amended to prohibit new or increased large quantity water withdrawals that cause an "adverse resource impact," which is determined through using an online water withdrawal assessment tool.[46] Like the above agreements, Part 327 recognizes that the Great Lakes Basin water are "Valuable public natural resources held in trust by the state. . . ." [47]

Part 327 now requires a landowner to register their property if it is capable of withdrawing an average of at least 100,000 gallons per day from the waters of the state.[48] Further, all new or increased withdrawals from inland waters over 2 million gallons per day and from the Great Lakes over 5 million gallons per day now require a permit.[49] While this legislation is very significant in protecting the Great Lakes Basin waters, it overlooks and is inconsistent with the declaration that the Basin waters are subject to the public trust doctrine, which is more fully discussed below.

III. Public Trust Doctrine

A. Origins of the Public Trust Doctrine

Throughout history, the Public Trust Doctrine has recognized that certain elements of nature, such as air and water, are so essential to life that they ought to be held in and governed as a "public trust." The origins of the public trust doctrine are traceable to ancient Roman laws. The ancient laws of the Roman Emperor Justinian held that the air,

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[38] *Id*. at sec 9.4; see also US Const, art I, § 10, cl 3 ("No State shall, *without the Consent of Congress* . . . enter into any Agreement or Compact with another State, or with a foreign power . . .")[emphasis added].
[39] See Minn Stat Ann 103G.801 (West 2007); 45 Ill Comp Stat Ann 147/99 (West 2007); Ind Code 14-25-15 (2008); NY Envtl Conserv Law 21-1001 (McKinney 2008); Wis Stat Ann 281.343 (West 2008); Ohio Rev Code Ann 1522.01 (West 2008); Pa Stat Ann Tit 32, 817.22 (West 2008); MCL 324.34201 (West 2008).
[40] See *Great Lakes – St. Lawrence River Basin Compact*, (signed Oct 3, 2009), 122 Stat 3739.
[41] *Compact*, n 9 supra at § 1.3(1)(a) and (b).
[42] See generally *Compact*, n 9 supra.
[43] *Id*. at § 4.8-4.9.
[44] *Id*. at § 4.10.
[45] Petrash, n 21 *supra* at 138.
[46] MCL 324.32721(1) and MCL 324.32803(5)(a).
[47] MCL 324.32702(1)(d).
[48] MCL 324.32701(p).
[49] MCL 324.32723.

running water, and sea were incapable of private ownership; they were dedicated to the use of the public.[50] After inclusion in the Magna Carta in 1215, this Doctrine became part of English common law. [51]

After the American Revolution, each of the original states succeeded to this right and duty. Each of the original states took control over their respective navigable waters for the public's common use. [52] Subsequently, all after-admitted states acquired the same rights over their tide and submerged lands upon admittance.[53] This means title to navigable waters and the land underneath them are held by each state in trust for the public.

B. Public Trust in the Great Lakes

"[W]ater is and always has been a public resource."[54] The public trust doctrine has long guided decisions about Great Lakes Basin water.[55] The navigable waters of the Great Lakes are held in trust by their respective states and should be managed for the benefit of the public.[56] The public trust doctrine has slight variations in each of the Great Lakes states, but the key principles remain the same; under the public trust doctrine, the state is the trustee, the waters are trust property, and the public are the beneficiaries.

Unlike other types of property, water has a unique legal status that weighs heavily against defining it as a product that can be bought or sold.[57] Property rights in water have been described as usufructuary, meaning that the public has the use and enjoyment of water without actual ownership of it.

> [P]roperty rights in water have been delineated in very limited terms. Water has been described as merely usufructuary; as belonging to the public; as subject to public servitudes; as incapable of full ownership; as subject to constraints that it be used nonwastefully, reasonably, beneficially, etc. [58]

Judicial decisions affecting the Great Lakes states have elucidated these concepts. For example, in *Illinois Cen R Co v Illinois,* the United States Supreme Court had to determine who held title to submerged lands on the shore of Lake Michigan. The state of Illinois had granted title to submerged lands of Lake Michigan to Illinois Central Railroad Company and later revoked the grant, claiming that the state held title to the land according to the public trust doctrine. The Court held that "the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake" cannot be abdicated and "cannot be relinquished by a transfer of the property."[59] However, the Court noted that there are limited circumstances where this trust can be alienated:

> The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be

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[50] Institutes of Justinian 2.1.1.
[51] Magna Carta, Clause 33, 1215, http://www.fordham.edu/halsall/source/magnacarta.html (accessed July 9, 2009)("All fish-weirs shall be removed from . . . throughout the whole of England . . . .").
[52] *Martin v Waddell's Lesseee,* 41 US 367, 410 (1842).
[53] *Pollard v Hagan*, 44 US 412, 228-229 (1845)(Held that the original States had reserved to themselves the ownership of the shores of navigable waters and the soils under them and that under the principle of equality, the title to the soils of navigable water passes to a new State upon admission).
[54] Sax, *The Limits of Private Rights* in Public Waters, 19 ENVTL . 473, 475 (1989).
[55] *Illinois Cent R Co v Illinois*, 146 US 387, 435 (1892) [hereinafter Illinois Cent].
[56] *Id*. at 436-47.
[57] Sax, n 54 *supra* at 475 (explaining that water is a public resource incapable of private ownership); Scanlan, Sinykin & Krohelski, *Realizing the Promise of the Great Lakes Compact*: *A Policy Analysis for State Implementation,* 8 Vt J Envtl L 39, 45 (2006-2007).
[58] Sax, *Rights that "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 Loy LA L Rev 943, 944 (1993).
[59] *Illinois Cent*, n 55 *supra* at 452-53.

> alienated, except in those instances . . . of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. [60]

Therefore, a state cannot surrender control over public trust lands or waters to a private company unless it is a relatively small conveyance that does not substantially impair the public's right of use, or the conveyance is in furtherance of the public's interest, such as advancing navigation, public access, or commerce.

One of the first cases in which the United States Supreme Court dealt with water diversions in relation to the public trust doctrine was *Hudson Cty Water Co v McCarter*.[61] In *Hudson*, the Court upheld the right of New Jersey to prohibit the diversion of water from the Passaic River to consumers on Staten Island, New York.[62] The Court stated:

> [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. The public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we of opinion that the private property of riparian proprietors cannot besupposed to have deeper roots . . . . The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health. [63]

According to public trust expert, Joseph Sax, "[t]his may be the most important statement the Court has ever made about the constitutional status of water rights."[64]

The Great Lakes Charter, the Great Lakes Charter Annex of 2001 and Part 327 clearly affirm the public trust doctrine. The Charter begins with the Great Lakes Governors and Premiers declaring that "[t]he water resources of the Great Lakes Basin are precious public natural resources, shared and held in trust by the Great Lakes States and Provinces."[65] The Charter also describes the role of the Great Lakes States and Provinces as trustees of the waters of the Great Lakes Basin.[66] Similarly, the first finding in the Annex is that "[t]he Great Lakes are a bi-national public treasure and are held in trust by the Great Lakes States and Provinces."[67] Finally, Part 327 declares that "[t]he waters of the state are . . . held in trust by the state, and the state has a duty as trustee to manage its water effectively for the use and enjoyment of present and future residents . . . ."[68]

In accordance with the prior charters, the Great Lakes-St. Lawrence River Basin Water Resources Compact "echoes the finding that Great Lakes Basin waters are 'precious public natural resources and held in trust' by the

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[60] Id. at 455-56.
[61] *Hudson Cty Water Co v McCarter*, 209 US 349 (1908).
[62] *Id*. at 356-57.
[63] Id. at 356.
[64] Sax, n 54 *supra* at 480.
[65] *Charter*, n 21 supra.
[66] *Id*. "As trustees of the Basin's natural resources, the Great Lakes States and Provinces have a shared duty to protect, conserve, and manage the renewable but finite waters of the Great Lakes Basin for the use, benefit, and enjoyment of all their citizens . . . ."
[67] *Annex*, n 31 *supra* at 3.
[68] MCL 324.32702(c).

states."[69] The Compact also reiterates the duties defined in the Annex for the Great Lakes States and Provinces of protecting, conserving, and managing the waters of the Basin for the benefit of the public.[70]

C. Does the Public Trust Doctrine Apply to Groundwater?

As previously noted, the public trust doctrine has historically only applied to navigable waters. Some states have expanded this to apply to non-navigable tributaries and wetlands that directly affect the navigable waters.[71] At least one state, Hawaii, has expanded the doctrine to groundwater, irrespective of its impact on navigable waters.[72]

The Compact and Part 327 recognize that the public trust doctrine applies to groundwater. In the Compact, "Waters of the Basin or Basin Water" is defined to include "Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater . . . ."[73] Part 327 echoes an almost identical definition of "Waters of the Great Lakes basin."[74] However, public trust standards have not been incorporated into the decision-making standard of the Compact.[75] This lack of standards "creates a significant legal dilemma, since . . . the private commercialization or diversion of public trust water in many instances would violate the public trust doctrine."[76]

Water that is subject to the public trust doctrine cannot be "disposed of, alienated, or transferred for private commercial purposes unless there is explicit legislative authority and the purpose is primarily a public one."[77] Groundwater should be subject to this same standard; the Compact covers all waters of the Great Lakes Basin, including groundwater, so "it is reasonable to conclude that groundwater also is intended to be subject to the public trust doctrine." [78]

D. Public Trust as Applied to Bottled Water

Although the Compact and prior charters explicitly recognize that all Great Lakes waters are subject to the public trust doctrine, there is a major inconsistency with the public trust doctrine found in the Compact – the 5.7 gallon exception. This same exception is found in Part 327.[79] The Compact clearly prohibits the bulk transfer of water out of the Basin in any container greater than 5.7 gallons.[80] However, each state has the discretion to determine how to regulate the removal of water in containers of 5.7 gallons or less.[81] This provision of the Compact allows "private corporations to take water out of the public trust, without compensating the public for it, and is inconsistent with the public trust doctrine." [82] This exception most prominently comes into play with bottled water companies. Because of this loop-hole, these companies can tap into a state's groundwater supply and divert large quantities of water in individual, small bottles. Bottled water companies profit from taking a state's groundwater without compensating the public. Because

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[69] *Compact,* n 9 *supra* at § 1.3(1)(a).
[70] *Id*. at § 1.3(1)(f).
[71] *Omernik v State*, 64 Wis2d 6, 12-13; 218 NW2d 734, 739 (1974). The court held that a "statute generally prohibiting diversion of water from lakes and streams . . . applies to diversions from nonnavigable . . . streams." *Just v Marinette Cty*, 56 Wis2d 7, 19-20; 201 NW2d 761, 769 (1972). "Land adjacent to or near navigable waters . . . are subject to . . . public trust powers of the state . . . ."
[72] Haw Const art XI, § 7. "The State has an obligation to protect, control and regulate the use of Hawai'i's water resources for benefit of its people." *In re Water Use Permit Applications*, 94 Hawai'I 97, 9 P3d 409 (2000). "[T]he public trust doctrine applies to all water resources without exception or distinction." Id. at 134.
[73] *Agreement*, n 9 *supra* at §1.2.
[74] MCL 324.32701(qq).
[75] See generally *Id*. at §4.11.
[76] Olson, *Navigating the Great Lakes Compact: Water, Public Trust, and International Trade Agreements*, 2006 Mich St L Rev 1103, 1130 (2006).
[77] *Id.*; see also *Illinois Cent*, 55 n *supra* at 423; *Collins v Gerhardt*, 211 NW 115, 117-118 (Mich 1926); People ex rel Scott v Chi Park Dist, 360 NE2d 773, 779 (Ill 1976).
[78] *Olson*, n 76 *supra* at 1130.
[79] MCL 324.32701(p).
[80] *Agreement,* n 9 *supra* at § 4.12(10).
[81] *Id*.
[82] Scanlan, *Protecting the Public Trust and Human Rights in the Great Lakes*, 2006 Mich St L Rev 1333, 1345 (2006).

groundwater is covered by the Compact and the Compact holds in trust all water of the Great Lakes Basin, this could violate the public trust doctrine. However, the courts have not recognized a situation like this to be a violation of the public trust doctrine.

In 2000, Nestlé Waters North America Inc. (Nestlé) purchased groundwater rights to 139 acres of property on the shore of Osprey Lakes in Mecosta County, Michigan.[83] Four wells were installed on the property and Nestlé prepared to pump 400 gallons of groundwater per minute for the production of bottled water.[84] Michigan Citizens for Water Conservation (MCWC), a non-profit corporation formed to protect water resources in Michigan, brought suit seeking an injunction on behalf of 265 members that were riparian owners in the disputed area.[85] Six counts were listed in the complaint: 1) an injunction to prevent the construction of wells, wellhouses, and pipelines to transport the water, 2) a violation of common-law riparian rights, 3) violation of common-law rules governing diversions of groundwater, 4) violation of the public trust doctrine, 5) unlawful taking of public resources, and 6) violation of the Michigan Environmental Protection Act (MEPA).[86] The trial court dismissed all counts except the common-law groundwater claim and the MEPA claim.[87] The court found that the public trust doctrine did not apply because the water involved was not navigable.[88] MCWC appealed this dismissal and the appellate court also found navigability to be the test as to whether the public trust doctrine will apply.[89] However, MCWC was ultimately successful in obtaining an injunction under common-law groundwater rights and MEPA, which will be discussed below.

IV. Great Lakes Water as a "Product"

A. "Product" Loophole and NAFTA

Even if the 5.7 gallon exception to diversions found in the Compact were to be stricken, the Compact contains another exception that promotes the privatization of the Great Lakes water. Under the Compact, "diversion" is defined as "a transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer . . . but does not apply to Water that is used in the Basin or Great Lakes watershed to manufacture or produce a Product that is then transferred out of the Basin or watershed."[90] "Product" is then defined as "something produced in the Basin by human or mechanical effort . . . and used in manufacturing, commercial or other processes or intended for intermediate or end use consumers." [91]

Bottled water clearly falls within this definition of a product, and is therefore not prohibited as a diversion by the Compact. Also, because bottled water is considered a product, it is subject to the North American Free Trade Agreement (NAFTA), which states that no Party may adopt or maintain any prohibition or restriction on the importation of any good . . . or on the exportation or sale . . . of any good.[92] It also states that "[e]ach Party shall . . . accord to goods and service providers of another Party . . . treatment no less favorable than that it accords to like goods . . . of any other country."[93] However, a party may enact restrictions that are appropriate to pursue "legitimate objectives of safety or the protection of human, animal or plant life or health, [or] the environment or consumers."[94] Therefore, once a product – including

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[83] *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc,* 479 Mich 280, 286; 737 NW2d 447 (2007) [hereinafter MCWC].
[84] *Id*. at 287.
[85] *Id*.
[86] *Id*. at 288.
[87] *Id*.
[88] *Id.*
[89] *Id*. The court determined the test of navigability to be whether the water is capable of floating rafts or logs.
[90] *Compact*, n 9 *supra* at § 1.2.
[91] *Id.*
[92] *Canada – Mexico – United States: North American Free Trade Agreement,* 32 ILM 289, art 309.
[93] *Id.* at art 904.
[94] *Id.*

bottled water - has been placed into the stream of commerce, it is subject to NAFTA and any restrictions on it must be justified. U.S. House Representative Dennis Kucinich describes this dilemma in the context of the Compact as follows:

> If a state cannot justify the need for the 5.7 gallon limit, it is not defensible and would collapse. For example . . . it would be difficult for a state to defend the prohibition of a transfer of 100 million gallons a year in 1000 10,000-gallon containers when a transfer of 200,000 5-gallon containers would be allowed under the 5.7 gallon limit, particularly if the water was removed from a water source that would result in the same or lesser impacts.[95]

James Olson, environmental law attorney and expert, suggests that in order to fix this problem, a state must expressly impose clear directives that indicate that any transfer of Great Lakes water is a diversion, not a product or commodity.[96] Mr. Olson states, in reference to international trade agreements, that:

> [t]he clearest way to ensure the export of water, in any form, is prohibited as a diversion is to add "packaged water in any size container" to the definition of "diversion." In this way, "bottled water" or water in containers less than 5.7 gallons can be prohibited consistent with commerce and trade law except where treated differently in the Compact and state law.[97]

Without these changes to the Compact, this major loophole will lead to "privatization of Great Lakes water for commercial sale, thus undermining the intent of the agreement."[98]

V. Remedies Available Against Bottled Water Companies

A. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*

Although there are significant obstacles to challenging bottled water diversions, there are some limited remedies available. As previously noted, the MCWC brought suit on behalf of riparian owners in an area where Nestlé (defendant) planned to pump 400 gallons per minute for the production of bottled water.[99] The trial court granted summary disposition in favor of Nestlé or dismissed all counts except for the common law groundwater and MEPA claims.[100] The trial court held that the defendant's pumping had harmed and would continue to harm the plaintiffs' riparian interests, and the defendant's water withdrawals violated MEPA by unlawfully diminishing an inland lake or stream and draining water from a wetland.[101] The court issued an injunction and ordered the defendant to terminate all water withdrawals in the area.[102] On appeal, the defendant argued that the trial court erred in ruling that the pumping unlawfully interfered with plaintiffs' riparian rights because it claimed that the balancing test found in 4 Restatement Torts, 2d, § 858 is the proper test.[103] The court rejected this rule, but also rejected the trial court's hybrid rule "as contrary to the principles

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[95] *Letter to House Committee on the Judiciary*, Aug 20, 2008, <http://kucinich.house.gov/UploadedFiles/Kucinich%20Compact%20Committee%20Language%20Request.pdf> (accessed July 29, 2009) [hereinafter *Letter*].
[96] *Olson*, n 76 *supra* at 1127.
[97] *Id.*
[98] *Letter*, n 95 *supra*.
[99] *Michigan Citizens for Water Conservation v Nestlé Waters North American Inc*, 269 Mich App 25, 709 NW2d 174 (2005) [hereinafter *Nestlé]*. http://courts.michigan.gov/supremecourt/Clerk/01-07/130802/130802-Opinion.pdf
[100] *Id*. at 38.
[101] *Id*.
[102] *Id*.
[103] *Id.* at 52. 4 Restatement Torts, 2d, § 858 states that "A proprietor of land . . . who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless (a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure, (b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground

established by Michigan authorities dealing with competing water uses."[104] Instead, the court found that a reasonable use balancing test similar to the Restatement's rule was proper.[105]

The court looked to the historical doctrines that have applied to water disputes in Michigan, such as the natural flow doctrine and the reasonable use doctrine. The court ultimately concluded that a reasonable use balancing test is the law that is applicable to issues between riparian and groundwater users.[106] The court stated the underlying principles of this process of balancing competing water uses:

> First, the law seeks to ensure a "fair participation" in the use of water for
> greatest number of users. Hence, the court should attempt to strike a proper balance between protecting the rights of the complaining party and preserving as many beneficial uses of the common resource as is feasible. Second, the law will only protect a use that is itself reasonable. A plaintiff whose water use has little value or is excessive or harmful will be entitled to no protection. Third, the law will not redress every harm, no matter how small, but will only redress unreasonable harms. Therefore, a plaintiff must be able to demonstrate not only that the defendant's use of the water has *interfered with the plaintiff's own reasonable use*, but also that interference was *substantial*
> [emphasis added].[107]

The factors to be considered in this balancing test are "(1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of the water use, and (6) any other factor that may bear on the reasonableness of the use."[108]

As for purpose of use, natural purposes are given preferential treatment as opposed to artificial ones.[109] Although the court did not define "natural purposes," "artificial purposes" is defined as "those which merely increase one's comfort and prosperity and do not rank as essential to . . . existence." [110] Preference is also given to a riparian owner's uses over a use that ships the water away.[111] For suitability of use, the court will assess "the nature of the water source and its attributes."[112] This is because certain water sources would be affected more or less by withdrawals than others.[113] In looking to the harm and benefits, the court should consider the economic effects on the parties and the social benefits and costs of the use.[114] The court also must look into "the extent, duration, necessity, and application of the use, including any effects on the quantity, quality, and level of the water."[115]

In applying that test, the court stated that the plaintiffs' use of the Dead Stream was a reasonable use because they utilize the stream for boating, wildlife observation, swimming, and fishing.[116] However, the defendant's use of the water also served a beneficial purpose, as the bottling plant employed 140 people, and the plant and equipment provided a significant source of tax revenue.[117] Because of this, its use was not inherently unreasonable.[118] The court

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water, or (c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water."

[104] *Nestlé*, n 99 supra at 52.
[105] *Id*.
[106] Id. at 68.
[107] *Id.* at 69-70.
[108] *Id*. at 71.
[109] *Id*. at 72.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 73. "Negative social effects should weigh against the use, and positive social effects should weigh in favor of a determination of reasonableness."
[115] *Id*.
[116] *Id*. at 74.
[117] *Id*. at 74-75.

noted that although the plaintiffs' recreational use and the defendant's commercial profit use were both artificial uses, "the plaintiffs' uses were directly related to the use and enjoyment of their riparian land, whereas the defendant's use was not directly related to the land."[119] Because of this, plaintiffs' were entitled to some preference.[120] The court also looked to the degree of harm to the Dead Stream and weighed the harm of the stream losing approximately 24 percent of its base flow and 2 inches of the natural fluctuations against the defendant's commercial benefits. [121]

The court ultimately held that the defendant's withdrawal of 400 gallons per minute was unreasonable under the common-law test.[122] However, the defendant is allowed a "fair participation" in the groundwater.[123] The court concluded that an injunction was the proper remedy,[124] but stated that the "defendant is entitled to make reasonable use of the available water resources, and plaintiffs may properly be compelled to endure some measure of loss as long as an adequate supply of water remains for their own water uses."[125]

Next, the court turned to MEPA. Under MEPA, "a party 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.'"[126] The trial court had held that the plaintiffs made out a prima facie MEPA case because the defendant violated the Inland Lakes and Streams Act (ILSA) and the Wetlands Protection Act (WPA).[127] However, the appellate court noted that under MCL 324.1701(2), if a statute or rule's standard is not a pollution control standard, a court cannot use the standard to determine whether a prima facie MEPA claim is made.[128] The court determined that neither ILSA or the WPA were pollution control standards, so a prima facie case was not made.[129]

The Michigan Supreme Court later narrowed the scope of remedy for the affected riparian landowners. The areas affected by the defendant's pumping in this case involved Osprey Lake, Thompson Lake, the Dead Stream, and numerous wetlands. [130] The appellate court had held that the plaintiffs had standing "with respect to all natural resources at issue . . ." because all waters involved in the case are connected and any impact to one particular resource will affect others in the area.[131] The Michigan Supreme Court noted that the plaintiffs provided no evidence that they actually used or physically participated in activities on Osprey Lake and the wetlands; therefore, the plaintiffs could not establish injury in fact as required to have standing for a MEPA claim.[132] This failure to recognize the interconnectedness of Great Lakes water severely limited the cause of action available to citizens of a state to only those water resources that they actually use. This holding leaves many water resources that are infrequently used open to destruction by private companies.

The parties reached a settlement upon remand on the issue of defendant's "fair share" of the groundwater.[133] Nestlé agreed to pump only 218 gallons per minute.[134] This settlement was reached after Nestlé conducted "extensive hydrologic and ecologic assessments to assure the long-term sustainability of the (groundwater) source and surrounding

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[118] *Id.*
[119] *Id*.
[120] *Id.*
[121] *Id*. at 76.
[122] *Id. at 78.*
[123] *Id*.
[124] *Id.*
[125] *Id*. at 80
[126] *Id*. at 88, quoting MCL 324.1701(1).
[127] *Id*.at 90.
[128] *Id*.
[129] *Id*. at 93-95.
[130] MCWC, n 83 supra at 285-86.
[131] *Id*. at 289.
[132] *Id.* at 285, 289-90.
[133] *Settlement reached in Mecosta County water dispute*, Chicago Tribune, July 7, 2009, <http:archives.chicagotribune.com/2009/jul/07/news/chi-ap-mi-bottledwater> (accessed July 31, 2009).
[134] *Id.*

environment."[135] The president of the MCWC called this settlement a victory, stating that "[t]his will leave more water in the system and should eliminate the more serious impacts."[136]

VI. Conclusion

The Great Lakes water resources are endangered by the threat of privatization by bottled water companies. The Compact and Part 327 not only fail to protect this natural resource, but they actually promote the taking of a public property interest by private companies. The gaping 5.7 gallon and "product" loopholes clearly violate the public trust doctrine, and there seems to be little recourse for the citizens of a Michigan. Major changes need to be made to the Compact and Part 327, such as eliminating the 5.7-gallon container provision and not allowing water to become a "product." If the treatment of bottled water is not changed by the legislature and judiciary, the Great Lakes water may begin to substantially diminish due to this privatization.

Going Local: How the Property Assessed Clean Energy Act and Feed-in Tariffs Could Decentralize Michigan's Energy Grid

By: Ross Hammersley, Olson, Bzdok & Howard, P.C., and Kaitlyn Sundt, Wayne State University Law School

The January 2011 issue of the *Michigan Bar Journal* was devoted to the many recent shifts in energy law in Michigan, and is certainly recommended reading for all who are interested and/or involved in the field.[1] However, while many of the recent statutory changes are still being digested by the regulated community and legal practitioners alike, the rapidly evolving energy field continues to move forward on a number of fronts. One field in which many jurisdictions and utilities continue to innovate is the facilitation and development of "distributed" or decentralized electricity generation, where commercial, industrial and residential property owners are able to generate their own electricity and sell their excess energy back to the grid.[2]

Local Generation: PACE

When it comes to businesses and homeowners generating their own electricity, the refrain we hear most often concerns the difficulty in determining whether the capital investment necessary to acquire and install a set of solar panels or a high-efficiency furnace will result in sufficient cost savings in an appreciably short amount of time. Michigan's Property Assessed Clean Energy (PACE) Act is one method by which a number of states help ease these capital cost hurdles and incentivize energy efficiency gains.[3] The PACE legislation does this by authorizing the creation of local programs under which municipalities may finance the initial capital cost of energy efficient improvements on behalf of a property owner, and then levy a special tax assessment upon that property.

This framework is ideal for the property owner because it allows the owner to benefit immediately from the upgrade while spreading the large up-front costs over time. Furthermore, because the assessment runs with the land, the property owner is not burdened with the re-payment responsibility should the owner elect to sell.

The Act is currently focused solely on "privately owned commercial or industrial real property,"[4] but residential property owners could also conceivably benefit from what the PACE program has to offer. Although current

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[135] *Id.*
[136] *Id.*
[1] See the archived issue here: http://www.michbar.org/journal/home.cfm?viewtype=archive&volumeid=131.
[2] *See* "Michigan's Ten Steps", *available* at http://www.michigan.gov/energy/0,1607,7-230-54278-223258--,00.html
[3] *See* Property Assessed Clean Energy Act (Public Act No. 270 of 2010), MCL 460.931 *et seq*.
[4] MCL §460.933(g).

Federal Housing Finance Agency rulings and other complications preclude applying Michigan's PACE program to the residential sector at this time, the success of commercial and industrial applications of PACE, could result in significant energy savings, reductions in greenhouse gas emissions, the creation of "green" job opportunities, and mitigated reliance on the traditional electric grid.[5] If these benefits are realized, and state and federal agencies become accustomed to the operation of PACE programs, that could eventually lead to the removal of obstacles impeding residential PACE implementation as well.

Feeding Energy Back to the Grid

Former Department of Energy, Labor and Economic Growth Director Stanley "Skip" Pruss describes distributed generation and the creation of a "smart" grid as a new and "different paradigm" that presents Michigan with an opportunity to take part in the evolution of the trillion dollar energy industry.[6] By facilitating innovation in this field, Michigan could potentially reap significant economic investment and employment opportunities while also diversifying the state's economy.

While the PACE legislation helps to clear some of the initial investment hurdles involved with local generation, a property owner is also likely to wonder whether there are ways to maximize the return on the owner's energy investment. One commonly used tool for doing so is the "feed in tariff" ("FIT"). Also known as "standard offer contracts," "fixed-price policies," "minimum price policies," "feed-in laws," and "advanced renewable tariffs," a FIT program typically allows the property owner/customer to enter into a long-term contract for the sale of the energy at fixed rates.[7] The National Renewable Energy Laboratory outlines a number of different ways to award FIT payments to a project developer for the energy produced, including a fixed-price incentive, an auction or bid process, the actual levelized cost of renewable energy generation, or the "value" in terms of the costs avoided by the utility, or by society generally, in facilitating the development of renewable energy.[8]

Many global businesses are already well-acquainted with FIT operation due to their widespread use throughout Europe, but only a handful of jurisdictions in the United States and Canada, such as Ontario, California, and British Columbia, have begun to experiment with the creation of such programs.[9] Here in Michigan, some commercial and municipal utilities have begun to investigate and develop pilot FIT programs, while a number of advocacy groups continue to work on policy proposals that could complement and guide the development of more FIT programs. For example, Consumers Energy launched an "Experimental Advanced Renewable Program" for wind and solar energy generation in 2009 and quickly filled its program participation allotments. The Traverse City Light and Power Board has been presented with FIT proposals and has hosted public presentations and discussions on the topic. Clearly, FIT programs remain in the earliest stages of development in this state. However, when it comes to facilitating the next stage of growth for Michigan's budding renewable energy industry, the development of feed-in tariff programs could play an integral role in giving project developers the monetary incentives they need to invest in clean, efficient, renewable, and locally-generated power.

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[5] Unlocking the Building Retrofit Market: Commercial PACE financing - A Guide for Policymakers, Derek Supple and Olivia Nix, December 2010

[6] Sandra Svoboda, *Green it up*, MetroTimes (January 26, 2011), available at http://metrotimes.com/news/green-it-up-1.1095385.

[7] *A Policymaker's Guide to Feed-in Tariff Policy Design*, National Renewable Energy Laboratory (July 2010), available at http://www.nrel.gov/docs/fy10osti/44849.pdf.

[8] *Id*. at 7.

[9] *Id.*