

## Supreme Court Vacates *Anglers of the AuSable* Decision

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The Michigan Supreme Court has vacated its December 29, 2010, decision in *Anglers of the AuSable, Inc. v. Department of Environmental Quality (DEQ)*. The court's decision this week revives the principle in *Preserve the Dunes, Inc. v. DEQ*, that the Michigan DEQ cannot be sued under the Michigan Environmental Protection Act (MEPA) for merely issuing a permit.

In its earlier opinion in *Anglers*, the Michigan Supreme Court had overruled *Preserve the Dunes* to hold that as soon as the DEQ issues a permit, it can be sued in circuit court for violating MEPA. As a result, the *Anglers* decision allowed permit opponents to bypass administrative remedies and deferential administrative appeal standards in favor of the immediate opportunity for discovery and unfettered judicial review allowed in a MEPA lawsuit. With the *Anglers* decision now vacated, permit opponents are once again limited to the deferential administrative appeal process -- and only after first exhausting their administrative remedies.

The court's recent order also has other implications for environmental permit challenges. The majority in *Anglers* had commented that "any person" could bring a claim under MEPA, overriding the court's earlier decision in *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.* Under *Nestle*, only owners and users of affected property could challenge a permit. Vacating the *Anglers* decision does not restore *Nestle* because *Lansing School Education Ass'n v. Lansing Board of Education* overruled *Nestle* earlier in 2010. But the recent changes in the Michigan Supreme Court's composition and the order vacating the *Anglers* opinion signal that the court may eventually restore *Nestle's* limitations on who can challenge a permit.

Finally, the new order removes from Michigan case law the theory that any discharge of water with even the slightest level of contaminants into a "non-contaminated" water source is unreasonable and could violate other's riparian rights. Thus, Michigan law continues to require use of a balancing test to determine whether one owner's riparian rights unreasonably interfere with another's.

If you have questions about the decision, please contact Dennis Donohue ( [ddonohue@wnj.com](mailto:ddonohue@wnj.com) or 616.752.2192) or another member of the Environmental Practice Group or Gaetan Gerville-Reache ( [ggerville-reache@wnj.com](mailto:ggerville-reache@wnj.com) or 616.752.2207) or another member of the Appellate Practice Group at Warner Norcross & Judd.