

MSC Opinion: Anglers of the Ausable, Inc. v. Department of Environmental Quality UPDATED

21. January 2011 By Matthew Nelson

On December 29, 2010, the Michigan Supreme Court issued a split decision in *Anglers of the AuSable, Inc. v. Department of Environmental Quality*, with Justice Davis writing the lead opinion. The lead opinion reached two holdings: (1) diverting “contaminated” water from one watershed into an uncontaminated watershed is “manifestly unreasonable”; and (2) the Department of Environmental Quality (“DEQ”) (n/k/a Department of Natural Resources and Environment) can be sued for permit decisions under the Michigan Environmental Protection Act (“MEPA”). Justice Davis’ decision was joined by Justice Hathaway in its entirety. Chief Justice Kelly and Justice Cavanagh fully concurred except as to Justice Davis’s holding that diverting contaminated water from one watershed to another is manifestly unreasonable. But the concurring justices agreed with Justice Davis’s result—the discharge plan at issue was unreasonable. Justice Young dissented. He would have dismissed the case because it was moot. The dissent further disagreed with holdings of the lead opinion. Justices Corrigan and Markman joined Justice Young’s dissent. Attorney General Bill Schuette, on behalf of the DNRE, has moved for rehearing by the Court.

Since the Court issued its opinion, Justice Davis has been replaced by Justice Mary Beth Kelly who defeated Justice Davis in the November 2010 election. Likewise, dissenting Justice Maura Corrigan has been replaced by Justice Brian Zahra. If the Court is as active in granting rehearing as it was when the Court’s personnel changed in 2009, this case has a significant likelihood of being reversed on mootness grounds. The *Anglers* case arose after the plaintiffs, who own or use riparian property in the AuSable River watershed, sued to stop Merit Energy from discharging water in Kolke Creek, a tributary of the AuSable River. Merit purchased a property in Otsego, Michigan. As part of the purchase, Merit agreed to clean a plume of contaminated groundwater that originated from the site. Merit proposed to do so by running more than 1 million gallons of water a day through an air-stripping system and then discharging the treated water into Kolke Creek. To do so, Merit obtained the necessary permit from the DEQ and an easement across state-owned land to build a pipeline from the facility to the discharge point. The discharge water still contained some contaminants.

The plaintiffs sued Merit and the DEQ alleging various common-law and MEPA claims. After a bench trial, the circuit court issued an injunction to stop the discharge plan. The court concluded that the discharge was not reasonable under the reasonable-use balancing test adopted by the Michigan Supreme Court in *Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc.*, 269 Mich. App. 25; 709 N.W.2d 174 (2005). The court ruled that the discharge and DEQ’s authorization of the discharge violated MEPA. The defendants appealed to the Court of Appeals. The Court of Appeals unanimously affirmed the trial court’s conclusion that the discharge plan was unreasonable, but dismissed DEQ as a defendant applying *Preserve the Dunes, Inc. v. Department of Environmental Quality*, 471 Mich. 280; 737 N.W.2d 447 (2007).

The plaintiffs sought and obtained leave to appeal from the Michigan Supreme Court.

In the lead opinion, Justice Davis reasoned that *Preserve the Dunes* was not correctly decided and should be overruled. In *Preserve the Dunes*, the Court held that reviewing the DEQ's decisions on whether to grant or deny permits was outside the judicial authority under MEPA. Justice Davis reasoned that because a permit decision can cause the commencement of harm to the environment, the DEQ is the proper subject of suits under MEPA. In her concurrence, Chief Justice Kelly applied her analysis of whether *stare decisis* should preserve *Preserve the Dunes* and also concluded that the case should be overruled.

Justice Davis then turned to the issue of standing and whether *Nestlé* should be overruled. He concluded that the plaintiffs had different interests than the citizens at large and consequently would themselves suffer an actual injury from the discharge. Consequently, the plurality decision did not need to address the standing analysis in *Nestlé*.

Finally, Justice Davis turned to whether Merit's proposed discharge into Kolke Creek was reasonable. Justice Davis wrote that "the parties have agreed that the reasonableness of the water's use is the determining factor in deciding water-use cases." He continued, "'unreasonable use of water has never been deemed an allowable use and is not now an allowable use.'" He then opined that "[i]t would be incongruous to hold that it is reasonable to decontaminate water by contaminating different water." Justice Davis's analysis on this issue only garnered the support of Justice Hathaway and is arguably not binding.

Justice Young dissented "vigorously." He derided the Court's opinion as "one of the most shocking examples of the assertion of power that is not grounded in the constitution or any statute." Justice Young noted that the case was moot because "*Merit no longer has the physical means of discharging treated water into Kolke Creek*" (emphasis in original) because Merit had quitclaimed its easement across state land. Consequently, Merit no longer has the ability to injure the plaintiffs.

Justice Young further dissented from the lead opinion's creation of a "new common law rule that certain discharges of contaminants are per se unreasonable infringements on riparian owners' rights." He charged that the lead opinion ignored the historic tie between reasonableness of a riparian discharge and the existence of a private nuisance.

Finally, Justice Young would have applied *Preserve the Dunes* and affirmed the Court of Appeals' dismissal of DEQ as a party.