



## MICHIGAN ENVIRONMENTAL LAW JOURNAL

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#### Message From the Chair

by: *Charlie Denton, Barnes & Thornburg LLP*

“Inertia” is not a negative when applied to the tendency to stay in motion, such as the exciting forward progress of our Michigan Environmental Law Section. The continued regular publication of this *Michigan Environmental Law Journal* in electronic format is a testament to the progress and active involvement of many Section members. There are many other ongoing positive activities, such as continuing education programs, membership outreach to law students, website and social media developments, and lots more! The best way to stay tuned to the Environmental Law Section is to [Visit our website](#).

The continued positive motion of our Environmental Law Section is also exemplified by the new group of leaders nominated to become officers and members of our council. The nominating committee report is included in this edition, and the election will be conducted at **State Bar Annual Meeting in Dearborn on September 15, 2011** (at which we will also present a timely CLE program). I also want to thank and acknowledge the outgoing council members who have been integral in getting our Section on the right track over the last few years. Indeed, our legacy of past leadership for this Environmental Law Section is impressive. We look forward to seeing all of you at our **Environmental Law Section’s 30<sup>th</sup> Anniversary Event on October 6, 2011 in Lansing**, where both this legacy of past contributions and our positive future momentum will be celebrated. For a complete list of events, check out the "Upcoming Events" section in this newsletter and [On our Website](#).

You are reading this *Michigan Environmental Law Journal* because of the leadership and persistence of Chris Dunskey, together with our other co-editors, authors and Section Administrator Mary Anne Parks. I know you will find this edition useful and informative, and if you are not already familiar I also commend our Environmental Law Desk Book as an invaluable resource.

Even with all these great activities, there is still room for **YOU** to become more actively involved with our Environmental Law Section, through presenting a program, authoring an article, attending a committee meeting, or many other ways.

#### Environmental Law Section 30th Anniversary Celebration Announces Program Line Up/Sponsorship Opportunities

Celebrate the past 30 years of environmental law, its lasting impact on Michigan and what’s in our future. Scheduled to participate among others are: Bill Rustem, strategist for Governor Snyder and former environmental aide to Governor Milliken; Jack Bails, former DNR/DEQ Deputy Director; James M. Olson, an early environmentalist, litigator and early ELS member. The celebration will be held on **October 6**, at the University Club in Lansing from 2:00 p.m.-6:30 p.m. and includes a cocktail reception featuring the musical parody troupe “A Habeas Chorus.” **Ticket price is \$65. Bring a guest and get two tickets for \$100!**

A variety of 30<sup>th</sup> Anniversary sponsorships are available. Contact Kurt Brauer at: [kbrauer@wnj.com](mailto:kbrauer@wnj.com) or Mark Bennett at: [bennettm@millercanfield.com](mailto:bennettm@millercanfield.com) for more information.

## Nominating Committee Recommendations

The Nominating Committee of the Environmental Law Section of the State Bar of Michigan conferred on June 6, 2011 to consider potential candidates consistent with the requirements for service as officers and as members of the Environmental Law Section Council. Based on its review, the Nominating Committee makes the following recommendations:

Chair:	Anna Maiuri will automatically become Chair by operation of the Bylaws
Chairperson-Elect:	Dustin Ordway
Secretary-Treasurer:	Kurt Brauer
First 3-year term on Council:	Rebecca Dukes Rodger Kershner Steven Kohl AnnMarie Sanford William Schikora

Voting on these positions will be held at the Environmental Law Section Annual Meeting at 4:30 p.m. in Dearborn, Michigan on September 15, 2011. In accordance with the Section Bylaws, other nominations for these positions may be made from the floor at the annual meeting, and thereafter the officers and members of the Council of the Section for the 2011-2012 year will be elected by Section members.

## Upcoming Events

### ELS Annual Meeting, Program, & Dinner

Date: Thursday, September 15, 2011

Time: Program: 1:30 p.m.–4:30 p.m., Meeting: 5:00 p.m.–6:30 p.m., dinner afterward at Tria Restaurant

Location: Hyatt Regency, Dearborn

[Registration](#) is requested to allow for proper facilities planning. ***If you plan on attending the dinner please contact Mary Anne Parks at [parks.maryanne@gmail.com](mailto:parks.maryanne@gmail.com).***

Topics:

- A state-of-the-law summary for each subject area
- A panel discussion on environmental claims in bankruptcy (highlights, lessons learned, etc.)
- Environmental due diligence in international transactions
- Hazardous Substances and Brownfields Committee presentation on due care for LUGs and other general due care issues

### Law School Mixers

Dates: Thursday, September 22, 2011

Time: 5:30 p.m.–7:30 p.m.

Locations: Cass Café, 4620 Cass Ave., Detroit

Cocktails and Appetizers included

[Register:](#)

Thursday, October 20, 2011

5:30 p.m.–7:30 p.m.

Beggar's Banquet, 218 Abbott Rd., East Lansing

Cocktails and Appetizers included

[Register:](#)

The Environmental Law Section of the State Bar of Michigan invites you to two informal cocktail mixers for law school students, ELS members, and attorneys interested in ELS membership. Meet and mingle with attorneys and law students sharing an interest in environmental law in a friendly atmosphere to learn about the past, present, and future of the environmental legal profession.

## 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

Registration begins in mid-August

## Joint Environmental Conference, co-sponsored by the ELS and the AWMA

Date: Thursday, November 10, 2011

Time: 8:00 a.m.-4:00 p.m., lunch included

Location: Lansing Community College, West Campus, 5708 Cornerstone Dr., Lansing, MI 48917

Program details will be announced as they become available.

## Recent Section Activity



Robert Reichel, from the Michigan Department of Attorney General, spoke passionately about Asian Carp litigation at the 6/24/11 ELS Summer Program, held at the Kellogg Center in Lansing.

## ELS Annual Summer Program

The Environmental Law Section's annual summer program, held on June 24, was a big success with great attendance and meaningful discussions on beach access and high water mark cases, Asian Carp and more. [View 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.

## Two Trial Courts Conclude the MDEQ Lacks Authority to Deny Air Permits to Power Plants on the Basis of Need Alone

*by: Steven C. Kohl and Sarah C. Lindsey, attorneys at Warner Norcross & Judd LLP*

### INTRODUCTION

During 2010, the Michigan Department of Environmental Quality ("MDEQ")<sup>1</sup> denied permit to install ("PTI") applications for electric generation facilities to two applicants – the City of Holland's Board of Public Works ("HBPW") and Wolverine Power Supply Cooperative, Inc. – based on MDEQ's determination that the applicants did not "need" the proposed facilities. HBPW submitted a PTI application in January 2007, and the MDEQ issued a draft permit in November 2008. Wolverine submitted a PTI application in September 2007, and the MDEQ issued a draft permit in September 2008. In February 2009, the Governor released an Executive Directive that ordered the MDEQ to determine whether "feasible

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<sup>1</sup> During portion of the relevant period discussed in this article, MDEQ was the Michigan Department of Natural Resources and Environmental. For ease of reference, it will be referred to as MDEQ throughout this article.

and prudent alternatives” existed to any proposed coal-fired electric generation facilities. The MDEQ enlisted the assistance of the Michigan Public Service Commission (“MPSC”) to evaluate the purported need for each of the facilities. After the MPSC concluded that neither entity needed the proposed facility, the MDEQ denied each application, stating that neither entity demonstrated a need for the facility.

Each applicant appealed the permit denial, claiming that the MDEQ did not have authority under Michigan’s Natural Resources and Environmental Protection Act (“NREPA”) or the Clean Air Act to deny permits based solely on the MDEQ’s determination of the applicant’s purported lack of need for the facility. In each case, the court agreed and remanded the permit decision to the agency.

## **BACKGROUND**

### ***HBPW and Wolverine submit applications for PTIs***

A coal-fired power plant qualifies as a “major stationary source” of air pollutants subject to the permit requirements of the Prevention of Significant Deterioration (“PSD”) provisions of Title I of the federal Clean Air Act, 42 U.S.C. § 7470, *et seq.*, and its implementing regulations, and Part 55 of NREPA, MCL 324.5501 *et seq.*, and its implementing regulations. Before beginning construction of a major source, an applicant must obtain a PTI. Accordingly, both HBPW and Wolverine submitted applications for PTIs to the MDEQ.

HBPW submitted PTI Application No. 25-07 on January 15, 2007, to install a 78-megawatt coal-fired electric generating plant.<sup>2</sup> The MDEQ issued a draft permit on November 26, 2008, and opened the public comment period.<sup>3</sup>

Wolverine submitted PTI Application No. 317-07 on September 26, 2007, to install a 600-megawatt solid fuel-fired steam electric generation facility to be called the WCEV, in Rogers City, Michigan.<sup>4</sup> The MDEQ issued a draft permit in September 2008, providing notice for public comment.<sup>5</sup>

### ***The Governor directs the MDEQ to consider need for any new coal-fired power plants***

On February 3, 2009, then Governor Jennifer Granholm delivered the State of the State address, in which she called for a reduction in Michigan’s reliance on fossil fuels by 45 percent by the year 2020.<sup>6</sup> In connection with this goal, Governor Granholm explained:

Achieving these ambitious goals will also lessen the need for a slew of new coal power plants in Michigan. That’s why I have directed the Department of Environmental Quality to evaluate, in consultation with our Public Service Commission, both the need for additional electricity generation and all feasible and prudent alternatives before approving new coal-fired power plants in Michigan.<sup>7</sup>

On the same day, the Governor issued Executive Directive (“ED”) No. 2009-2, entitled “Consideration of Feasible and Prudent Alternatives in the Processing of Air Permit Applications from Coal-Fired Power Plants.” ED 2009-2 claimed that “coal-fired electricity generating plants annually emit thousands of tons of air emissions, including, but not limited to, greenhouse gases, that threaten the air, water and other natural resources of Michigan and the health, safety, and general welfare of Michigan residents.”<sup>8</sup> The Directive claimed authority under the Clean Air Act to “consider

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<sup>2</sup> *City of Holland v. MDNRE*, No. 10-022031-AA, slip op. at 6 (Ottawa Co. Cir. Ct. Dec. 15, 2010) (“*Holland* opinion”).

<sup>3</sup> *Id.*

<sup>4</sup> *Wolverine Power Supply Coop., Inc. v. MDNRE*, No. 10-7686-CE, slip op. at 2 (Missaukee Co. Cir. Ct. Jan. 28, 2011) (“*Wolverine* opinion”).

<sup>5</sup> *Id.*

<sup>6</sup> Governor Jennifer Granholm, State of the State Address, Feb. 3, 2009, at 6, available at [http://www.michigan.gov/documents/gov/SOS2009\\_265915\\_7.pdf](http://www.michigan.gov/documents/gov/SOS2009_265915_7.pdf).

<sup>7</sup> *Id.* at 7.

<sup>8</sup> ED 2009-2 at 1.

alternatives to proposed sources of air emissions when determining whether or not to grant an air permit to that source.”<sup>9</sup> Accordingly, ED 2009-2 required:

Before issuing a permit to install under Part 55 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.5501 to 324.5542, for the construction of a new coal-fired electricity generating plant, the Department of Environmental Quality shall determine whether there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare that would better protect the air, water, and other natural resources of this state from pollution than the proposed coal-fired electricity generating plant.<sup>10</sup>

The Directive further stated that before making the above determination, the MDEQ must “first determine whether a reasonable electricity generation need exists in this state” that would be served by the proposed plant.<sup>11</sup> If the MDEQ determined that need existed, then the MDEQ was to consider alternative methods for meeting the electricity need, including use of alternative technologies that reduce or sequester emissions, reducing electricity demand through energy efficiency, and generating or purchasing electricity through existing resources.<sup>12</sup>

Finally, the Directive stated that if a feasible and prudent alternative existed, the MDEQ “shall not issue a permit to install.”<sup>13</sup> The Governor directed the MPSC to provide technical assistance to the MDEQ in making the determinations required by the Directive.<sup>14</sup> ED 2009-2 was to be effective immediately.

### ***The Attorney General declares ED 2009-2 unenforceable***

Attorney General Michael Cox issued Opinion No. 7224 on February 20, 2009, in response to a request by State Representatives Kevin Elsenheimer and Kenneth Horn to evaluate the enforceability and the legal effect that should be afforded to ED 2009-2.<sup>15</sup> The Attorney General (“AG”) began the analysis by explaining that an executive directive is not mentioned explicitly by the Michigan Constitution, but rather is used by governors to exercise their supervisory authority in the form of internal policy statements.<sup>16</sup> Further, because the constitution provides for separation of powers, prohibiting one branch from exercising powers of another branch except where expressly provided in the constitution, and the constitution does not vest legislative power in the Governor through executive directives, executive directives may not amend substantive law.<sup>17</sup>

With this backdrop, the AG examined whether the Governor could direct the MDEQ to determine whether there are “feasible and prudent alternatives” to constructing coal-fired power plants, and if so, deny the permit. The AG determined that the MDEQ did not have authority under Part 55 of NREPA to determine whether there were “feasible and prudent alternatives” to a power plant or to deny a permit if the MDEQ determines such alternatives exist. Similarly, the AG stated that the MDEQ lacked such authority under the other statutory authorities cited in the Executive Directive, including Part 17 of NREPA<sup>18</sup> (the Michigan Environmental Protection Act), Section 165(a)(2) of the Clean Air Act,<sup>19</sup> and the MDEQ’s Part 18 Rules, and in particular Rule 1817(2). The AG concluded that the directions to the MDEQ to consider alternatives and deny a permit if those alternatives exist, contained in ED 2009-2(A) and (D), constituted an

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶ A.

<sup>11</sup> *Id.* at ¶ B.

<sup>12</sup> *Id.* at ¶ C.

<sup>13</sup> *Id.* at ¶ D.

<sup>14</sup> *Id.* at ¶ E.

<sup>15</sup> Michigan Attorney General Opinion No. 7224, at 1 (Feb. 20, 2009) (“OAG No. 7224”), available at <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10301.htm>.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.*

<sup>18</sup> MCL 324.1701-324.1706.

<sup>19</sup> 42 U.S.C. § 7475(a)(2).

“attempt to amend substantive law contrary to the separation of powers doctrine of Const 1983, art 3, § 2, and are unenforceable.”<sup>20</sup>

The AG then addressed the directives contained in ED 2009-2(B) and (C), requiring the MDEQ to engage in a “need and alternative methods” analysis. He stated that this analysis “can only logically be read as part of a cohesive whole that operates in conjunction with the ‘feasible and prudent alternatives analysis’ required in the directive,”<sup>21</sup> and concluded that for the same reasons already stated, the “need and alternative methods” analysis was an unconstitutional attempt to amend substantive law contrary to the separation of powers doctrine and was unenforceable.<sup>22</sup>

### ***The MDEQ requests “needs” analyses from HBPW and Wolverine and denies the permits.***

After the Governor issued ED 2009-2, the MDEQ requested that HBPW and Wolverine submit analyses of alternatives to the construction of the proposed facilities. Wolverine submitted an Electric Generation Alternatives Analysis, under protest, on June 8, 2009. The MDEQ entered into a Memorandum of Understanding with the MPSC to provide assistance in evaluating the electric generation need and to assess the alternatives. On September 8, 2009, the MPSC expressed the opinion, *inter alia*, that “Wolverine failed to demonstrate the need for the proposed facility as the sole source to meet their projected capacity. In particular, long-term purchase power options were not fully explored as part of their analysis.”<sup>23</sup>

HBPW submitted an Electric Resource Plan on March 30, 2010, also under protest. On July 7, 2010, the MPSC similarly opined that HBPW did not need the proposed facility. Specifically, the MPSC stated: “HBPW failed to adequately demonstrate the need for the proposed facility as the sole source to meet its projected capacity requirements. Given Michigan’s recent economic recession and uncertainty concerning the time frame for economic recovery, HBPW’s forecasted annual demand growth rate of approximately 2.1% appears overly optimistic.”<sup>24</sup>

The MDEQ denied Wolverine’s permit application on May 21, 2010. In the letter, the MDEQ stated:

In assessing Wolverine’s submittal, the findings of the MPSC, and the response provided by Wolverine, the DNRE is persuaded by the MPSC report. Wolverine has not adequately demonstrated its inability to secure long-term power supply purchase arrangements to meet its member needs. Wolverine has not demonstrated a need for the proposed facility.<sup>25</sup>

In the letter denying HBPW’s permit application, dated August 20, 2010, the MDEQ similarly stated that it was persuaded by the MPSC report that HBPW had failed to demonstrate a need for the new facility.<sup>26</sup>

In both denial letters, the MDEQ cited Section 165(a)(2) of the Clean Air Act, which provides that no permit shall be issued unless, *inter alia*, “a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations.”<sup>27</sup>

### **COURT CASES**

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<sup>20</sup> OAG No. 7224, at 6.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 6-7.

<sup>23</sup> MPSC Staff Report to MDEQ, “Wolverine Power Supply Cooperative Electric Generation Alternatives Analysis For Proposed Permit to Install (PTI) No. 317-07 For Circulating Fluidized Bed Coal Boilers at Rogers City, Michigan,” Docket No. U-16000, at p. 3 (Sept. 8, 2009).

<sup>24</sup> MPSC Staff Report to MDEQ, “Holland Board of Public Works Electric Generation Alternatives Analysis For Proposed Permit to Install (PTI) No. 25-07 For Circulating Fluidized Bed Coal Boiler in Holland, Michigan,” Docket No. U-16077, at p. 6 (July 7, 2010).

<sup>25</sup> *Wolverine* Opinion at 3.

<sup>26</sup> *Holland* Opinion at 7.

<sup>27</sup> 42 U.S.C. § 7475(a).

***HBPW and Wolverine file lawsuits to challenge the MDEQ's actions.***

On August 9, 2010, Wolverine filed a Petition for Review and Complaint for Declaratory Judgment (“Petition”) in Missaukee County Circuit Court challenging the MDEQ’s denial of the permit. Count I of the Petition alleged that the MDEQ’s denial of the permit was contrary to law because, *inter alia*, it was not authorized by Part 55 or the implementing regulations, was not supported by the record and was arbitrary and capricious. In Count II, Wolverine sought a declaration that ED 2009-2 was unconstitutional under the separation of powers doctrine and in violation of the Administrative Procedures Act. Natural Resources Defense Council (“NRDC”) and Sierra Club were permitted to intervene as defendants in the action.

Before the MDEQ denied the permit, on August 12, 2010, HBPW filed a Complaint for a Writ of Mandamus, Declaratory and Injunctive Relief in Ottawa County Circuit Court. Count I of the Complaint sought a writ of mandamus, compelling the MDEQ to issue the permit or render a decision on the permit by no later than August 20, 2010, in accordance with the criteria applicable as of the date the MDEQ should have acted. Counts II and III sought a declaratory judgment and injunctive relief, also asking the court to require the MDEQ to issue the permit or render a decision without delay. Finally, Count IV was an appeal pursuant to MCL 324.5505(8), claiming that the MDEQ’s failure to act on the permit application within the time frame required by regulation constituted a constructive denial. NRDC and Sierra Club sought to intervene in the action as defendants, but their motion was denied.

***Both courts reject the MDEQ's legal authority to deny permits on the basis of need.***

***HBPW***

The Ottawa County Circuit Court issued a written opinion on December 15, 2010, in which the court concluded that the MDEQ “violated the constitution and exceeded its statutory authority by basing its denial of [HBPW’s] application for a permit to install on electric generating need rather than upon whether the application met the air quality requirements of NREPA Part 55.”<sup>28</sup> The court also concluded that while MDEQ did not improperly delegate authority to the MPSC, the MDEQ nonetheless acted outside its statutory authority in relying on the MPSC report.<sup>29</sup>

In addition, the court determined that MDEQ’s reliance on standards outside its statutory authority was arbitrary, and the policy change that led to the denial of the permit was made “suddenly, and apparently on the whim of the executive, and was therefore capricious.”<sup>30</sup> In this regard, the court held that ED 2009-2, “by undertaking to establish substantive requirements and procedures for a permit to install under Part 55 of NREPA, is unconstitutional, and violates the APA.”<sup>31</sup>

Because the “regulatory environment” had changed since the denial of the PTI application – including new National Ambient Air Quality Standards for SO<sub>2</sub> and a new requirement that PTI applications address greenhouse gas emissions – the court remanded the permit application to the MDEQ and granted HBPW’s request for a writ of mandamus. The court ordered the MDEQ to evaluate and decide, within 60 days of the date of the order, the permit application consistent with the standards that were in effect on the date the MDEQ issued its denial.<sup>32</sup>

Finally, the court denied proposed intervenors NRDC’s and Sierra Club’s motion for reconsideration of the denial of their motion to intervene. The court’s original ruling had been based on its finding that the proposed intervenors’ interests were adequately represented, because there was no evidence that the health and social interests of their members differed in any significant way from those of the general public, and because they offered no pleading as required by

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* In a footnote, the court noted that the MPSC had no jurisdiction over HBPW. *Id.* at 7 n.3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.*

MCR 2.209(C).<sup>33</sup> The court concluded that no palpable error had been committed that would require a different result and denied the motion for reconsideration.<sup>34</sup>

### ***Wolverine***

The Missaukee County Circuit Court first addressed the MDEQ's contention in its brief that the basis for its denial of the permit application was broader than an evaluation of *Wolverine's* need for the facility.<sup>35</sup> The court stated that the MDEQ's denial was fully stated in the May 21, 2010 denial letter, which "establishes that the basis for the denial was a lack of support for the need for the WCEV."<sup>36</sup> The court concluded that the MDEQ made no evaluation of air quality standards, the use of increments, or the competing economic needs for those increments to protect air quality.<sup>37</sup> In concluding that the MDEQ lacked authority to deny the permit on the basis of need alone, the court reasoned:

Although it is clear that Section 165(a)(2) of the Clean Air Act and the Michigan Administrative Code [Rule] 336.2817(2)(e) require the permitting authority to consider public comments and to evaluate alternatives to the major source proposed in the permit application, neither the federal [nor] state requirements or regulations authorize denial based on need alone. They, however, require that there be an evaluation of the need and the alternatives to the need in light of the goals of the Clean Air Act as enacted through NREPA Part 55. The legislative enactment clearly gives a broad authorization to implement the requirements of the PSD provisions of the Clean Air Act. However, those requirements do not supersede the specific legislative limitations contained in NREPA regarding proper denial of a PTI.<sup>38</sup>

Accordingly, the court concluded that the MDEQ exceeded its statutory authority when it denied the PTI on the basis of need.<sup>39</sup> The MDEQ's action was not authorized by law because it was in violation of the statute and in excess of the statutory authority or jurisdiction of the agency.<sup>40</sup> The court remanded and ordered the MDEQ to make a permit decision within 60 days of the date of the opinion consistent with the opinion, NREPA and the Clean Air Act.<sup>41</sup>

### **CONCLUSION**

In what may be the first court challenges in the country to address this issue, two Michigan trial courts held that the Clean Air Act does not allow a permitting agency to deny an air permit on the basis of "need" alone. The court in *Wolverine* further explained that the reference to consideration of "alternatives thereto" in Section 165(a)(2) of the Clean Air Act did not allow consideration of a no-build alternative without reference to air quality considerations or the competing economic need for increments to protect air quality. Thus, under these decisions, any consideration of alternatives to a facility must be made "in light of the goals of the Clean Air Act."<sup>42</sup>

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<sup>33</sup> *Id.* at 9.

<sup>34</sup> *Id.* MDEQ and proposed interveners filed separate appeals of the court's order. MDEQ's appeal was docketed as Michigan Court of Appeals Case No. 301921, and was dismissed pursuant to the parties' stipulation on February 16, 2011. NRDC's and Sierra Club's appeal was docketed as Case No. 302031 and remains pending as of the date of this article.

<sup>35</sup> *Wolverine* Opinion at 7.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The court made no determination regarding whether the action was made upon unlawful procedure resulting in material prejudice or was arbitrary and capricious. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Wolverine* Opinion at 9.

## Court of Appeals Limits MDEQ's Jurisdiction Under the Great Lakes Submerged Lands Act

by: Brad H. Sysol, attorney at Miller, Canfield, Paddock and Stone

In [Burluson v. Department of Environmental Quality](#), 2011 WL 1820109 (May 12, 2011), the Michigan Court of Appeals held that the MDEQ's jurisdiction over lands surrounding Lake Michigan under the Great Lakes Submerged Lands Act ("GLSLA"), MCL 324.32501 *et seq.*, is limited to the ordinary high-water mark as defined by the international Great Lakes datum of 1955 (*i.e.*, 579.8 feet above sea level).

The case arose from Burluson's plans to construct a home along the shore of Lake Michigan within a critical dune area. When Burluson sought a permit under Part 353 (Sand Dune Protection and Management) of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, the MDEQ refused to issue a permit on the grounds that a permit was also required of the GLSLA, which provides, in relevant part:

This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section . . . . The word "land" or "lands" as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakeward of the *natural ordinary high-water mark*, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the *ordinary high-water mark* shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

MCL 324.32502 (emphasis added).

Burluson argued that because his home would be constructed at a minimum elevation of 585 feet above sea level, a permit was not required under the GLSLA. The MDEQ argued that because the Michigan Supreme Court held in [Glass v. Goeckel, 473 Mich 667 \(2005\)](#) that the public trust doctrine is not limited by the elevations set forth of the GLSLA, and because the statute is intended to protect the public trust, MDEQ's regulatory jurisdiction under the GLSLA likewise extends beyond the elevations set forth.

Reversing both the MDEQ's and the circuit court's interpretation, the Court of Appeals held that the agency's jurisdiction of the GLSLA was not conterminous with the scope of the public trust doctrine as it applies to littoral lands. The court found that it "strains credulity and common sense to conclude" that the Legislature intended to give "phrases as similar as 'natural ordinary high-water mark' and 'ordinary high-water mark,' employed within the same statutory paragraph" different meanings, and that had the Legislature intended to apply MDEQ's definition of the "natural ordinary high-water mark," it would have expressly done so. The MDEQ argued that the elevations set forth in the GLSLA applied only to "regulating activities such as dredging, beach maintenance, and the mowing and removal of vegetation," found in other sections of the GLSLA. Observing that these "uses" were added to the GLSLA *after* the elevations were added, the court found MDEQ's reliance on these other sections of the GLSLA misplaced; holding again that it "strains credulity to conclude that the Legislature included elevations in the proposed statute for purposes that were not yet in existence." The court also held that the statute's reference to reliction negated MDEQ's interpretation because "[i]f the [natural ordinary high-water mark] were independent of the listed elevations . . . then the 'reliction exception' would be superfluous, because relictied lands would, by definition, fall outside the boundary of the [natural ordinary high-water mark] as defined by [MDEQ]."

Concerning the *Glass* holding, the court held that the public trust doctrine did not establish the outer limits of MDEQ's jurisdiction under the GLSLA, but rather that the GLSLA "establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine. In other words, the scope of [MDEQ's] regulatory authority under the GLSLA is not *automatically equivalent* to the scope of the public trust." Instead, the Court found that the term "natural," when read within the statute as a whole, had a reasonable understanding. More specifically, the court held that "in defining the phrase 'ordinary high-water mark' using specific elevations, and, within the same paragraph,

modifying that phrase with the adjective ‘natural,’” the Legislature “intended the phrase ‘natural ordinary high-water mark’ to refer to the specific elevations as measured by the land in its natural state, unaltered by humans.”

## Western District Dismisses Trespass and MEPA Claims Based on Alleged Groundwater Contamination

*by: Michael B. Ortega, attorney at Lewis Reed & Allen P.C.*

The United States District Court for the Western District of Michigan recently dismissed trespass and Michigan Environmental Protection Act (MEPA, now codified as Part 17 of Michigan’s Natural Resources and Environmental Protection Act, NREPA) claims brought by property owners seeking to recover damages based on alleged groundwater contamination.<sup>1</sup> As described below, the court ruled that the trespass claims failed as a matter of law, in part because the plaintiffs did not own the groundwater beneath their property. In addition, the court concluded that the MEPA claims were barred by the pre-enforcement judicial review bar in Part 201 of NREPA.

The plaintiffs own property near a fruit juice and fruit drink processing facility owned by defendant The Coca-Cola Company (Coca-Cola).<sup>2</sup> From 1979 to 2002, Coca-Cola disposed of wastewater from the processing facility by spraying it onto adjacent fields, pursuant to a permit issued by DEQ.<sup>3</sup> In September 2000, Coca-Cola entered into an Administrative Consent Order (ACO) with DEQ that required Coca-Cola to phase out land application of wastewater from the processing facility, and Coca-Cola ceased spraying wastewater in December 2002.<sup>4</sup>

The plaintiffs alleged that the spraying of wastewater caused naturally occurring heavy metals to leach into groundwater, which then migrated onto their properties.<sup>5</sup> The plaintiffs claimed harm from the allegedly contaminated groundwater in the form of property damage, loss of property value, and physical ailments.<sup>6</sup> The court granted summary judgment to the defendants on four of the plaintiffs’ seven claims: negligence per se, trespass, Part 201 of NREPA, and MEPA.<sup>7</sup> In addition, the court dismissed twenty-two plaintiffs for failure to allege any specific individual harm.<sup>8</sup>

With respect to the plaintiffs’ trespass claims, the court concluded that these claims failed as a matter of law where groundwater contamination was the only alleged injury.<sup>9</sup> To recover under a theory of trespass, a plaintiff must show “an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession.”<sup>10</sup> The court noted that the Michigan Court of Appeals “has recognized that one does not have ownership or exclusive possession over water beneath one’s property.”<sup>11</sup> Further, the Michigan Court of Appeals has stated that elements in groundwater should be considered intangible objects and that “contaminants in groundwater, even more so than dust that settles on land, simply becomes “a part of the ambient circumstances of that space” and will not support an action in trespass.”<sup>12</sup> Based on this, the court concluded “that Michigan does not recognize claims of trespass where groundwater contamination is the only alleged injury.”<sup>13</sup>

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<sup>1</sup> [Abnet v. The Coca-Cola Company](#), F Supp 2d ; 2011 WL 1230823 (WD Mich 2011).

<sup>2</sup> *Abnet*, slip op at 1.

<sup>3</sup> *Abnet*, slip op at 1. The court’s opinion refers to DEQ as the Michigan Department of Natural Resources and Environment, or MDNRE. The agency’s name was changed to the Department of Environmental Quality effective March 13, 2011, pursuant to Executive Order 2011-1.

<sup>4</sup> *Abnet*, slip op at 1.

<sup>5</sup> *Abnet*, slip op at 1.

<sup>6</sup> *Abnet*, slip op at 1.

<sup>7</sup> *Abnet*, slip op at 3-6.

<sup>8</sup> *Abnet*, slip op at 2-3.

<sup>9</sup> *Abnet*, slip op at 4.

<sup>10</sup> *Abnet*, slip op at 4, quoting [Adams v. Cleveland-Cliffs Iron Co](#), 237 Mich App 51 (1999).

<sup>11</sup> *Abnet*, slip op at 4, citing [Postma v. Cty of Ottawa](#), unpublished opinion per curiam of the Court of Appeals, issued Sept 2, 2004 (Docket No. 243602), slip op at 10.

<sup>12</sup> *Abnet*, slip op at 4, quoting *Postma*, supra at \*9.

<sup>13</sup> *Abnet*, slip op at 4.

The court also held that the plaintiffs' MEPA claims were subject to the Part 201 pre-enforcement judicial review bar, MCL 324.20137(6)(d), which states that a court "does not have jurisdiction to review challenges to a response activity selected or approved by the [DEQ]" until "after the completion of the response activity."<sup>14</sup> The court rejected the plaintiffs' argument that they were not challenging DEQ's decisions, but merely seeking additional response activities under MEPA, stating: "[S]eeking injunctive relief requiring Defendants to perform additional response activities not required by MDNRE is tantamount to challenging the adequacy of MDNRE's decisions with respect to remedial action. Plaintiffs are alleging that the MDNRE hasn't done enough."<sup>15</sup>

## Supreme Court Reverses Itself by Vacating *Anglers* Decision

by: Rebecca J. Dukes, Myers & Myers PLLC

On April 25, 2011, in *Anglers of the AuSable, Inc. v. Dep't of Environmental Quality*,<sup>1</sup> the Michigan Supreme Court granted motions for rehearing and vacated its earlier decision, which had been issued just before the end of the 2010 term by a sharply divided court.<sup>2</sup> In *Anglers I*, the lead opinion included three notable rulings:

1. It overturned *Preserve the Dunes, Inc. v. Dep't of Environmental Quality*<sup>3</sup> and held that MDNRE (formerly and currently the MDEQ or "DEQ") permitting actions constituted "conduct" under the Michigan Environmental Protection Act ("MEPA") – and that the DEQ could be sustained as a defendant in a MEPA action when the DEQ had issued a permit for activity that is alleged would cause environmental harm;<sup>4</sup>
2. It failed to apply the reasonable-use balancing test of *Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc.*<sup>5</sup> and held that the discharge of contaminated water, at any levels, into an area that would ultimately lead to uncontaminated water is "manifestly unreasonable;"<sup>6</sup> and
3. It applied the standing test of *Lansing Schools Education Association v. Lansing Board of Education*<sup>7</sup> to MEPA claims, noting that no particularized injury is required and that any person can maintain an action against any person for the protection of the air, water, and other natural resources irrespective of whether that person suffered an injury in fact.<sup>8</sup>

Following the 2010 elections, the composition of the Court changed and the new majority, mostly dominated by conservative justices, granted motions for rehearing and vacated the 2010 opinion and the Court of Appeals decision on the grounds of mootness because the parties in the underlying case had abandoned their plans and no longer had the physical means of discharging into the AuSable River.<sup>9</sup> The order in *Anglers II* essentially resurrects the holdings and application of *Preserve the Dunes* and *Nestle*.

Under *Preserve the Dunes*, DEQ permitting activity will again be shielded from direct MEPA claims.<sup>10</sup> Challenges to DEQ permitting activity will again be required to be brought within the context of the administrative appeal process under the Michigan Administrative Procedures Act ("APA").<sup>11</sup> A person who wants to challenge DEQ permitting activity may intervene in the permitting proceeding for the purpose of asserting that the proposed proceeding involves conduct that

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<sup>14</sup> *Abnet*, slip op at 5-6. The court erroneously cited MCL 324.20137(4)(d) as the pre-enforcement judicial review bar.

<sup>15</sup> *Abnet*, slip op at 5.

<sup>1</sup> [Anglers II](#), 489 Mich 884 (2011).

<sup>2</sup> [Anglers of the AuSable, Inc. v. Dep't of Env'tl. Quality](#), 488 Mich 69 (2010) ("*Anglers I*").

<sup>3</sup> [471 Mich 508 \(2004\)](#).

<sup>4</sup> [Anglers I](#), 488 Mich at 76-80.

<sup>5</sup> [269 Mich App 25 \(2005\)](#).

<sup>6</sup> [Anglers I](#), 488 Mich at 82-85.

<sup>7</sup> [487 Mich 349, 372 \(2010\)](#).

<sup>8</sup> [Anglers I](#), 488 Mich at 81-82.

<sup>9</sup> [Anglers II](#), 489 Mich 884 (2011).

<sup>10</sup> [Preserve the Dunes](#), 471 Mich 508 (2004).

<sup>11</sup> [MCL 24.201 et seq.](#)

has or likely will have the effect of polluting, impairing or destroying natural resources.<sup>12</sup> The person may then have a contested case hearing, and may ultimately seek judicial review of the agency decision through an appeal to the circuit court pursuant to the APA.<sup>13</sup> Subsequent to those opportunities, a person may bring a MEPA claim directly against the permit holder whose actual conduct violates or would imminently violate MEPA.<sup>14</sup>

Under *Nestle Waters*, the reasonable-use balancing test will again apply to determine if competing water uses are reasonable under the circumstances. This test requires a court to analyze multiple factors to determine whether the alleged violation of a plaintiff's water rights amounts to an unreasonable infringement of those rights.<sup>15</sup> *Nestle*, 269 Mich App at 71-74.

With respect to standing, the test and analysis of *Lansing Schools* is still applicable.

[A] litigant has standing whenever there is a legal cause of action. ... Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.<sup>16</sup>

MEPA provides a cause of action for "any person" to bring suit to challenge a defendant's "conduct" that will pollute, impair, or destroy the air, water or other natural resources of the State of Michigan.<sup>17</sup> Under the *Lansing Schools* standing test, this statutory language will be read strictly and will not require an interest that differs from the citizenry at large in order to have standing. While the *Anglers II* Order does not change this standing test, it limits the potential defendants and types of challenges that "any person" can bring by eliminating the possibility of challenging the permitting procedures outside the APA. Now, "any person" can bring MEPA claims only against the actual persons or entities engaging in the conduct and can challenge only the conduct, not the permit itself.

Only time will tell exactly how the *Lansing Schools* standing test is applied to environmental claims, but for the time being, *Preserve the Dunes* and *Nestle*, and their progeny, are precedential once again.

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<sup>12</sup> [MCL 324.1705\(1\)](#).

<sup>13</sup> [MCL 24.302](#).

<sup>14</sup> [MCL 324.1703](#).

<sup>15</sup> [Nestle, 269 Mich App 25 \(2005\)](#).

<sup>16</sup> [Lansing Schools, 487 Mich 349, 371](#).

<sup>17</sup> [MCL 324.1701](#).