



## MICHIGAN ENVIRONMENTAL LAW JOURNAL Vol. 29, No. 1, Winter 2011, Issue 82

### Message From the Chair:

by: Charlie Denton, Barnes & Thornburg LLP

It is with great excitement and anticipation that I write my first “Message from the Chair” for the revitalized *Environmental Law Section Journal*. This *Journal* epitomizes what I meant by my comments at the Annual Meeting about our rich tradition and need to stay relevant. This *Journal* builds on the best of the acclaimed *Michigan Environmental Law Journal* tradition of scholarly articles, but also seeks to provide timely and helpful practical information for Michigan’s environmental lawyers.

It can be dangerous to pass out “thanks” because someone is always overlooked; however, it is no understatement to say that this new edition of our *Journal* would not have happened without the efforts of our immediate past-Chair Chris Dunsky. Our willing and energetic “co-editors” are also deserving of our gratitude and we look forward to future editions as the fruits of their labors. Stay tuned for other exciting Environmental Law Section developments, including programs and committee meetings through [our website](#).

### ELS is on Facebook:

If you’ve got a Facebook page become a member of the Environmental Law Facebook group page. The ELS page will be used to promote events and discussions, as well as a marketing tool to expand our environmental law connections and promote section activity.

 [Follow us on Facebook](#)

## Upcoming Events:

### **Part 201 Update: Legislative Amendments and Recent Case Law**

**Wednesday, February 16, 2011**

**4:30-6:30 p.m.**

**Foster Swift Collins & Smith PC**

**313 South Washington Square**

**Lansing, MI 48933-2193**

**FREE (Refreshments provided)**

Presented by the Brownfields & Hazardous Substance Committee.

#### Discussion Topics/Speakers

- In Part I of the program, Troy Cumings, of Warner Norcross & Judd LLP, will give us a “behind-the-scenes” peek into the process of that led up to passing of the Part 201 legislative amendments and a summary of the major changes.
- In Part II of the program, Charlie Denton, of Barnes & Thornburg LLP, and Sharon Newlon, of Dickinson Wright PLLC, will present the recent Court of Appeals decisions in [A.D. Transport Inc. v. Michigan Mat. & Aggregates Co.](#) and [1031 Lapeer LLC v. Rice](#) and lead a discussion about the issues these decisions raise for clients providing notice per Part 201 when transferring real property.

If you are not available to attend in-person, you can participate by Conference Call: 800-270-1153,  
Pass Code: 123915#

Contact: Tammy Helminski at [thmelminski@dickinsonwright.com](mailto:thmelminski@dickinsonwright.com) or 313-223-3057.

### **ELS Council Meeting**

**Wednesday, February 16, 2011**

**6:30 p.m. (following the Part 201 Update)**

**Foster Swift Collins & Smith PC**

**313 South Washington Square**

**Lansing, MI 48933-2193**

Section members are welcome to attend.

## **Air Quality Regulations in 2011: Greenhouse Gases and Beyond**

**Tuesday, April 12, 2011**

**8:30 a.m. to 1:00 p.m. (registration begins at 8:00 a.m.)**

**MMA Headquarters, 620 S. Capitol Avenue, Lansing [\[directions\]](#)**

**\$50 (lunch included)**

Join us for the second annual joint program with the Environmental Law Section Air Quality Committee and the Michigan Manufacturers Association. Enjoy a half-day program featuring updates on the most urgent air quality regulatory issues facing Michigan manufacturers in 2011.

### **Discussion Topics/Speakers**

- The Science of Climate Change -- Dr. George Wolff, Principal Scientist, Air Improvement Resource, Inc.
- Michigan Department of Environmental Quality Update -- Dan Wyant, Director, MDEQ
- Air Dispersion Modeling Challenges Presented by Recent NAAQS -- Alan M. Greenberg, Partner, Horizon Environmental
- NAAQS Issues Affecting Michigan -- Chuck Hersey, Southeast Michigan Council of Governments
- Greenhouse Gas Regulatory, Legislative and Judicial Developments -- S. Lee Johnson, Partner, Honigman Miller Schwartz and Cohn
- MACT Standards Development -- Steve Kohl, Partner, Warner Norcross & Judd

### **Who Should Attend**

CEOs, CFOs, controllers, plant managers, environmental managers, facility managers and accountants, and persons responsible for environmental reporting

[Register online](#) or contact MMA's LeAnn Hicks, at 800-253-9039 (press 9 and ext. 557) or 517-487-8557.

## **ELS Celebrates its 30th Anniversary This Fall:**

Plans are underway for the Michigan Environmental Law Section's 30<sup>th</sup> anniversary, to be held in late September or October. The 30<sup>th</sup> anniversary committee is planning a headline event to honor one of the nation's first environmental law sections, highlighting where we were, where we are, and where we're headed. Details will be announced soon!

## **DEQ Déjà Vu: Gov. Snyder Issues Executive Order Splitting DEQ and DNR:**

**by: Kevin Plumstead, Jaffe Raitt Heuer & Weiss PC.**

Governor Snyder issued Executive Order 2011-1 on January 4, 2011, splitting the Department of Environmental Quality (DEQ) and the Department of Natural Resources (DNR) into two separately functioning departments effective March 13, 2011. Former Governor Engler separated the two departments in 1995, but former Governor Granholm reunited them in 2009 as the Department of Natural Resources and Environment (DNRE).

As Governor Snyder announced in November of last year, Dan Wyant will serve as director of the DEQ and Rodney Stokes will serve as director of the DNR. Mr. Wyant will also oversee the DEQ, DNR, and the Department of Agriculture as the Quality of Life group executive. The Office of the Great Lakes will move to the DEQ under the Executive Order with former Senator Patricia Birkholz serving as director and as a member of the Governor's Cabinet.

An organizational chart says little about the Governor's environmental plans; however, the fact that the Executive Order was one of his first orders of business after taking office may be a sign of Governor Snyder's commitment to and focus on the importance of Michigan's natural resources and environmental quality. Now Governor Snyder, Mr. Wyant, and Mr. Stokes must begin to answer the many questions that face state government as it seeks to protect the environment and encourage green industry and brownfield redevelopment without squelching business growth.

## **The Michigan Bar Journal January 2011 Issue—Energy Law:**

The Environmental Law Section was pleased to coordinate and sponsor the *Michigan Bar Journal's* January 2011 Energy Law theme issue, with articles on this rapidly changing area including: A Brief Introduction to Electricity Transmission, "Green" Tax Incentives, Deep Shale Natural Gas Production in Michigan, and Changes in the Law Governing Public Utilities. [Read the Issue Online](#)

## **Governor Signs Part 201 Reform Package:**

**by: Sharon Newlon and Karolyn Zande, Dickinson Wright PLLC**

On December 14, 2010, Governor Jennifer Granholm signed a package of bills approved by the State House and Senate that will substantially reform Part 201 of the Natural Resources and Environmental Protection Act (NREPA), Michigan's general environmental cleanup, liability and brownfield legislation. The reforms are immediately effective. The Part 201 Reform Package includes revisions designed to streamline and encourage remediation activities under Part 201. This article summarizes the top 10 changes you need to know about this law.

### **1. There is a new definition of "baseline environmental assessment."**

The definition of "baseline environmental assessment" (BEA) is amended to refer to the document resulting from "all appropriate inquiry" (as defined by the 2005 ASTM Phase I standard) and sufficient sampling to establish that the property is a "facility" (impacted above unrestricted residential cleanup criteria). BEAs will no longer need to distinguish existing impacts from potential new impacts, and the Department of Natural Resources and Environment ("DNRE," soon to be MDEQ again) will no longer offer formal determinations of their adequacy.

### **2. Due care obligations are altered to align better with EPA "continuing obligations" requirements.**

The Part 201 Reform Package requires owners of "facilities" to: (1) provide reasonable cooperation/access to persons conducting cleanup, (2) comply with established land use or resource use restrictions, and (3) refrain from interfering with restrictions or response activities. The reforms eliminate the due care exemption for local governments if they invite the general public to use the property.

### **3. The "response activity" concept replaces "remedial action."**

The Reform Package replaces the concept of "remedial action" with "response activity," a term that encompasses all steps in the remediation process, including site evaluation, feasibility studies, partial and complete cleanups, and self-implemented cleanups. Response activity plans for any qualifying activity may be submitted to DNRE for review. DNRE has 150 days to approve, impose added conditions, deny, or request more information on a plan from the submitting party. If public participation and input on the plan is necessary, DNRE has 180 days to review. If DNRE does not issue a response, the plan is deemed approved.

### **4. It may be easier to get site-specific criteria approved.**

Instead of merely allowing the approval of site-specific cleanup criteria, the Part 201 Reform Package now mandates DNRE approval of site-specific criteria when those criteria provide more accurate numeric information or, for non-numeric criteria, if the site-specific criteria provide better protection to the environment or public than general criteria under Part 201.

**5. Parties will be able to submit no further action reports for DNRE approval.**

Upon completion of a response activity or remedial action, the party undertaking an action may now submit a "No Further Action Report" to DNRE describing all actions taken, from which DNRE can conclude that all remedial actions have been completed pursuant to Part 201. If the cleanup category is other than unrestricted residential use, a party will be required to submit a "postclosure plan" and "postclosure agreement" when seeking a no further action determination.

A postclosure plan must include any land or resource use restrictions in detail and any permanent markers used to describe the restricted areas. As with remedial action plans, DNRE will have either 150 or 180 days to make a decision or the no further action report will be deemed approved by operation of law.

**6. DNRE technical decisions are appealable to a Response Activity Review Panel.**

In a significant departure from the prior law, the reforms establish a procedure for appeals from DNRE determinations regarding a response activity plan or a no further action report to a Response Activity Review Panel. The Panel will consist of fifteen volunteers from outside the DNRE appointed by Director. Five members will hear each appeal and make a recommendation to the Director, with the Director making all final decisions. Those decisions will be appealable to circuit court.

**7. The number of clean up categories is reduced from ten to four.**

The Part 201 Reform Package reduces the number of cleanup categories from ten to four: residential, limited residential, nonresidential, and limited nonresidential. DNRE will need to develop new cleanup criteria for the nonresidential category, and review and revise all cleanup criteria at least once every four years.

**8. Requirements for the groundwater/surface water interface (GSI) criteria have changed.**

The new provisions confirm that the appropriate monitoring point for the GSI criteria is the groundwater/surface water interface itself and that surface water does not include groundwater or enclosed sewers or utility lines. Alternative monitoring points will be allowed, as will mixing zone-based criteria, with DNRE approval and a 30-day public comment period. Permits will not be required for venting groundwater.

**9. The DNRE will be required to monitor the effectiveness of the program.**

The Part 201 Reform Package requires DNRE to keep an inventory of known facilities with information regarding each facility's location, response activity plans, no further action reports, and cleanup category associated with the property. DNRE will be required to post this information on its website, along with quarterly reporting response activity plans approved and disapproved by DNRE, recommended for approval and disapproval by the Response Activity Review Panel or approved by operation of law.

**10. Current rules and future rulemaking are affected by the new legislation.**

The Part 201 Reform Package rescinds numerous DNRE rules under Part 201, including those relating to the list of contaminated sites, listed criteria for selecting a remedial action, and site assessment models. It will permit, not require, DNRE to promulgate rules under Part 201. However, the reforms specify that, consistent with Michigan's Administrative Procedure Act, any guidelines, bulletins, or interpretive statements issued by DNRE are not binding on any party.

## Offshore Wind Energy Development in Michigan's Great Lakes: Current Law and Proposed Legislation:

By: Katherine Brady-Medley, Attorney

Nick Schroeck, Executive Director, Great Lakes Environmental Law Center

### Background -- Offshore Wind Energy

Michigan has over 38,000 square miles of state owned Great Lakes bottomlands. However, due to current limits with wind turbine technology, wind farms are restricted to areas on the Great Lakes where the water is less than 30 meters deep.<sup>1</sup> For wind energy to be practicable, wind farms must be close to existing transmission facilities, so that energy generated from the turbines can be distributed to consumers. Construction of a wind energy facility requires heavy machinery and a wind farm site needs a transmission station nearby and underground lines for transmission of power.

For terrestrial wind farms, a developer typically secures access to land through easements or lease agreements and pays royalties to the landowner. The developer's role is to secure capital for construction, permits from the local zoning board and a contract with a power purchaser. Permitting decisions do fall under state authority, but are typically exercised through local zoning boards. Ordinarily the federal government has a role only if the wind farm is on federal land or uses federal dollars.<sup>2</sup>

### Current Situation in Michigan

Michigan does not yet have a process for approving or denying requests to construct offshore wind energy facilities on Great Lakes bottomlands. The bottomlands are regulated by the Michigan Department of Natural Resources and Environment (MDNRE) under the Great Lakes Submerged Lands Act, Part 325 of the Natural Resources and Environmental Protection Act (NREPA) which authorizes MDNRE to enter into agreements for use of Great Lakes bottomlands. Current permitting for use of bottomlands under Part 325 does not include a process for development of offshore bottomlands. When the Act was written, it only contemplated edge use of bottomlands as part of the property rights of riparian owners.

---

<sup>1</sup> [Report of the Michigan Great Lakes Wind Council](#), September 2009

<sup>2</sup> M.McCammon, "Environmental Perspectives on Siting Wind Farms" 17 NYU Envtl LJ 1243 (2008).



No area of the Great Lakes is subject to exclusive federal jurisdiction, but offshore wind development projects may trigger federal laws. The U.S. Army Corps of Engineers has permitting authority for offshore wind projects in the Great Lakes under section 404 of the Clean Water Act, 33 U.S.C. 1344, for any dredging or fill material, and section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, to ensure that navigation is not obstructed.

In response to proposals for offshore wind development, and the state's lack of a formal process to review these proposals, former Governor Granholm created the Great Lakes Wind Council. This 25 member advisory body was created by Executive Order 2009-1 with the charge to:

1. Recommend criteria for reviewing applications for offshore wind energy development,
2. Recommend criteria for identifying areas within Michigan that are least suited and those that are best suited for this type of development, and
3. Create frameworks for permitting and leasing with guidelines for agencies, developers and the public.

Initial public response to proposed wind farms has focused on concerns about siting of the facilities and the potential for adverse impacts. The Michigan Great Lakes Wind Council responded to these siting concerns by hiring consulting firms to map the lakes based on various criteria so that potential developers can focus on sites with minimal concerns and maximum public support. Their mapping criteria classified areas of Michigan's Great Lakes into three categories:

1. Areas for Categorical Exclusion. These are areas where the bottomlands are not suitable for development because of existing use and/or existing state or federal laws that exclude this use. Excluded areas include navigation channels, submerged utilities and coastal airport setbacks, among others.
2. Conditional Areas. These areas are not categorically excluded, but have one or more competing values, such as fish spawn areas, habitats for threatened species, harbors, shorelines, national parks, commercial fishing, and state/international boundaries. They are divided into four groups: Biological, Physical, Protected Feature and Other.

3. Favorable Areas. These are areas are not categorically excluded and do not have a competing value. They would include areas that are not excluded by current use or law and that do not have any special feature of environmental or cultural significance. Bottomlands receiving this designation are intended to meet the *Portage* factors for assessing environmental risk under the Michigan Environmental Protection Act (MEPA, now Part 17 of the NREPA)<sup>3</sup> and are not located near coastlines. The *Portage* factors are: (1) whether the natural resource involved is rare, unique, endangered, or has historical significance, (2) whether the resource is easily replaceable, (3) whether the proposed action will have any *significant* consequential effect on other natural resources, and (4) whether the direct or consequential impact on animals or vegetation will affect a critical number, considering the nature and location of the wildlife affected.<sup>4</sup>

### **Jurisdiction and the Public Trust Doctrine**

Under the Public Trust Doctrine, the State of Michigan serves as owner and trustee of the water and Great Lakes bottomlands within state boundaries and has a duty to manage and protect these resources for the benefit of residents.

The Public Trust Doctrine is derived from common law and holds that things that are common to all, like large bodies of navigable water, are natural resources that belong to the public. The sovereign's role is to act as trustee of the public rights in these natural resources. The Supreme Court in *Illinois Central Railroad Co v. Illinois*, 146 US 387 (1892) held that even if the trust is not codified, there is an implied trust in regards to the state's navigable waters.

Although it was traditionally applied to the open seas, the Public Trust Doctrine has repeatedly been applied to the Great Lakes. *Hilt v. Webber*, 252 Mich 198 (1929); *People v. Silberwood*, 110 Mich 103 (1896). The state lacks the power to diminish those rights when conveying littoral property to private parties. *Illinois Central Railroad Co v. Illinois*, *supra*; *Nedtweg v. Wallace*, 237 Mich 14 (1926). When a state conveys littoral property to a private party, the property remains subject to the public trust. The public trust includes uses that are public in nature and for the public benefit. Under the doctrine, the state owns the land as real property in trust for public benefit. The state may make use of its proprietary ownership of these lands, but that ownership is subject to the right of the public to enjoy the benefit of the trust. *See Glass v. Goeckel*, 473 Mich 667 (2005).

The doctrine applies to submerged land that is adjacent to privately owned land. A riparian owner's title goes to the low water mark, and beds of the Great Lakes are not susceptible to private ownership. The state is the fee owner of land beneath the Great Lakes. *People v. Silberwood*, *supra*. The only exception to this rule is legislative action. For example, the legislature permitted a portion of the bed of Lake Michigan to be reclaimed for a public park. *See Bliss v. Ward*, 198 Ill. 104 (1902). In that case, the court

---

<sup>3</sup> MCL 324.1701-1706

<sup>4</sup> *City of Portage v. Kalamazoo Cty Rd Comm'n*, [136 Mich App 276](#) (1984)

held that it was acceptable for the state to appropriate submerged lands for a purpose consistent with the public trust.

Part 325 authorizes the state to convey by lease the unpatented Great Lakes bottomlands in areas belonging to the State of Michigan and “held in trust by it.” MCL 324.32502. According to *Glass v. Goeckel*, supra, Part 325 does not define the scope of the Public Trust Doctrine with regard to the land lakeward of the ordinary high water mark. *Glass* determined that the private title of land owners is subject to the public trust for the portion of their land below the high water mark. Thus, others may be able to use the land below the ordinary high water mark for purposes consistent with the Public Trust Doctrine.

MCL 324.32502 requires the state to “preserve and protect the interests of the general public in the lands and waters of the Great Lakes.” This section provides for the sale, lease or disposition of the unpatented bottomlands and public or private use of the waters “whenever it is determined by the department that private or public use will not substantially affect public use of lands” for the activities traditionally provided for in the common law: hunting, fishing, boating, and navigation. Part 325 also requires that such sales or lease agreements must not impair the public trust.

### **Protection of the Public Trust**

Part 325 dictates that any lease or use of Great Lakes bottomlands in Michigan must be approved by the legislature. MCL 324.32502 does not allow the legislative branch to delegate its authority over the bottomlands to a municipality. Any process to lease or convey bottomlands must consider the public trust, as well as the requirements of Part 325.

The legislature must determine if offshore wind energy is in the best interest of the public, if sited with due diligence regarding natural features, historical and cultural areas, public recreation, navigation, and fishing. If offshore wind is determined to be in the public interest, the legislature would need to amend Part 325 and write new legislation to govern offshore wind energy, including application requirements, permit review criteria, site agreement requirements and the state’s use of funds received from leases because the legislature will have to determine how the money from leases should be spent, in keeping with the public trust.

In light of the legislature’s responsibilities under Part 325 and the Public Trust Doctrine, new legislation is necessary to provide for the use of waters and submerged lands of the Great Lakes for wind energy development. Legislation proposed by then Senator Patricia Birkholz in 2010 would have empowered the Public Service Commission and Great Lakes Wind Council to iron out the details of Great Lakes wind facility permitting and siting. Senator Birkholz introduced two bills, SB 1066 (to make clear that Part 325 does not apply to activities regulated by the Great Lakes Wind Development Act) and SB 1076, the Great Lakes Wind Development Act. Both SB 1066 and SB 1067 were referred to the Committee on Natural Resources and Environmental Affairs but were not acted upon by the full Senate.<sup>5</sup>

---

<sup>5</sup> Senators Jansen, Kuipers, Gilbert, Van Woerkom and Jelinek introduced SB 1134 which would have amended MCL 324.32503 to address offshore wind energy development. SB 1134 was also referred to the Committee on Natural Resources and Environmental Affairs but was not acted upon by the Senate in 2010. A House version (HB 5761) was introduced by Representative Hansen and referred to the Committee on Energy and Technology.

MEPA, now Part 17 of the NREPA, provides another avenue for the protection of the state's natural resources held in the public trust. Part 17 authorizes private individuals to bring suit in circuit court for equitable or declaratory relief for "the protection of the air, water or other natural resources and the public trust therein".<sup>6</sup> MDNRE is subject to MEPA.

### **Recommendations & Conclusion**

Development of offshore wind farms in the Great Lakes is subject to the laws of many jurisdictions. In addition to traditional zoning laws, which have proven cumbersome and lacking in regulatory certainty for addressing projects of this size and scope, both state and federal laws are applicable. Federal laws, including the National Environmental Policy Act, 42 U.S.C.A. 4321 *et seq.*, the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and the Migratory Bird Act, 16 U.S.C. 703 *et seq.*, among others, are all potentially relevant, depending on the site of the proposed wind farm. Michigan statutes, including Part 17 and Part 325 of NREPA, detail the environmental considerations of the legislature and agencies in making decisions affecting the environment, particularly outlining the state's role in protecting the bottomlands as part of the public trust.

The Michigan legislature must consider the potential impacts of allowing wind farm development on Great Lakes bottomlands and enact legislation to protect the state's environmental resources and the public trust. Legislation should provide clear and strict guidelines for permitting decisions and include protections for maintenance and restoration of wind farm sites, as well as offsets for any impacts on local populations. The Great Lakes are truly one of the world's most valuable natural resources and the State of Michigan must ensure that any new laws governing their use exemplify excellent stewardship.

---

<sup>6</sup> *Ray v. Mason County Drain Commissioners*, 393 Mich 294 (1975).

## Michigan Supreme Court Overhauls Permitting, Procedure, and Litigation of Environmental Matters in Michigan:

by: Rebecca J. Dukes, attorney at Clark Hill PLC\*

In a sweeping opinion released December 29, 2010, the Michigan Supreme Court overturned *Preserve the Dunes Inc. v. Dep't of Environmental Quality*<sup>1</sup> and held that Department of Environmental Quality<sup>2</sup> (DEQ) permitting actions may be challenged by citizens under the Michigan Environmental Protection Act (MEPA) and that “the DEQ can be sustained as a defendant in a MEPA action when the DEQ has issued a permit for activity that is alleged will cause environmental harm.” The Court also held that the discharge of contaminated water from one watershed, even at low levels of contamination, into a creek that flows into a different “uncontaminated” watershed is “manifestly unreasonable.” The opinion, *Anglers of the AuSable Inc. v. Dep't of Environmental Quality*<sup>3</sup>, may substantially change the process for permitting and litigating environmental matters in Michigan.

In this case, Merit Energy Company (Merit) sought approval from the DEQ to remediate a plume of contaminated groundwater by using an air-stripping process, which removes some of the contaminants, but leaves some brines and chlorides in the water. Merit’s plan included discharging 1.15 million gallons per day of treated water through a 1.3-mile pipeline from the stripping site to Kolke Creek, which ultimately flows into the AuSable River. The DEQ approved Merit’s plan and issued a permit and certificate allowing for the discharge of water. The DEQ granted Merit an easement to pipe the water across state lands from the area of treatment to the discharge point.

The plaintiffs in the case included riparian owners along the AuSable River and users of the waterways for recreational purposes. They filed a lawsuit against Merit and the DEQ alleging claims for common-law water rights violations and statutory violations under the Natural Resources and Environmental Protection Act (NREPA) and MEPA. Plaintiffs’ MEPA claims were two-fold: a claim against the DEQ for granting the permit and a claim against Merit to enjoin the proposed discharge. The trial court applied the “reasonable use balancing test” and concluded that the discharge plan constituted an unreasonable use because it would harm the AuSable River water system by increasing the flow of water in the AuSable River water system and increasing the level of substances not previously found in Kolke Creek. The trial court left open the possibility that Merit could discharge treated water into Kolke Creek at a lower rate that might be considered reasonable under the balancing test. (The reasonable use balancing test was outlined by the Michigan Court of Appeals in *Mich Citizens for Water Conservation v Nestlé Waters North America, Inc.*<sup>4</sup> )

---

<sup>1</sup> [Preserve the Dunes Inc. v. Dep't of Environmental Quality](#), 471 Mich 508 (2004).

<sup>2</sup> The DEQ is currently part of the DNRE, but by virtue of Executive Order 2011-1, effective March 13, 2011 will again be the DEQ.

<sup>3</sup> [Anglers of the AuSable Inc. v. Dep't of Environmental Quality](#), \_\_\_ Mich \_\_; \_\_\_ NW2d \_\_; 2010 Mich LEXIS 2591 (Dec 29, 2010).

<sup>4</sup> [Mich Citizens for Water Conservation v. Nestlé Waters North America, Inc.](#), 269 Mich App 25 (2005).

Merit subsequently abandoned the Kolke Creek discharge plan and began treating the plume through another method. The Michigan Supreme Court, however, refused to dismiss the appeal as moot on the basis that the trial court left open the possibility that Merit could discharge treated water into Kolke Creek at a lower rate. The Court then issued its opinion, which has extensive implications in the permitting, procedure, and litigation of environmental matters in Michigan.

First, the Court held that Merit's discharge plan is not an allowable use of water because it is manifestly unreasonable to "decontaminate water by contaminating different water."<sup>5</sup> The seemingly broad holding against diverting contaminated water was qualified in the following footnotes:

We do not hold that diverting water from one watershed to another is *ipso facto* unreasonable. Our concern today is with the discharge of contaminated water into an uncontaminated watershed.<sup>6</sup>

...

In reaching this decision, it is important to note that we focus our ruling on the reasonableness of using Kolke Creek as a discharge point for contaminated water removed from a separate watershed. We are not basing this decision on Merit's status as a riparian or groundwater user. We are not basing this decision on Merit's status as an off-tract or on-tract water user. And we are not basing this decision on the fact that Merit is seeking to divert water out of the Manistee River watershed.<sup>7</sup>

Even with these clarifications (which could be essentially useless distinctions), the holding could strip the DEQ of authority to authorize the discharge of water containing *any level of contaminants* – even if they are below regulatory thresholds and considered safe for the environment under current permitting criteria – into a different watershed. The ruling essentially allows a trial court to substitute its judgment for the expertise of the DEQ and calls into question the scientifically-based regulatory thresholds established by DEQ pursuant to the Clean Water Act and NREPA.

Second, the Court held that the DEQ may be named as a defendant in a MEPA action when it is alleged to have authorized activity that will harm the environment, thus overruling *Preserve the Dunes'* holding to the contrary.<sup>8</sup> Under this new application of the law, MEPA is applicable to administrative actions, which means plaintiffs can challenge DEQ permitting decisions or other administrative actions. This could cause significant delay in development and clean up actions, and may also increase the costs of the permitting process for both the DEQ and those who require permits for their operations.

The third main issue addressed by the Court was the standing requirement. The historical standing test in Michigan for MEPA claims was set forth by the Michigan Supreme Court in *Mich Citizens for Water Conservation v. Nestle Waters North America Inc.*<sup>9</sup> which, based on federal standing jurisprudence, required that, to bring a suit under MEPA, a citizen must establish that he/she "has

---

<sup>5</sup> Anglers, 2010 Mich LEXIS at \*18.

<sup>6</sup> Anglers, 2010 Mich LEXIS at \*18-19, n16.

<sup>7</sup> Anglers, 2010 Mich LEXIS at \*19-20, n17.

<sup>8</sup> Anglers, 2010 Mich LEXIS at \*7-14.

<sup>9</sup> [Mich Citizens for Water Conservation v. Nestlé Waters North America Inc.](#), 479 Mich 280 (2007).

suffered or will imminently suffer a concrete and particularized injury in fact.” In July, 2010 the Court overruled that standing test in *Lansing Schools Education Association v. Lansing Board of Education*,<sup>10</sup> ruling that there is no constitutional standing requirement of a personalized injury and that standing can be conferred by statute alone. In *Anglers*, Justice Davis extended the application of the *Lansing Schools* test to MEPA claims and wrote that the Court was wrong in *Nestlé*:

MEPA, which specifies that ‘any person may maintain an action ... against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction,’ should be applied as it is written.<sup>11</sup>

The Republican justices vigorously dissented from the "extraordinarily lawless and profoundly dangerous" lead opinion and from the results reached by the majority:

[T]his case represents one of the most shocking examples of the assertion of power that is not grounded in the constitution or any statute. This case is simply an empty vehicle to reach desired policy results.<sup>12</sup>

The dissent first concluded the case was moot because Merit had voluntarily abandoned its plan, the permit at issue was vacated and no longer in effect, and the easement had been deeded away so that Merit no longer had any physical access for the discharge at issue. The dissenting justices also stated that overturning *Preserve the Dunes* was inconsistent with the plain language of MEPA and would “wreak havoc on the state’s legal system” and further undermine the state’s fragile economy.<sup>13</sup>

While environmental groups are praising the change in the law, it is unclear how long the decision will stand. The Court was sharply divided along party lines and the dissenting Republican justices have regained a majority on the court as of late January. Justice Alton Davis, the author of the lead opinion, was not reelected last November. Justice Robert P. Young, who has now been elected Chief Justice, dissented strongly and echoed concerns expressed by state business groups. Thus, the decision came right before a major change in the Court’s composition following the 2010 elections. To potentially take advantage of the newly reconstituted court, both Merit and the DEQ have filed motions for rehearing. The Michigan Manufacturers Association filed an *amicus* brief in support of these motions.

\*Rebecca and Clark Hill represented Amicus in these matters.

---

<sup>10</sup> [Lansing Schools Education Association v. Lansing Board of Education](#), 487 Mich 349 (2010).

<sup>11</sup> *Anglers*, 2010 Mich LEXIS at \*15.

<sup>12</sup> *Anglers*, 2010 Mich LEXIS at \*30.

<sup>13</sup> *Anglers*, 2010 Mich LEXIS at \*98-99.