ENVIRONMENTAL LAW

TODD C. SCHEBOR†

I. INTRODUCTION

This Article summarizes various opinions handed down by the Michigan Supreme Court and the Michigan Court of Appeals over the *Survey* period[1] that pertain to the area of environmental law. This Article is not intended to be a comprehensive study of every published decision in the area of environmental law over the *Survey* period, but rather a highlight and discussion of those cases that, in the view of this author, deserve particular consideration.

II. PART 201—ENVIRONMENTAL TRANSFER NOTICE REQUIREMENTS

During the *Survey* period, the Michigan Court of Appeals interpreted the rarely-litigated transfer notice section of the Michigan environmental liability statute, Part 201 of the Michigan Natural Resources and Environmental Protection Act ("Part 201").[2] Specifically, that section states:

> A person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a facility shall not transfer an interest in that real

† Senior Attorney, Dykema Gossett PLLC. B.S., 1998, University of Michigan; J.D., 2002, Case Western Reserve University; LL.M. in Environmental Law, 2003, Lewis and Clark College.

1. The *Survey* period covers cases decided between June 1, 2010 and May 31, 2011. Where appropriate, subsequent history has been included in case citations.

2. MICH. COMP. LAWS ANN. §§ 324.20101-.20142 (West 1995).

> property unless he or she provides written notice to the purchaser or other person to which the property is transferred that the real property is a facility and discloses the general nature and extent of the release.[3]

In *1031 Lapeer LLC v. Rice*,[4] the Michigan Court of Appeals held that because a lessor failed to disclose to its lessee the lease property's status as a site of environmental contamination, the lease was founded on an act prohibited by statute and therefore void.[5]

In 2006, plaintiffs 1031 Lapeer LLC and William R. Hunter entered into a lease agreement with defendant R.L. Price Properties for the purpose of leasing a gas station from the defendant for a period of ten years.[6] In 1996, ten years prior to the date the lease was entered, the gas station property was added to the State of Michigan's list of leaking underground storage tanks because it was a site of known environmental contamination.[7] The defendant station owner knew about the contamination at the time of the lease but did not tell the plaintiffs.[8] In late 2007, the plaintiffs learned of the contamination through the Michigan Department of Environmental Quality ("MDEQ") and initiated the lawsuit "alleging that defendant had violated his statutory duty to inform [the plaintiffs]" of the contamination on the property and "sought damages as well as rescission of the lease."[9] The "plaintiffs moved for . . . summary disposition . . . contending that the lease at issue was void and that they had established the elements of their claims against [the] defendant," and therefore only the issue of damages should be left for trial.[10] The defendant also moved for summary disposition contending that "plaintiffs had failed to exhaust their administrative remedies under" Part 201, the statute of frauds bars plaintiffs' claims, there is no genuine issue of material fact, and plaintiffs did not reasonably rely on any alleged written or oral misrepresentation.[11] The trial court denied defendant's motion for summary disposition, granted rescission in response to plaintiffs' motion for partial summary disposition, and

---

3. MICH. COMP. LAWS ANN. § 324.20116(1) (West 1995).
4. 290 Mich. App. 225 (2010).
5. *Id.* at 233.
6. *Id.* at 227.
7. *Id.*
8. *Id.*
9. *Id.*
10. *1031 Lapeer LLC*, 290 Mich. App. at 227.
11. *Id.*

damages of $83,000 were awarded following a jury trial on the plaintiffs' fraud claims.[12]

On appeal, the Michigan Court of Appeals affirmed the rescission of the lease, finding that MCL section 324.20116(1) states that a person "shall not" transfer property "unless he or she provides written notice" to the transferee "that the property [is] a facility."[13] The court, after noting that the legislature failed to specify a remedy for a violation of MCL section 324.20116(1), stated that "'[c]ontracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void.'"[14] Furthermore, because the "word 'shall' is generally used to designate a mandatory provision," the court stated that "the term 'shall not' may . . . [conversely be] construed as a prohibition."[15] Therefore, the court concluded that due to the fact that the defendant was prohibited from transferring an interest in the gas station property unless it provided the plaintiffs (or any other lessee) "with written notice that the property was a facility," the lease "was founded on an act prohibited by statute and was thus void."[16] Moreover, the court noted that public policy also supported finding the contract was void.[17] Under Part 201, "one who obtains ownership over or becomes an operator of a [property where contamination exists,] risks exposure to potentially significant, [unanticipated] costs and liability," and because of these potential costs and liability, the court opined that enforcing a contract in which the

---

12. *Id.* at 227-28.

13. *Id.* at 231 (citing MICH. COMP. LAWS ANN. § 324.20116(1) (West 1995)). At the time the case was decided, a "facility" was defined in Part 201 as

> [A]ny area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located. Facility does not include any area, place, or property at which response activities have been completed which satisfy the cleanup criteria for the residential category provided for in section 20120a(1)(a) and (17) or at which corrective action has been completed under part 213 which satisfies the cleanup criteria for unrestricted residential use.

MICH. COMP. LAWS ANN. § 324.20101(1)(o) (West 2010). On December 15, 2010, the definition of "facility" was changed as a result of the 2010 amendments to Part 201. *See* MICH. COMP. LAWS ANN. § 324.20101(1)(r).

14. *1031 Lapeer LLC*, 290 Mich. App. at 231 (quoting Michelson v. Voison, 254 Mich. App. 691, 694, 658 N.W.2d 188 (2003)).

15. *Id.*

16. *Id.*

17. *Id.*

required environmental disclosure was admittedly not made would be against public policy.[18]

In appealing the denial of its motion for partial summary disposition on the fraud claims, the defendant claimed, among other defenses, the "plaintiffs did not reasonably rely on any alleged written or oral misrepresentation," and that the plaintiffs had the means to discover the existence of the contamination on the property.[19] The defendant cited provisions in the lease "that expressly mentioned contamination," including provisions holding the landlord responsible for the cleanup of "environmental contamination which exists on the property at the time of this Lease Agreement," and an express indemnity for liability and expenses for "pre-existing contamination."[20] The court, nevertheless, affirmed the decision of the trial court, noting that the "[s]uppression of facts and truths can constitute silent fraud where the circumstances are such that there exists a legal or equitable duty to disclose."[21] "Whether defendant intentionally failed to advise plaintiffs of the known contamination" and "whether the contract itself reasonably placed plaintiffs on notice . . . [were] question[s] of fact for the jury," and therefore "the fraud claims properly withstood summary disposition."[22]

The *1031 Lapeer* decision confirms that a lease of an entire contaminated parcel would trigger the general Part 201 transfer notice requirement. What is less clear is whether a transfer of a portion of the property, particularly in an area not known to be contaminated, would also trigger the notice requirement. In light of the *1031 Lapeer* decision, transferors are likely to err on the side of disclosure and to ensure that their disclosures are fully documented, to lessen the chance of their contracts being voided in the future.

III. GREAT LAKES SUBMERGED LANDS

In the *Survey* period, the Michigan Court of Appeals resolved an important dispute about the Michigan Department of Environmental Quality's jurisdiction over setbacks from the Great Lakes' shorelines. In *Burleson v. Michigan Department of Environmental Quality*,[23] the Michigan Court of Appeals undertook a straightforward statutory

18. *Id.* at 232.
19. *Id.* at 236.
20. *1031 Lapeer LLC*, 290 Mich. App. at 237.
21. *Id.* at 236 (quoting Cleary Trust v. Edward-Marlah Muzyl Trust, 262 Mich. App. 485, 500, 686 N.W.2d 770 (2004)).
22. *Id.* at 238-39.
23. 292 Mich. App. 544, 808 N.W.2d 792 (2011).

construction analysis in determining the meaning of "natural ordinary high-water mark" in the Great Lakes Submerged Lands Act ("GLSLA") (now Part 325 of the Natural Resources and Environmental Protection Act ("NREPA")).[24] The court ultimately determined in a divided opinion that the Michigan Department of Environmental Quality's ("MDEQ") jurisdiction over the land surrounding and below the Great Lakes under the GLSLA is limited to the ordinary high water mark defined by the International Great Lakes datum of 1955.[25]

Petitioner Bobby Burleson sought the right to build a lakefront home on property he owned along the shoreline of Lake Michigan.[26] Because his "property [lay] within a critical dune area," Burleson applied for a permit from the MDEQ.[27] In refusing to grant Burleson's permit request, the MDEQ stated that he "was also required to obtain a permit under Part 325 (the GLSLA.)"[28] Claiming that the land he proposed to build his home on did not fall within the jurisdiction of the MDEQ,[29] Burleson "requested a declaratory ruling from [the MDEQ] to address the shoreline elevation . . . that constitutes the limit of [the MDEQ's] jurisdiction for purposes of [the GLSLA]."[30] The statute at issue states, in 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

24. MICH. COMP. LAWS ANN. §§ 324.32501-.32516 (West 1995).

25. *Burleson*, 292 Mich. App. at 553-54.

26. *Id.* at 546.

27. *Id.*

28. *Id.* at 546-47.

29. *Id.* at 547. The MDEQ has jurisdiction to require permits under Part 325 of the NREPA concerning lands "lying below and lakeward of the natural ordinary high-water mark . . . ." *Id.* at 550 (quoting MICH. COMP. LAWS ANN. § 324.32502 (West 1995)).

30. *Id.* at 547-48.

> Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.[31]

In its declaratory ruling, the MDEQ stated "that its jurisdiction is based on the natural ordinary high-water mark (NOHWM), which is [different than] the ordinary high-water mark (OHWM)."[32] The MDEQ stated that the "NOHWM must be different from the OHWM . . . otherwise the word 'natural' would be rendered superfluous."[33] Citing the Michigan Supreme Court case of *Glass v. Goeckel*,[34] the MDEQ stated "that the NOHWM is found at the point where the 'presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.'"[35] In other words, the MDEQ determined that in some instances there may be property that lies above the OHWM but below the NOHWM and held that this property is subject to the MDEQ's regulation under the GLSLA. The MDEQ also stated that it's mandate to protect the public trust requires the NOHWM to be something different than the OHWM, reasoning that because "the pubic trust is not limited by the [statutory] elevations" of the OHWM, as determined by the *Glass* court, "and because [the GLSLA] is intended to preserve the public trust, [then the MDEQ's] jurisdiction should not be limited to the specified elevations, either."[36] Burleson appealed the MDEQ's declaratory ruling to the circuit court, "arguing that the [Michigan] Legislature expressly limited [the MDEQ's] jurisdiction [under the GLSLA] to lands lakeward of 579.8 feet in elevation."[37] In upholding the MDEQ's declaratory ruling, the trial court found "[the MDEQ's] interpretation of the statute more logical than [Burleson's] interpretation."[38]

On leave of appeal, the Michigan Court of Appeals reversed the decision of the trial court, finding "that the Legislature expressly limited [the MDEQ's] jurisdiction to lands lakeward of 579.8 feet in

---

31. MICH. COMP. LAWS ANN. § 324.32502 (emphasis added).

32. *Burleson*, 292 Mich. App. at 548.

33. *Id.* at 550.

34. 473 Mich. 667, 703 N.W.2d 58 (2005). In *Glass v. Goeckel*, the Michigan Supreme Court held that the public-trust doctrine extended to those lands that lay below the ordinary high-water mark, which it defined by reference to the natural indicators of the shoreline: "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *Id.* at 691 (quoting Diana Shooting Club v. Husting, 145 N.W. 816 (Wis. 1914)).

35. *Burleson*, 292 Mich. App. at 548 (quoting *Glass*, 473 Mich. at 693).

36. *Id.* at 551.

37. *Id.* at 548.

38. *Id.*

elevation."[39] As a preliminary matter, the court noted that the parties "agree that the 'natural ordinary high-water mark' constitutes the limit of [the MDEQ's] jurisdiction under [the GLSLA,] [h]owever, they differ regarding the proper interpretation of that phrase."[40] The court determined that "[b]ecause there is no provision defining the phrase 'natural ordinary high-water mark,' statutory interpretation is necessary" to resolve the issue.[41]

In holding that the MDEQ's jurisdiction is limited to the ordinary high-water mark defined by the international Great Lakes datum of 1955, the court concluded that it "strains credulity and common sense to conclude that" the Legislature intended for vastly different definitions of such similar phrases as "ordinary high-water mark" and "natural ordinary high-water mark," especially when the two phrases are "employed within the same statutory paragraph . . . ."[42] The court was of the opinion that had the Michigan Legislature not intended for the elevations stated in the international Great Lakes datum of 1955 to apply, their inclusion in the statute would have been completely meaningless at the time the Legislature proposed the statute.[43] Furthermore, the court noted that "had the [Michigan] Legislature meant to apply [the MDEQ's] definition to the NOHWM,"[44] it could have expressly done so because when it enacted the Inland Lakes and Streams Act[45] two years before the GLSLA was introduced, it defined the phrase "ordinary high-water mark" in such a manner.[46] Finally, in discerning the reason the Michigan Legislature included the term "natural" in the statute, the court looked to the

39. *See id.*

40. *Id.* at 550.

41. *Burleson*, 292 Mich. App. at 549.

42. *Id.* at 551.

43. *Id.* at 551-52. The MDEQ "contend[ed] that the stated elevations [were] relevant for regulating activities such as dredging, beach maintenance, and the mowing and removal of vegetation." *Burleson*, 292 Mich. App. at 551. However, the court noted that none of these uses were in effect at the time the language containing the elevations was proposed. *See id.* at 551. One of these uses was in effect in 1968, however, the language containing the elevations was proposed in 1967. *Id.*

44. *Id.* at 552.

45. MICH. COMP. LAWS ANN. §§ 324.30101-.30113 (West 1995).

46. *Burleson*, 292 Mich. App. at 552. In the Inland Lakes and Stream Act, the term "ordinary high-water mark" is defined as "[T]he line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation. On an inland lake that has a level established by law, it means the high established level. Where water returns to its natural level as the result of the permanent removal or abandonment of a dam, it means the natural ordinary high-water mark." MICH. COMP. LAWS ANN. § 324.30101(m).

language of the Inland Lakes and Streams Act for guidance and pointed out that it "uses the phrase 'natural ordinary high water mark' to refer to the specifically defined '[o]rdinary high water mark' as it would exist without alteration by humans."[47] Therefore, the court opined that "it is logical to conclude that the [Michigan] Legislature . . . intended the phrase 'natural ordinary high-water mark' to refer to the specified elevations" used to define "ordinary high-water mark" "as measured by the land in its natural state, unaltered by humans."[48] Judge Gleicher wrote a strongly worded dissent focusing on the Michigan Legislature's deliberate insertion of the word "natural" to delineate the scope of the state's ordinary high water mark jurisdiction. Judge Gleicher opined that the

> Legislature's incorporation of the modifier 'natural' signal[s] its intent that benchmarks created by nature, such as eroded soil and altered patterns of vegetation, demarcate the extent of the [DEQ's] jurisdiction . . . . And given that the term 'natural ordinary high-water mark' represents both a centuries-old legal term of art and a concept well-known to surveyors, I presume that the Legislature understood the meaning and significance of the language it included in MCL 324.32502.[49]

While the fixed-data ordinary high water marks found in the GLSLA may be artificial and inflexible, they provide a predictable reference point for determining public and private rights. Property owners are likely to be relieved by the *Burleson* opinion because it provides greater certainty as to development rights.

IV. WATER RESOURCES PROTECTION

A. Responsibility of Municipality for Sewerage Discharge

The Michigan Court of Appeals addressed the responsibility upon a municipality for sewerage discharge that occurs within its jurisdiction. In *Department of Environmental Quality v. Township of Worth*,[50] the Michigan Court of Appeals held that Part 31 of the Natural Resources and Environmental Protection Act ("NREPA")[51] does not empower the

47. *Burleson*, 292 Mich. App. at 553.
48. *Id.* at 554.
49. *Burleson*, 292 Mich. App. at 558-59.
50. 289 Mich. App. 414, 808 N.W.2d 260 (2010).
51. *See* MICH. COMP. LAWS ANN. §§ 324.3101-.3134 (West 1995).

Michigan "Department of Environmental Quality to require a township to install a sanitary-sewer system when there is widespread failure of the private septic systems [in its jurisdiction] resulting in contamination of lake waters."[52]

On a five-mile strip of land located between highway M-25 and Lake Huron, in Worth Township, failing private septic systems resulted in the discharge of raw sewage into the waters of Lake Huron and its tributaries.[53] The township "does not operate a public sanitary sewer system[, therefore] all the residences and businesses within the township rely on" individual septic systems for waste.[54] For years the MDEQ and the county health department requested that the township install a sanitary sewer system.[55] However, the township refused due to financial constraints and subsequently the MDEQ brought an action under Part 31 of the NREPA.[56] The trial court granted summary disposition to the MDEQ and issued an order establishing a time frame for the township to design, construct, and operate a public sanitary sewer system, imposing a $60,000 fine, and awarding attorney fees to the MDEQ.[57]

MCL section 324.3109(2), which is the relevant provision of Part 31 of NREPA relied on by the MDEQ "to establish [the township's] responsibility for the discharge from the private septic systems into the waters of Lake Huron,"[58] states in part:

> The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state *shall be considered*

---

52. *Worth Twp.*, 289 Mich. App. at 416. On March 23, 2011, the Michigan Supreme Court granted the application for leave to appeal the August 17, 2010 judgment of the court of appeals, limiting the issue on appeal to "whether the Natural Resources and Environmental Protection Act, MCL 324.101, et seq., empowers the Department of Environmental Quality to seek, and the circuit court to grant, an order effectively requiring a township to install a sanitary sewer system when a widespread failure of private septic systems results in contamination of lake water." Dep't of Envtl. Quality v. Twp. of Worth, 489 Mich. 856, 795 N.W.2d 13 (2011). The Michigan Supreme Court heard oral arguments on November 9, 2011.

53. *Worth Twp.*, 289 Mich. App. at 416.

54. *Id.*

55. *Id.*

56. *Id. See also* MICH. COMP. LAWS ANN. §§ 324.3101-.3134.

57. *Worth Twp.*, 289 Mich. App. at 417. In footnote 2, the court of appeals notes that the district court technically did not "compel the construction of a sanitary-sewerage system. Rather, [the court's order] refers to the [township's] obligation 'to take necessary corrective action' and then establishes a time frame for that action." *Id.* at 417 n.2. The court of appeals commented that it seems apparent that "the project" is the construction of a sewer system" given that the MDEQ viewed it as the only practical option to address the problem. *Id.*

58. *Id.*

> *prima facie evidence* of a violation of this part *by the municipality* in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in section 3115.[59]

On appeal, the Michigan Court of Appeals reversed the trial court's decision and instructed the trial court to enter an order granting summary disposition in favor of the township.[60] The majority opinion held "that MCL 324.3109(2) does not impose . . . responsibility on a municipality for any sewage discharge that occurs within its jurisdiction . . . ."[61] Rather, it merely creates a rebuttable presumption that a discharge originating within a municipality results in a violation of that municipality.[62] The court of appeals agreed with the township that the presumption that the township violated Part 31 of NREPA was rebutted because the township was not and could not be the source of the violating activity because "it does not operate a sanitary-sewerage system."[63] The court of appeals also disagreed with the MDEQ's contention "that any discharge of raw sewage within a municipality constitutes prima facie evidence of a violation by the municipality even if the municipality is not the source of the discharge," concluding that the use of the word "by" in MCL section 324.3109(2) means that the violation must "occur 'through the agency of' the municipality or 'as a result' of the municipality . . . ."[64] Therefore, it must be "the actions of the municipality that lead to the discharge."[65]

---

59. MICH. COMP. LAWS ANN. § 324.3109(2) (emphasis added).

60. *Worth Twp.*, 289 Mich. App. at 424.

61. *Id.*

62. *Id.* at 419.

63. *Id.*

64. *Id.* at 420.

65. *Id.* In a dissent, Judge O'Connell explained that, historically, townships have been responsible for infrastructure issues necessary for utilities and access to properties within their boundaries, which includes the oversight of proper sewage disposal, and therefore "[t]he purpose of MCLA 324.3109(2) is to make the local municipality responsible for any discharges within its boundaries, even if the municipality did not actively discharge the sewage." *Worth Twp.*, 289 Mich. App. at 441. Judge O'Connell also stated "rebuttal of prima facie evidence of a violation does not automatically mean that summary disposition in favor of the opposing party is appropriate." *Id.* at 443. Therefore, "[a]t the very least, the majority should [have] remand[ed the case] for additional fact-finding" regarding the township's responsibility for the discharge, as opposed to "summarily granting summary disposition in favor of the township." *Id.*

B. Permit Requirements for CAFOs

The scope of MDEQ's rulemaking authority was challenged when various farming associations commenced a declaratory judgment action challenging the validity of an administrative rule pertaining to concentrated animal feeding operations ("CAFO").[66] In *Michigan Farm Bureau v. Department of Environmental Quality*, the Michigan Court of Appeals upheld Michigan Administrative Code Rule 323.2196 ("Rule 2196"), which requires all owners and operators of CAFOs to obtain a National Pollutant Discharge Elimination System ("NPDES") permit, unless the owner or operator demonstrates that it does not have the potential to discharge pollutants.[67]

In 2005, a similar federal rule[68] was held by a federal court to exceed the scope of the United States Environmental Protection Agency's ("EPA") statutory rulemaking authority as conferred by the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA").[69] In *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*,[70] the Court of Appeals for the Second Circuit ruled that pursuant to the CWA, the EPA does not have the authority to require owners and operators of CAFOs to obtain an NPDES permit if they have the *potential* to discharge pollutants into the navigable waters; rather, their regulatory authority is limited to owners and operators of CAFOS that *actually* discharge.[71] Relying in part on the *Waterkeeper* decision, the plaintiffs in *Michigan Farm Bureau* initiated the instant case alleging that Rule 2196 violates federal law because it is contrary to the CWA and regulations promulgated by the EPA, violates state law because it exceeds the scope of its enabling act, which is Part 31 of the Natural Resources and Environmental Protection Act ("NREPA"),[72] and is arbitrary and capricious.[73] The trial court granted summary disposition in favor of the MDEQ.[74]

---

66. Mich. Farm Bureau v. Dep't of Envtl. Quality, 292 Mich. App. 106, 807 N.W.2d 866 (2011). Concentrated animal feeding operations are "large-scale industrial operations that raise extraordinary numbers of livestock." Waterkeeper Alliance, Inc. v. Envtl. Prot. Agency, 399 F.3d 486, 492 (2d Cir. 2005).

67. *Mich. Farm Bureau*, 292 Mich. App. at 120.

68. NPDES Permit Regulation and Effluent Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176 (Feb. 12, 2003).

69. 33 U.S.C. § 1251-1376 (2006).

70. 399 F.3d 486 (2d Cir. 2005).

71. *Id.* at 506.

72. *Mich. Farm Bureau*, 292 Mich. App. at 111. *See also* MICH. COMP. LAWS ANN. §§ 324.3101-.3134.

73. *Mich. Farm Bureau*, 292 Mich. App. at 113.

74. *Id.* at 115.

On appeal, the Michigan Court of Appeals rejected the plaintiffs' challenge to Rule 2196 and upheld the rule's requirements, holding that the MDEQ did not exceed its statutory rulemaking authority.[75] As an initial matter, the court noted that the EPA granted the State of Michigan the authority to administer its own NPDES program and that it "may adopt discharge standards and effluent limitations that are more stringent than the federal standards and limitations."[76] Applying the *Luttrell* test,[77] the court stated that "the powers conferred upon the [M]DEQ [under] Part 31 of the NREPA are broader than the powers conferred upon the EPA by the CWA [and, therefore], the reasoning of the *Waterkeeper* decision does not apply in this case."[78] In particular, because the MDEQ has a duty pursuant to Part 31 to "take all appropriate steps to prevent any pollution the [MDEQ] considers to be unreasonable and against public interest in view of the existing conditions in any . . . waters of the state," the promulgation of Rule 2196 is within the scope of Part 31 of NREPA.[79] Furthermore, the court held that "Rule 2196 is rationally related to the Legislature's purpose to *prevent* the pollution of the waters of this state" noting that "[g]iven that numerous CAFOs without NPDES permits had already discharged waste into Michigan's waters, the [MDEQ] concluded that it was reasonable and necessary to require all CAFOs to seek and obtain an NPDES permit or to satisfactorily demonstrate that they have no potential to discharge."[80]

For those CAFO owners and operators who believe that they do not have a potential to discharge pollutants into the waters of Michigan, Rule 2196 will impose additional costs and regulatory hurdles in order to obtain an NPDES permit waiver from the MDEQ. However, as the court stated in *Michigan Farm Bureau*, "a rule is not arbitrary or capricious merely because it displeases the regulated parties."[81]

---

75. *Id.* at 120.

76. *Id.* at 131 (citing 40 CFR 123.1(i)(1)).

77. "To be enforceable, administrative rules must be constitutionally valid, procedurally valid, and substantively valid." *Id.* at 129 (citing LEDUC, MICH. ADMIN. LAW § 4:30, 214 (2001)). Michigan courts must employ a three-part test to determine whether an administrative rule is substantively valid: "(1) whether the rule is within the subject matter of the enabling statute, (2) whether it complies with the legislative intent underlying the enabling statute, and (3) whether it is arbitrary and capricious." *Id.* (citing Luttrell v. Dep't of Corr., 421 Mich. 93, 100, 365 N.W.2d 74 (1984)).

78. *Mich. Farm Bureau*, 292 Mich. App. at 137.

79. *Id.* (quoting MICH. COMP. LAWS ANN. § 324.3106).

80. *Id.* at 143-44.

81. *Id.* at 145 (citing Binsfield v. Dep't of Natural Res., 173 Mich. App. 779, 786-87, 434 N.W.2d 245 (1988)).

V. MICHIGAN ENVIRONMENTAL PROTECTION ACT

On December 29, 2010, the Michigan Supreme Court handed down arguably one of the most significant environmental decisions during the *Survey* period. In *Anglers of the AuSable, Inc. v. Department of Environmental Quality*,[82] the Michigan Supreme Court overruled its earlier decision in *Preserve the Dunes, Inc. v. Department of Environmental Quality*[83] and held that as soon as the Michigan Department of Environmental Quality ("MDEQ") issues a permit, it can be sued in circuit court for violating the Michigan Environmental Protection Act ("MEPA").[84]

The case involved Merit Energy Company's ("Merit") "proposed plan to discharge treated, but still partially contaminated, water [from an environmental cleanup site in] the Manistee River watershed into the AuSable River [watershed] in an effort to clean a plume of contaminated groundwater" that originated from its facility in Otsego County, Michigan.[85] The MDEQ approved Merit's plan, "issued a general permit and certificate of coverage," and "granted Merit an easement through state-owned land to allow Merit to construct a pipeline . . . to the discharge" point in the AuSable River watershed.[86] The plaintiffs subsequently filed a complaint against Merit alleging violations of surface-water law, riparian law, and MEPA, and seeking an injunction against the plan.[87] The trial court applied the "reasonable use balancing test" from *Mich. Citizens for Water Conservation v. Nestle Waters North America Inc.*,[88] concluding that the proposed discharge constituted an unreasonable use because it would severely harm the AuSable River watershed, and issued an injunction.[89] All parties appealed and the Michigan Court of Appeals affirmed the trial court's decision based on the unreasonableness of Merit's proposed discharge plan.[90] The Michigan Supreme Court granted leave to appeal and "ask[ed] the parties

82. 488 Mich. 69, 793 N.W.2d 596 (2010), *vacated*, 489 Mich. 884, 796 N.W. 2d 240 (2011).

83. 471 Mich. 508, 684 N.W.2d 847 (2004).

84. *Anglers of the AuSable*, 488 Mich. at 72. *See also* MICH. COMP. LAWS ANN. §§ 324.1701-.1706 (West 1995).

85. *Anglers of the AuSable*, 488 Mich. at 72.

86. *Id.* at 74.

87. *Id.*

88. 269 Mich. App. 25, 709 N.W.2d 174 (2005).

89. *Anglers of the AuSable*, 488 Mich. at 74-75.

90. *Id.* (citing Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality, 283 Mich. App. 115, 770 N.W.2d 359 (2009)).

to discuss, among other issues, whether [*Nestle*] and [*Preserve the Dunes*] were correctly decided."[91]

In a sharply divided decision, the majority's opinion held that Merit's discharge plan was "manifestly unreasonable" and that the MDEQ can be sustained as a defendant in a MEPA action for its permitting decisions.[92] In doing so, the majority overruled *Preserve the Dunes*, which previously held that reviewing the MDEQ's permit decisions was outside the judicial authority under MEPA.[93] The majority's opinion also overruled the restrictive standing test used in *Nestle* and instead relied on its 2010 decision in *Lansing Schools Education Association v. Lansing Board of Education*[94] to apply MEPA's express statutory language and allow any person to bring suit under the law.[95]

However, on April 25, 2011, the Michigan Supreme Court vacated its December 2010 decision.[96] By a 4-3 majority, the court reasoned that the case was moot because not only had Merit voluntarily abandoned the easement that granted it physical access to the AuSable River watershed, but also Merit no longer proposed to discharge treated water into the AuSable River watershed.[97] This view is consistent with then-Justice (now Chief Justice) Young's dissent in the court's December 2010 decision.[98]

As a result of the court vacating its December 2010 decision, the court's 2004 decision in *Preserve the Dunes* is restored and 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 others' riparian rights is removed from Michigan case law. Thus, the use of a balancing test to determine whether one owner's riparian rights unreasonably interfere with another's rights appears to still be required.

---

91. *Anglers of the AuSable*, 488 Mich. at 75-76 (citing Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality, 485 Mich. 1067, 777 N.W.2d 407 (2010)).

92. *Anglers of the AuSable*, 488 Mich. at 83 n.13.

93. *Id.* at 80.

94. 487 Mich. 349, 792 N.W.2d 686 (2010).

95. *Anglers of the AuSable*, 488 Mich. at 81.

96. Anglers of the AuSable v. Dep't of Envtl. Quality, 489 Mich. 884, 796 N.W.2d 240 (2011).

97. *Id.* at 884-85.

98. *Anglers of the AuSable*, 488 Mich. at 91 (Young, J., dissenting).

VI. CONCLUSION

The cases in the *Survey* period addressed a variety of areas within the environmental practice area. This Article has attempted to put those legal decisions into context.