MICHIGAN CLIMATE CHANGE LITIGATION: CAN THE MICHIGAN ENVIRONMENTAL PROTECTION ACT SAVE THE DAY?

I. INTRODUCTION

Well-respected scientific reports have left little doubt of the connection between rising global temperatures and the increasing concentration of carbon dioxide in the world's atmosphere, caused primarily by the use of fossil fuels.[1] Armed with this scientific data, and angry over the impact of climate change on their immediate environments, citizens and several states have initiated lawsuits targeting fossil-fuel-producing energy and utility companies.[2] These suits have rested upon theories of public and private nuisance under both the federal common law of nuisance and state nuisance law.[3] The success of these suits has varied considerably.[4]

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1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, 30-37 (2007), http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf ("Warming of the climate is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global sea level . . . . The radiative forcing of the climate is due to long-lived GHGs [greenhouse gases] . . . . Carbon dioxide (Co2) is the most important GHG . . . . Its annual emissions have grown between 1970 and 2004 by about 80% . . . and represented 77% of total anthropogenic GHG emissions in 2004 . . . . The atmospheric concentrations of Co2 . . . in 2005 have exceed[ed] by far the natural range over the last 650,000 years. Global increases in Co2 are due primarily to fossil fuel use.").

2. Comer v. Murphy Oil USA, Inc., 585 F.3d 855 (5th Cir. 2009), *vacated*, 598 F.3d 208 (5th Cir. 2010), *and appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (alleging defendant oil and energy companies emitted GHGs contributing to global warming which, in turn, caused sea levels to rise and strengthened Hurricane Katrina, leading to increased damage of plaintiff's property); Native Vill. of Kivalina v. ExxonMobile Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009) (alleging defendant energy, oil, and utility companies have contributed to global warming causing the Artic sea ice protecting the Kivalina coast to diminish, resulting in coastal erosion and the forced relocation of Kivalina residents); Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), *rev'd sub nom.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (alleging defendant power plants are substantial contributors to global warming which will cost plaintiff States billions of dollars to remedy).

3. *Comer*, 585 F.3d at 859; *Native Vill. of Kivalina*, 663 F. Supp. 2d at 869; *Am. Elec. Power Co.*, 131 S. Ct. at 2534.

4. *Compare Native Vill. of Kivalina*, 663 F. Supp. 2d at 877-80 (holding plaintiffs lacked standing to bring their claim and that nuisance theory in the global warming context presented a non-justiciable political question), *with Am. Elec. Power Co.*, 131 S. Ct. 2535 (holding plaintiffs satisfied all federal requirements for standing).

This Note will focus on the potential success of similar litigation brought in Michigan state courts by Michigan citizens. Michigan's Great Lakes play a critical role in its economy, making the State especially vulnerable to the effects of global warming.[5] Should global warming progress un-checked, temperatures in Michigan are predicted to increase anywhere from five to ten degrees Fahrenheit over the next several decades.[6] A warmer climate will lower water levels and increase temperatures in the Lakes, disrupting the shipping, recreational, and fishing industries.[7] It is not difficult to imagine a Michigan resident adversely affected by these climate changes bringing suit against the State's major contributors of greenhouse gases alleging, for example, that his fishing business has suffered due to the disappearance of trout from the State's waters.[8]

Fortunately for this potential Michigan plaintiff, unlike the similarly situated out-of-state plaintiffs previously mentioned, he need not rely on nuisance theory alone in bringing his claim. The Michigan Environmental Protection Act (MEPA) provides Michigan citizens with an express cause of action against any party contributing to environmental degradation.[9] Still, the Michigan Supreme Court has employed several tools that limit MEPA's reach and restrict our plaintiff's opportunity to access the court system with his claim. Part II of this Note will introduce the policy objectives behind MEPA and some of the limiting doctrines the court has employed. Part III will assess the potential success of climate change litigation brought under MEPA in

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5. Center for Integrative Environmental Research and National Conference of State Legislatures, *Michigan: Assessing the Costs of Climate Change* 1 (July 2008), *available at* http://www.cier.umd.edu/climateadaptation/Climate%20change--MICH.pdf. The report details the economic impact of climate change on Michigan's tourism, fishing and agriculture industries. *Id.* at 2-3. Perhaps most financially devastating is the projected economic impact on Michigan's manufacturing and shipping industry. "Manufacturing, the largest economic sector in the state, contributes approximately [eighteen] percent of the gross state product and depends on the [St. Lawrence] seaway for cost-effective transport of goods . . . . If water levels continue to drop along the route, expensive channel dredging may be necessary . . . cost[ing] between $92 million and $154 million annually . . . . If Great Lakes water levels decrease as expected, system connectivity along the Great Lakes-St. Lawrence route could decline by 25 percent . . . caus[ing] an annual economic loss of almost $1.5 billion in foreign trade." *Id.* at 2.

6. *Id.* at 1.

7. *Id.* at 1-3.

8. *Id.* at 3. Trout are particularly sensitive to increased water temperatures resulting from global warming and, "[i]f trout fishing no longer is viable due to climate change, Michigan could lose more than $75 million in trip-related tourism." *Id.*

9. MICH. COMP. LAWS ANN. § 324.1701(1) (West 2010) (conferring authority on the attorney general or "any person" to bring suit against any other party for conduct that is likely to pollute, impair, or destroy a natural resource).

light of these doctrines. Finally, Part IV will conclude that, despite the province of MEPA, climate change litigation brought under its provisions is unlikely to succeed given the role of politics on the Michigan Supreme Court and the seeming inability of the court system to fit the global warming dispute within traditional legal paradigms.

II. BACKGROUND

A. MEPA Enactment

In 1963, the Michigan legislature amended the State Constitution in response to increasing nationwide environmental awareness[10] and concern over the preservation of Michigan's natural resources.[11] After declaring conservation of the state's natural resources to be a "paramount public concern,"[12] the amendment concluded with a call to action, announcing: "The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction."[13]

Seven years later, after failed citizen attempts to protect the environment through litigation,[14] and faced with agency inaction in environmental protection,[15] the legislature fulfilled "its constitutional duty to protect Michigan's natural resources"[16] by enacting the Michigan Environmental Protection Act in 1970.[17] MEPA confers authority on the attorney general or "any person" to

> [M]aintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for

10. Adam Rome, *"Give Earth a Chance:" The Environmental Movement and the Sixties*, 90 J. AM. HIST. no. 2 (2003).

11. Diane K. Danielson, *Environmental Regulation in Michigan and Massachusetts: Two Statutes with Two Different Solutions to the Same Problem*, 20 B.C. ENVTL. AFF. L. REV. 99, 103 (1993).

12. MICH. CONST., art. IV, § 52.

13. *Id.*

14. *See* Envtl. Def. Fund v. Ball, 162 N.W.2d 164, 164 (Mich. Ct. App. 1968) (dismissing an action to enjoin the use of Dieldrin, a pesticide, holding its use was best left to the "discretion" and "wisdom" of the Michigan State Department of Agriculture).

15. *See* Brief for Joseph L. Sax as Amicus Curiae Supporting Plaintiffs-Appellees at 3-4, Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co., 684 N.W.2d 800 (Mich. 2004), *overruled by* Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686 (Mich. 2010).

16. Susan J. Mahoney, *Muddying the Waters: The Effects of the Cleveland Cliffs Decision and the Future of the MEPA Citizen Suit*, 83 U. DET. MERCY L. REV. 229, 236 (2006).

17. MICH. COMP. LAWS ANN. §§ 324.1701-324.1706 (West 2010).

> declaratory and equitable relief 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.[18]

According to MEPA's author, law professor Joseph L. Sax, the statute's language was drawn broadly on purpose in order to accomplish three goals: "[T]o recognize the public right to a decent environment as an enforceable legal right; to make [this right] enforceable by private citizens suing as members of the public; and to set the stage for the development of a common law of environmental quality."[19] In this way, MEPA allowed for continued environmental law enforcement by agencies but supplemented that effort with enforcement measures taken by "that segment of society most directly affected [by environmental degradation]–the public."[20]

B. Statutory and Common-Law Requirements Under MEPA

Although broad in its grant of power, MEPA is a relatively short piece of legislation and many of its terms and standards are left undefined. Since its enactment in 1970, Michigan courts have attempted to fill in the gaps left by its broad language in an effort to define the scope of the Act and add substance to its provisions.[21] Contrary to the policy goals of the Act, the courts' efforts to provide clarity and meaning to MEPA have instead restricted its reach and erected barriers to effective environmental law enforcement.

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18. *Id.* at § 1701(1). Pursuant to section 1703(1), once a plaintiff has made a prima facie showing that the defendant's conduct has or is likely to pollute, impair, or destroy a natural resource, the defendant may, as an affirmative defense, show that "there is no feasible and prudent alternative" to the challenged conduct and that the conduct "is consistent with the promotion of public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources." MICH. COMP. LAWS ANN. § 1703(1) (West 2010).

19. Heather Terry, Comment, *Still Standing But "Teed Up:" The Michigan Environmental Protection Act's Citizen Suit Provision After* National Wildlife Federation v. Cleveland Cliffs, 2005 MICH. ST. L. REV. 1297, 1303 (2005) (quoting JOSEPH L. SAX, DEFENDING THE ENVIRONMENT 248 (1971)).

20. Ray v. Mason Cnty. Drain Comm'r, 224 N.W.2d 883, 888 (Mich. 1975).

21. *Id.* ("The Legislature in establishing environmental rights set the parameters for the standard of environmental quality but did not attempt to set forth an elaborate scheme of detailed provisions . . . . Rather the Legislature . . . in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality.") (footnote omitted).

1. The Portage Factors

According to MEPA section 1703(1), a plaintiff must make a prima facie showing that a defendant's conduct "has . . . or is likely to pollute, impair, or destroy the air, water or other natural resources."[22] The Michigan Supreme Court held that this requirement encompasses both actual and probable damage to the environment.[23] The evidence a plaintiff must put forth to successfully make his prima facie case will vary depending on the "nature of the alleged environmental degradation" at issue.[24]

In *City of Portage v. Kalamazoo County Road Commission*,[25] the plaintiff attempted to use MEPA to enjoin the defendant road commission from moving forward with a plan to cut down seventy-four trees along Portage Road.[26] While recognizing that the removal of trees equated to the "destruction" of a "natural resource" within the meaning of MEPA, the court maintained that because "virtually all human activities can be found to adversely impact natural resources in some way or other," not all threatened environmental impacts should rise to a level justifying judicial intervention.[27] Instead, according to the court of appeals, the statutory language—"has, or is likely to pollute, impair, or destroy"—should be viewed as "a limitation as well as a grant of power."[28] The court proceeded to set forth factors for future courts to apply when deciding whether judicial intervention is warranted under a MEPA claim.[29] Among the factors to be considered are: (1) whether the resource involved is "unique, endangered, or [of] historical significance,"[30] (2) whether the resource can easily be replaced,[31] (3) whether the defendant's action will have any "significant consequential effect on other natural resources,"[32] and (4) whether the defendant's action could affect a "critical number" of animals or vegetation either directly or indirectly.[33] Thus, despite broad statutory language, the *City*

22. MICH. COMP. LAWS ANN. § 1703(1).
23. *Ray*, 224 N.W.2d at 889.
24. *Id.*
25. 355 N.W.2d 913 (Mich. Ct. App. 1984).
26. *Id.* at 914.
27. *Id.* at 915.
28. *Id.* (quoting Oscoda Chapter of PBB Action Comm., Inc. v. Dep't of Natural Res., 268 N.W.2d 240, 247 (Mich. 1978)).
29. *Id.* at 915-16.
30. *Id.* at 916.
31. *City of Portage*, 355 N.W.2d at 916.
32. *Id.*
33. *Id.*

of Portage decision restricted court access by identifying a threshold level of environmental harm below which a MEPA plaintiff fails to make even a prima facie showing.

2. MEPA Standing

To a casual MEPA reader, the "any person" language of section 1701(1) appears relatively straightforward in its citizen-suit authorization and implicit promise of access to the court system. However, nothing has hindered environmental law enforcement under MEPA more than the pendular nature of Michigan's standing doctrine and its collision with MEPA's citizen-suit provision. Two opposing schools of thought have emerged with regard to the "any person" provision of MEPA section 1701(1). One would require a MEPA plaintiff to allege sufficient injury-in-fact, causation, and redressability to bring his claim; in short, the plaintiff would have to meet the federal requirements for standing.[34] The second holds that a legislatively created cause of action is sufficient to confer standing without regard to any federal requirements, particularly when the Legislature is fulfilling an alleged constitutional duty in supplying such a provision.[35] Our potential MEPA plaintiff's chances for success, especially in the context of climate change litigation, will depend upon which approach the court decides to apply.

a. The Federal, Lujan, Requirements

In *Lee v. Macomb County Board of Commissioners*,[36] decided thirty years after MEPA's enactment, the Michigan Supreme Court formally adopted the federal requirements for standing as articulated by the United States Supreme Court in *Lujan v. Defenders of Wildlife*.[37] In *Lujan*, the Supreme Court of the United States held that a citizen-suit provision of the Endangered Species Act (ESA), allowing "any person" to commence suit to enjoin an alleged ESA violation, did not preclude application of federal constitutional requirements for standing.[38] Citing U.S. Constitutional requirements limiting the jurisdiction of federal courts to "cases" and "controversies,"[39] the Court held that Congress could not, by statute, turn a public interest into an individual right by permitting any

34. *Nat'l Wildlife Fed'n*, 684 N.W.2d at 810.

35. Lee v. Macomb Cnty. Comm'rs, 629 N.W.2d 900, 909 (Mich. 2010) (Weaver, J., dissenting).

36. 629 N.W.2d 900 (Mich. 2001).

37. 504 U.S. 555 (1992).

38. *Id.* at 578.

39. U.S. CONST., art. III, § 2, cl. 1.

citizen to sue when he had not suffered a concrete injury.[40] To allow such a suit would violate the separation-of-powers doctrine implicit in the U.S. Constitutional structure and would "permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[41] Thus, the *Lujan* Court developed the "irreducible constitutional minimum of standing,"[42] composed of three necessary elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[43]

The Michigan Constitution does not include the "case" or "controversy" language[44] as it appears in Article III of the United States Constitution. However, the *Lee* court found support for the adoption of federal standing requirements by looking to other provisions of the Michigan Constitution.[45] Article six, section one, vests the state "judicial power" in the courts,[46] while article three, section two, "expressly directs that the powers of the legislature, the executive, and the judiciary be separate."[47] The court held that this language demonstrated that the separation-of-powers doctrine was implicit in the Michigan Constitution,[48] and incorporating the federal standing requirements into Michigan law would best preserve this desired separation and prevent "the judiciary from usurping the powers of the political branches."[49]

Three years after the decision in *Lee*, the Michigan Supreme Court was presented with its first opportunity to apply the *Lujan* requirements

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40. *Lujan*, 504 U.S. at 578.

41. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

42. *Id.* at 560.

43. *Id.* at 560-61 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)) (citations omitted).

44. *Lujan*, 504 U.S. at 578.

45. *Lee*, 629 N.W.2d at 906.

46. MICH. CONST. art. VI, § 1 (West 2010).

47. *Lee*, 629 N.W.2d at 906. *See also* MICH. CONST. art. III, § 2 (West 2010) ("The powers of the government are divided into three branches: legislative, executive and judicial. No person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution").

48. *Id.*

49. *Id.*

to a case directly involving MEPA. In *National Wildlife Federation v. Cleveland Cliffs Iron Company*,[50] the plaintiffs filed suit under MEPA to enjoin the defendant mining company's planned expansion in the Upper Peninsula.[51] According to the plaintiffs, the expansion would adversely affect water quality in the area, resulting in the destruction of bird, fish, and other wildlife habitat.[52] Since these adverse effects constituted an "impairment" or "destruction" of various "natural resources," the literal requirements of MEPA section 1703(1)[53] were satisfied. The lower courts, and ultimately the Michigan Supreme Court, grappled with whether these plaintiffs had standing to bring suit in light of the holding in *Lee* and despite the fact that they could successfully make a prima facie showing of environmental degradation.[54]

The court, confirming its earlier holding in *Lee*, held the *Cleveland Cliffs* plaintiffs to the federal standing requirements.[55] In so holding, the court relied heavily on the portions of the Michigan Constitution cited three years earlier in *Lee*[56] and the separation of powers implicit in a tripartite form of government.[57] Importantly, the court found that these particular plaintiffs had satisfied federal standing requirements, including injury in fact.[58] Since several individual members of the National Wildlife Federation lived near the mine expansion area and alleged they would no longer be able to enjoy bird-watching, biking, hiking, and other recreational activities, the court, following the lead of similar federal

50. 684 N.W.2d 800 (Mich. 2004).

51. *Id.* at 804-05.

52. *Id.* at 814.

53. MICH. COMP. LAWS ANN. § 324.1703(1) (West 2010) (requiring the plaintiff to make a prima facie showing that the defendant's conduct has or is likely to "pollute, impair, or destroy the air, water, or other natural resource . . . .").

54. *Nat'l Wildlife Fed'n*, 684 N.W.2d at 805 ("The trial court denied the injunction, finding that the plaintiffs lacked standing. Plaintiffs appealed, and the Court of Appeals reversed. The [Court of Appeals] analyzed the statute and found that it simply permitted 'any person' to bring suit. This Court granted leave, limited to the issue of 'whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing.'") (footnote omitted).

55. *Id.* at 810 (quoting *Lee*, 629 N.W.2d at 905) ("Thus, we continue to adhere to *Lee*, and conclude that *Lee* was correct in its holding that questions of standing implicate the constitutional separation of powers, and that forsaking this proposition 'would imperil the constitutional architecture . . . .'").

56. *Id.* at 811 (citing MICH. CONST. art. VI, § 1, as vesting the judicial power of the state "exclusively in one court of justice.").

57. *Id.* at 810.

58. *Id.* at 814.

cases adjudicated in the United States Supreme Court,[59] found this "aesthetic" and "recreational" injury sufficient to confer standing.[60]

Notably, the court also held that because the plaintiffs met the federal standing requirements articulated in *Lee* and *Lujan*, they had "standing without regard to [MEPA]."[61] Therefore, the court found it "unnecessary to reach the constitutionality of § 1701(1)," MEPA's citizen-suit provision.[62] In significant dicta, however, the court expressed its displeasure with a legislatively created standing right. It stated:

> When a broadening and redefinition of the 'judicial power' comes not from the judiciary itself, usurping a power that does not belong to it, but from the Legislature purporting to confer new powers upon the judiciary, the exercise of such power is no less improper. The acceptance by one branch of the expansion of the powers of another branch is not dispositive in whether a constitutional power has been properly exercised.[63]

The Michigan Supreme Court reiterated this displeasure and confirmed its holding in *Lee* and *Cleveland Cliffs* in 2007 with its decision in *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*[64] Again reviewing a suit brought under MEPA, the court held that "neither [article 4, section 52 of the Michigan Constitution], nor MCL 324.1701(1) lightens a plaintiff's burden to satisfy the traditional standing requirements in environmental cases."[65] Moreover, "the Legislature cannot compel this Court to exercise 'judicial power' beyond constitutional limits."[66]

b. A Prudential Approach

In each Michigan case discussed above, beginning with *Lee* in 2001, there has been a vigorous dissent to the adoption of federal standing doctrine led by Justices Weaver, Cavanaugh, and Kelly.[67] These justices

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59. *See* Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 184-85 (2000).
60. *Nat'l Wildlife Fed'n*, 684 N.W.2d at 814.
61. *Id.* at 815.
62. *Id.*
63. *Id.* at 807.
64. 737 N.W.2d 447 (Mich. 2007).
65. *Id.* at 459.
66. *Id.*
67. *Nat'l Wildlife Fed'n*, 684 N.W.2d at 825-46 (Weaver, J., concurring); *Mich. Citizens for Water Conservation*, 737 N.W.2d at 462-75 (Weaver J., dissenting); *Lee*, 629 N.W.2d at 908-10.

have consistently maintained that Michigan is under no obligation to adopt federal standing requirements[68] and that standing doctrine in Michigan has traditionally been "based on prudential, rather than constitutional, concerns."[69] Those prudential concerns include a determination of "whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy,'"[70] and "whether a litigant is a proper party to request adjudication of a particular issue."[71]

With regard to MEPA's citizen suit provision,[72] these dissenting Michigan Supreme Court justices considered the Michigan Legislature's citizen-suit provision in MEPA section 1701(1) as "proper" and a "fulfillment of [the Legislature's] constitutional responsibility."[73] By imposing "irrelevant" standing requirements, the majority in each case "disregard[ed] the intent of the Legislature, erode[d] the people's constitutional mandate, and overrule[d] 30 years of Michigan case law that held that the Legislature meant what it said when it allowed 'any person' to bring an action . . . to protect natural resources."[74] Moreover, because the structure of MEPA requires a "plaintiff to make a prima facie showing of environmental damage,"[75] separation-of-powers principles are neither implicated nor impeded, as there will "always be alleged actual or imminent harm"[76] and no threat of suit "at the instigation of a disinterested plaintiff."[77]

Recently, in *Lansing Schools Education Association v. Lansing Board of Education*,[78] a political shift in the Michigan Supreme Court presented an opportunity for those justices disagreeing with the adoption of the *Lujan* standing test to overrule *Lee* and its progeny. Although *Lansing Schools* did not involve MEPA or environmental issues, it did

68. *Lee*, 629 N.W.2d at 909 n.2 (Weaver, J., concurring) (quoting House Speaker v. State Admin. Bd., 495 N.W.2d 539, 553 (Mich. 1993); ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("In *House Speaker* we stated that 'this Court is not bound to follow federal cases regarding standing . . . .' Justice Kennedy, writing for the Court in *ASARCO Inc. v. Kadish* acknowledged: 'We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . .'").

69. *Id.* at 909 (quoting *House Speaker*, 441 Mich. at 559 n.20).

70. Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 713 (Mich. 2010) (quoting Detroit Fire Fighters Ass'n v. Detroit, 537 N.W.2d 436, 437-38 (Mich. 1995)).

71. *Id.* (citing Allstate Ins. Co. v. Hayes, 499 N.W.2d 743 (Mich. 1993)).

72. MICH. COMP. LAWS ANN. § 324.1701(1) (West 2010).

73. *Nat'l Wildlife Fed'n*, 684 N.W.2d at 826.

74. *Id.*

75. *Id.*

76. *Id.* at 845 (Kelly, J., concurring).

77. *Id.* at. 844.

78. 792 N.W.2d 686 (Mich. 2010).

involve standing doctrine and a statutorily created cause of action.[79] The court used the opportunity to explicitly overrule *Lee* and the adoption of the *Lujan* test, finding that it "lack[ed] a basis in the Michigan Constitution . . . ," and was "inconsistent with Michigan's historical approach [to standing] . . . ."[80] The court declared Michigan's return to a "limited, prudential approach" to standing.[81] Moving forward, the court explained "[w]here a cause of action is *not* provided at law, *then* a court should, in its discretion, determine whether a litigant has standing."[82] This holding suggests that where the Legislature confers a right on "any person," such as in MEPA, even prudential limitations to standing should not apply.[83]

Just five months after the Michigan Supreme Court overturned *Lee* and its progeny in the *Lansing Schools* decision, the court was presented with an opportunity to apply its prudential standing approach to MEPA in *Anglers of the AuSable, Inc. v. Department of Environmental Quality*.[84] At issue in *Anglers* was co-defendant Merit Energy's plan to discharge "treated, but still partially contaminated, water from the Manistee River watershed into the AuSable River water system in an effort to clean a plume of contaminated groundwater."[85] The Michigan Department of Environmental Quality (DEQ) granted an easement to Merit through state-owned property so that the company could carry out its proposed plan.[86] Plaintiffs, property owners and recreational users of the AuSable River system, claimed that Merit's plan and the DEQ's approval of it violated MEPA.[87]

Before addressing the merits of the claim, the Michigan Supreme Court reiterated its rejection of the *Lujan* standing requirements for MEPA plaintiffs, holding that the "any person" provision of section

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79. *Id.* at 689. Plaintiff-teachers sued defendant-school district for failing to comply with their alleged mandatory duty under MICH. COMP. LAWS ANN. § 380.1311a(1) (West 2010), to expel a student who physically assaults a teacher. Defendant school district alleges that plaintiffs do not have standing to sue and that MCL § 380.1311a(1) "does not create a private cause of action."

80. *Id.* at 688.

81. *Id.*

82. *Id.* at 699 (emphasis added) ("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.").

83. *Id.* ("Under [Michigan's historical standing] approach, a litigant has standing whenever there is a legal cause of action.").

84. 793 N.W.2d 596 (Mich. 2010), *vacated*, 796 N.W. 2d 240 (Mich. 2011).

85. *Id.* at 598-99.

86. *Id.* at 599.

87. *Id.*

1701(1) should be applied literally, as written.[88] Of course, there was a vigorous dissent to this decision, led by the same justices who formed the majority in *Lee*.[89] The dissenting opinion claimed that because Merit Energy had "quitclaimed its interest in the easement back" to the DEQ and had abandoned its plan of discharging into the AuSable River while plaintiff's appeal was pending, the case should be dismissed for mootness.[90] According to the dissent, since the majority refused to acknowledge that the case was moot, their decision was "simply an empty vehicle to reach desired policy results."[91] Four months after it was decided, the *Anglers* decision was in fact vacated on grounds of mootness[92] after new Michigan Attorney General Bill Schuette moved for a rehearing.[93] Importantly for MEPA plaintiffs, the *Lansing Schools* holding, and its rejection of *Lujan* standing requirements, remains intact.

Ultimately, the point of disagreement between these opposing schools of thought rests on differing interpretations of the Michigan Constitution. The justices consistently joining the majority in *Lee* and its progeny maintain that the judicial power provision in the Michigan Constitution[94] creates a tripartite form of government in which separation-of-powers principles must be protected.[95] Further, this protection can only be achieved by incorporating federal standing

88. *Id.* at 603. The court also held that the Michigan Department of Environmental Quality (DEQ) could be sustained as a defendant in this MEPA action for granting a permit to (another named defendant) Merit Energy, which expressly allowed Merit to "commence the conduct that [would] harm the environment." *Id.* at 601. To allow Merit's proposed discharge of contaminated water into the AuSable River watershed, "the permit from the DEQ serves as the trigger for the environmental harm to occur." *Id.* This portion of the decision explicitly overruled a 2004 Michigan Supreme Court case, *Preserve the Dunes v. Mich. Dep't of Envtl. Quality*, 684 N.W.2d 847 (Mich. 2004). In *Preserve the Dunes*, the court found that permitting decisions made by the DEQ were outside the purview of MEPA since administrative decisions did not constitute "conduct" which directly harmed the environment. *Id.* at 855. Thus, not only was the *Anglers* opinion important in confirming the Supreme Court's earlier rejection of the *Lujan* test, it also removed permitting decisions from the insulation provided by *Preserve the Dunes* with regard to MEPA litigation.

89. *Anglers of the AuSable, Inc.*, 793 N.W.2d at 608.

90. *Id.* at 611-12.

91. *Id.* at 608.

92. Anglers of the AuSable v. Dep't of Envtl. Quality, 796 N.W.2d 240 (Mich. 2011). Since the original decision was vacated, *Anglers*' express overruling of *Preserve the Dunes* must also fail, leaving *Preserve the Dunes* intact.

93. Press Release, Office of The Attorney General, Schuette Defends Taxpayers by Challenging Ruling in MEA PAC Deduction Case (Jan. 18, 2011), *available at* http://www.michigan.gov/ag/0,1607,7-164--249717--,00.html [hereinafter Schuette Press Release].

94. MICH. CONST. art. VI, § 1.

95. *Lee*, 629 N.W.2d at 906.

principles.[96] On the other hand, those justices forming the majority in *Lansing Schools* and the first *Anglers* case are equally resolute in their insistence that Michigan is under no obligation to adopt the federal requirements for standing[97] and that prudential considerations have long been the basis of Michigan standing doctrine without ever having endangered separation-of-powers principles.[98] Furthermore, MEPA's citizen-suit provision contains its own limitations ensuring a court would never hear the claim of a disinterested plaintiff.[99]

Our MEPA plaintiff's potential for success hinges on whether a court applies the *Lujan* test to the claim or the *Lansing Schools* approach. Although future MEPA plaintiffs of all kinds have recently won a victory of sorts with the *Lansing Schools* case, that success may be short-lived. Since Michigan standing doctrine appears to be such a highly politicized issue, the approach adopted and applied by the court at any given time may depend on its ever-changing political composition.[100] Even then, and regardless of which approach the court applies, a climate change litigant faces special challenges unlike those seen in previous MEPA cases.

III. ANALYSIS

A. Can a MEPA Climate Change Claim Survive Under a Lansing Schools Approach?

According to *Lansing Schools*, Michigan's prudential approach to standing seeks to ensure that a litigant's interest in a dispute is "sufficient to 'ensure sincere and vigorous advocacy.'"[101] Similar to at least the first element of the *Lee/Lujan* test, this suggests that a litigant's injury has to be particularized as opposed to a general grievance shared by all Michigan citizens.[102] This implication was left undisturbed by the first *Anglers* decision where the harm suffered by the plaintiffs, the discharge

96. *Id.* at 907.

97. *Nat'l Wildlife Fed'n*, 684 N.W.2d at 826 (Weaver, J. concurring).

98. *Lee*, 629 N.W.2d at 908 (Weaver, J., concurring).

99. *Nat'l Wildlife Fed'n*, 684 N.W.2d at 845.

100. Attorney General Bill Schuette's request for a rehearing of the *Anglers* decision on January 19, 2011, after the 2010 elections resulted in a political shift on the Michigan Supreme Court, is an example of how political changes can be used to advance partisan policy objectives. *See* Schuette Press Release, *supra* note 93.

101. Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 690 (Mich. 2010) (quoting Detroit Fire Fighters Ass'n v. Detroit, 537 N.W.2d 436, 438 (Mich. 1995)).

102. *Id.* at 690.

of contaminated water into a river used for recreational purposes,[103] was of a sufficiently "concrete and particularized"[104] nature to satisfy the first element of the *Lujan* test.[105]

While the prudential requirement may not be difficult to meet for a typical MEPA plaintiff, like those in *Anglers*, it could create problems for a climate change litigant. Since carbon dioxide is fungible, spreading equally throughout the global atmosphere,[106] it would be difficult for one citizen to successfully allege that his injury is somehow different or special when compared to any other Michigan citizen. In spite of this potential obstacle, dicta in the *Lansing Schools* opinion suggests that if the Legislature has conferred standing through a citizen-suit provision, that is sufficient to state a MEPA claim and no further inquiry is necessary.[107] Thus, our MEPA climate change litigant could be saved by this interpretation of MEPA's citizen-suit authorization in section 1701(1).[108]

Once standing is met under this approach, a climate change plaintiff could likely establish a prima facie case within the language of MEPA. To show that a fossil-fuel producing defendant's contribution to global warming "is likely to pollute, impair, or destroy the air, water or other natural resources"[109] should not be difficult. However, despite meeting the technical requirements of MEPA, the court may still refuse to intervene, holding that the level of environmental harm alleged does not justify judicial intervention.[110] The court will assess the plaintiff's alleged harm in light of the *Portage* factors: whether the damaged natural resource is rare and easily replaceable, whether the pollution significantly affects other natural resources or impacts animals and vegetation at a critical level.[111] As with any judicially created balancing test composed of multiple subjective factors, the result of this analysis can be unpredictable. Those resources which global warming impacts directly—air and water—may not appear "rare" or "irreplaceable" yet.

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103. Anglers of the AuSable v. Dep't of Envtl. Quality, 770 N.W.2d 596, 599 n.2, *vacated*, 793 N.W.2d 240 (Mich. 2011).

104. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

105. *See* Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 184-85 (2000), and *Nat'l Wildlife Fed'n*, 684 N.W.2d at 814, both recognizing a recreational or aesthetic injury as sufficient injury-in-fact under *Lujan*.

106. *See* Native Vill. of Kivalina v. ExxonMobile Corp., 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009).

107. *Lansing Schs. Educ. Ass'n*, 792 N.W.2d at 690-91 n.4.

108. MICH. COMP. LAWS ANN. § 324.1701(1) (West 2010).

109. § 1703(1).

110. City of Portage v. Kalamazoo Cnty. Rd. Comm'n, 355 N.W.2d 913, 915 (Mich. Ct. App. 1984).

111. *Id.* at 916.

Still, a plaintiff can make a strong scientific argument that the global warming threat satisfies the final two factors by adversely impacting animal habitats, the aquatic ecosystem, and plant-life.[112]

Given the uncertain application of the *Portage* factors in the climate change context, a MEPA plaintiff's best chance for success is encouraging the court to rely on the holding in *Nemeth v. Abonmarche Development, Inc.*[113] While not expressly overruling the *City of Portage* decision, the *Nemeth* court held that the use of the *Portage* factors "has stifled the development of the 'common law of environmental quality.'"[114] Rather than a mechanical application of each *Portage* factor to a MEPA claim, the court held "alleged MEPA violation[s] must be evaluated . . . using the pollution control standard[s] appropriate to the particular alleged violation."[115]

Success under a *Lansing Schools* standing approach is not guaranteed for a climate change MEPA plaintiff. If the *Portage* factors are applied, the outcome can be unpredictable as it depends entirely upon a court's subjective balancing of each factor. Success also relies on avoidance of a prudential standing approach, which may call for a particularized litigant injury. A plaintiff could succeed by using the *Nemeth* holding to reject application of the *Portage* factors to climate change claims, and by reinforcing the original, protective policy objectives behind MEPA[116] while emphasizing its deliberately broad grant of power to affected citizens.

B. Can a MEPA Climate Change Claim Survive Under the Lee/Lujan Test?

1. The Role of Politics on the Michigan Supreme Court

While victory under a prudential standing approach has its own obstacles, the federal courts' application of the *Lujan* test to recent global warming cases is even less promising. The potential success of our MEPA plaintiff turns largely on which standing doctrine, federal or prudential, the court chooses to apply. Here, the political composition of the Michigan Supreme Court cannot be ignored.

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112. Center for Integrative Environmental Research, *supra* note 5, at 3.

113. 576 N.W.2d 641 (Mich. 1998).

114. *Id.* at 651.

115. *Id.* at 650.

116. According to MEPA author Joseph L. Sax, the goals of MEPA were not only to protect Michigan's natural resources in a time of increasing environmental awareness, but to "recognize the public right to a decent environment as an enforceable legal right...enforceable by [those] private citizens." *See* SAX, *supra* note 19, at 248.

The court most recently applied the *Lujan/Lee* standing requirements to a MEPA plaintiff in 2007 in *Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc.*[117] The court's conservative justices joined the majority at that time,[118] just as they had in the *Lee*[119] and *Cleveland Cliffs*[120] decisions. Likewise, the court's liberal, or liberal-leaning, justices formed the dissent in each case.[121] Three years later, in *Lansing Schools*, the court abandoned the *Lee/Lujan* test in favor of a return to Michigan's historical, prudential approach to standing doctrine.[122] Justice Taylor, no longer sitting on the bench, had recently lost his re-election bid to a democratically backed candidate, Diane Hathaway.[123] With Justice Hathaway on the court, the same liberal justices dissenting in *Lee* joined her to form a new majority.[124]

It seems apparent that standing is a highly politicized issue for the court, strongly reflecting party affiliation. The court's partisan nature is well-documented.[125] Thus, despite the recent victory for advocates of

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117. 737 N.W.2d 447 (Mich. 2007).

118. *Id.* at 463. Justices Young, Taylor, Corrigan, and Markman joined the majority. All identified their party affiliation as "Republican" before either being elected or appointed to the court. *See On and Off the Court,* MICHIGAN SUPREME COURT HISTORICAL SOCIETY, http://www.micourthistory.org/on_and_off_the_court.php, (last visited Aug. 1, 2012).

119. Lee v. Macomb Cnty. Bd. of Comm'rs, 629 N.W.2d 900, 908 (Mich. 2001).

120. Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 826 (Mich. 2004), *overruled by* Lansing Schs. Educ. Ass'n, v. Lansing Bd. of Educ., 792 N.W.2d 686 (Mich. 2010).

121. *Mich. Citizens for Water Conservation*, 737 N.W.2d at 463, 469-70. Justices Kelly, Cavanagh, and Weaver formed the dissent. Justice Kelly identified her party affiliation as "Democrat" before her election to the court. *See On and Off the Court*, MICHIGAN SUPREME COURT HISTORICAL SOCIETY, http://www.micourthistory.org/on_and_off_the_court.php, (last visited Aug. 1, 2012). Justice Cavanagh identified with the Democratic Party. *See* Brent N. Bateman, *Partisanship on the Michigan Supreme Court: The Search for a Reliable Predictor of Judicial Behavior*, 45 WAYNE L. REV. 357, 379 (1999). Although backed by the Republican Party in two elections, since 2001, Justice Weaver consistently sided with the liberal justices on the court. Her lean to the left resulted in her party labeling her a "traitor" and "renegade." *See* Brian Dickerson, *High Court Hopefuls Wonder: What will Betty Weaver do?*, DETROIT FREE PRESS, May 2, 2010, at A26, *available at* http://www.freep.com/article/20100502/COL04/5020418/High-court-hopefuls-wonder-What-will-Betty-Weaver-do.

122. *Lansing Schs. Educ. Ass'n*, 792 N.W.2d 686, 688 (Mich. 2010).

123. *See* Zachary Gorchow, *Hathaway Pulls Off Upset in Michigan Supreme Court Race*, DETROIT FREE PRESS, Nov. 5, 2008, *available at* http://www.freep.com/article/20081105/NEWS15/811050449/Hathaway-pulls-off-upset-in-Michigan-Supreme-Court-race.

124. *Lansing Schs. Educ. Ass'n*, 792 N.W.2d at 702.

125. Sarah K. Delaney, *Stare Decisis v. The "New Majority:" The Michigan Supreme Court's Practice of Overruling Precedent, 1998-2002*, 66 ALB. L. REV. 871, 872 (2003);

prudential standing in the *Lansing Schools* decision, its future is uncertain at best. This is especially the case given the recent changes on the court. In the November, 2010 election, Republican-backed candidate Mary Beth Kelly took over the seat previously held by Justice Weaver.[126] In January, 2011, new Republican Michigan Governor Rick Snyder appointed Brian Zahra to replace outgoing Justice Corrigan.[127] If past voting tendencies are any indication, the election and appointment of two new conservative Justices to the court could mean a return to the *Lujan/Lee* standing test that *Lansing Schools* specifically rejected.[128]

As Michigan Supreme Court justices are either elected or appointed to the bench with the public backing of a political party, the political composition of the court, and, hence, standing doctrine in Michigan, can be expected to continually change.[129] Thus, as a practical matter, any global warming claim brought under MEPA must be analyzed against the more stringent *Lujan/Lee* test to fairly assess its future potential for success.

Nelson L. Miller, *"Judicial Politics:" Restoring the Michigan Supreme Court*, MICH. BAR J. 38 (2006) (suggesting, given the court's high rate of overturning precedent, that "judicial politics" are at work).

126. Michigan Supreme Court, *Biographies of the Justices*, http://courts.michigan.gov/supremecourt/AboutCourt/biography.htm (last visited Aug. 1, 2012). Justice M.B. Kelly defeated Alton Davis, who was appointed to the court in August 2010 after Justice Weaver's resignation, in the November 2010 election. *See* Brian Dickerson, *State Democrats' Biggest Loss Was in the Supreme Court*, DETROIT FREE PRESS, Nov. 3, 2010, at E12, *available at* http://www.freep.com/article/20101103/COL04/11030495/State-Democrats--biggest-loss-was-in-the-Supreme-Court.

127. Dawson Bell, *Snyder Names Zahra to Top Court*, DETROIT FREE PRESS, Jan. 11, 2011, at A3, *available at* http://www.freep.com/article/20110110/NEWS06/110110013/Snyder-names-Brian-Zahra-to-state-Supreme-Court.

128. *See* Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, And Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1930-40 (2009), for a discussion of the Michigan Supreme Court's tendency to overrule its previous decisions. According to Professor Sedler, from 1999 until 2008, the court majority used its power to overrule thirty-four decisions on ideological grounds. *Id.* at 1939. Professor Sedler attributes this high number of overrulings to the court's unusual approach to *stare decisis*. *Id.* at 1930. Their approach allows the court to overrule a previous decision simply because a majority feels as though it was wrongly decided. *Id.* "What has happened in Michigan, pure and simple, is that a majority of the justices on the Michigan Supreme Court have used their power to overrule prior decisions with which they have disagreed, in order to make significant changes in Michigan's tort law in favor of defendants over plaintiffs . . . ." *Id.* at 1942.

129. Justices are either elected or appointed to the Supreme Court. Although elections are considered nonpartisan in that party affiliations do not appear next to the candidate's name on the ballot, justices receive backing from either the Republican or Democratic parties. *See* Delaney, *supra* note 125, at 872-73.

2. Treatment of Climate Change Litigation in Federal Court

Climate change plaintiffs in the federal arena have based their claims against greenhouse-gas-producing energy and oil companies on common law tort theories of public and private nuisance under the federal common law of nuisance or, alternatively, state nuisance law.[130] Application of the *Lujan* standing requirements to these litigants has had mixed results, with only two cases resulting in success.

In *Connecticut v. American Electric Power Company*,[131] eight states filed suit against six electric companies collectively responsible for "ten percent of all carbon dioxide emissions from human activities in the United States."[132] Plaintiffs alleged that the defendant's contributions to global warming would result in severe flooding along coastlines, erosion, damage to infrastructure, and destruction of wildlife habitats.[133] The Second Circuit held that plaintiff-states had alleged sufficient injury-in-fact, causation, and redressability to meet the *Lujan* standard.[134]

Although plaintiffs' claims were based primarily on the risk of future harm, the Second Circuit held that the injury was "imminent" within the meaning of the *Lujan* standard and, thus, the injury-in-fact requirement was satisfied.[135] According to the Second Circuit, the *Lujan* court did not intend for "imminence" to impose "a strict temporal requirement that a future injury occur within a particular time period" but, rather, the U.S. Supreme Court "focused on the *certainty* of [the] injury occurring in the future, seeking to ensure that the injury was not speculative."[136] With respect to certainty, the Second Circuit held that plaintiffs had successfully demonstrated that the effects of global warming were not

130. Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), and *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); Native Vill. of Kivalina v. ExxonMobile Corp., 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009); Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 314, 318 (2d Cir. 2009), *rev'd sub nom.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011); *see also supra* text accompanying note 2.

131. 582 F.3d 309 (2d Cir. 2009), *rev'd sub nom.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

132. *Id.* at 316.

133. *Id.* at 342.

134. *Id.* at 344-49.

135. *Id.* at 343-44.

136. *Id.* at 343. In contrast, the "[d]efendants challenge[d] [the] [p]laintiffs' contentions of future injury by arguing that injuries occurring at 'some unspecified future date' are not the kind of 'imminent' injury referred to in Lujan...." *Id.* at 342. Rather, defendants claimed "'there must be a close temporal proximity between the complained-of conduct and the alleged harm.'" *Id.* (citing McConnell v. FEC, 540 U.S. 93, 226 (2003)).

speculative or based on conjecture but, instead, premised upon the laws of science.[137] Moreover, plaintiffs could show that global warming would "have substantial adverse impacts on [the States'] environments, residents, and property, and that it [would] cost billions of dollars to respond to these problems."[138]

With respect to causation, the court held that the plaintiffs' claims regarding the traceability of the defendants' conduct to global warming and subsequent harm must be measured by the same standard as any common law nuisance claim involving multiple tortfeasors contributing to an indivisible injury.[139] That is, "'[t]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution.'"[140] Since plaintiffs had named the five largest emitters of carbon dioxide in the United States as defendants, the court held plaintiffs could demonstrate that defendants were contributors to their current and future injuries.[141] Therefore, the harm was "fairly traceable" to defendant's conduct.[142]

Finally, the court did not require plaintiffs to show that an outcome in their favor would reverse global warming, only that it would "slow or reduce" it.[143] The defendants argued that a reduction in their emissions would not have an impact on the plaintiffs' injuries since third parties would continue to emit greenhouse gases and continue to contribute to global warming.[144] The Second Circuit disposed of this argument rather quickly, holding that redressability was still satisfied because, "[e]ven if emissions increase elsewhere, the magnitude of Plaintiffs' injuries will be less . . . than they would be without a remedy."[145]

Ultimately, the Second Circuit held that the plaintiff-states had stated a cognizable claim under the federal common law of nuisance, rendering their state law nuisance claims unnecessary, and remanded the case to the district court.[146] In so holding, the court concluded that the Clean Air Act

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137. *Am. Elec. Power Co.*, 582 F.3d at 344.

138. *Id.* at 317.

139. *Id.* at 345-46.

140. *Id.* at 346 (quoting RESTATEMENT (SECOND) OF TORTS § 840E (1979)).

141. *Id.* at 345-46. Defendants maintained that this alleged contribution was insufficient to allege causation and that the plaintiffs could "neither isolate which alleged harms will be caused by Defendants' emissions, nor can Plaintiffs allege that such emissions would alone cause any future harms." *Id.* at 345.

142. *Id.* at 347.

143. *Am. Elec. Power Co.*, 582 F.3d at 347 (citing Massachusetts v. EPA, 549 U.S. 497, 525 (2007)).

144. *Id.* at 347-49.

145. *Id.* at 349.

146. *Id.* at 358, 392-93.

did not displace the plaintiffs' federal common law nuisance claim.[147] The United States Supreme Court expressly overruled this holding in June 2011.[148] The Court concluded that, because the Clean Air Act already authorized the EPA to regulate greenhouse gas emissions,[149] there was "no room for a parallel track" in the federal common law of nuisance.[150] However, before reaching the merits of the case, the Supreme Court held that the plaintiff states did meet the federal *Lujan* standing requirements, as the Second Circuit had already concluded.[151] Also, while the decision eliminated federal common law nuisance claims from a climate change plaintiff's arsenal, the Court made clear that its decision did not apply to state law nuisance claims.[152]

Likewise, in *Massachusetts v. EPA*,[153] the United States Supreme Court made similar findings with regard to the *Lujan* requirements, deciding the case along lines of reasoning analogous to the Second Circuit in *American Electric Power*.[154] The case was situated somewhat differently in that Massachusetts was not suing a fossil-fuel producer for its contributions to global warming, but rather the Environmental Protection Agency ("EPA") for failing to regulate greenhouse gas emissions from new motor vehicles when it had a statutorily mandated duty to do so.[155] It remains to be seen whether *Massachusetts* and *American Electric Power* were more likely to meet federal standing requirements in the first instance because the plaintiffs were states owning thousands of miles of coastal property and/or having billions of dollars in potential remedial measures at stake, as opposed to individual litigants.

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147. *Id.* at 379-81. According to the Second Circuit, the plaintiff's problem would not be "thoroughly addressed" and the standard for displacement would not be met unless and until the EPA made findings that greenhouse gas emissions from stationary sources "cause[d], or contribute[d] to air pollution which may reasonably be anticipated to endanger public health or welfare," the regulatory trigger articulated in the Clean Air Act. *Id.* at 379.

148. Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

149. This regulatory authority was definitively settled in *Massachusetts v. EPA*, 549 U.S. 497, 528-32 (2007).

150. *Am. Elec. Power Co.*, 131 S. Ct. at 2538.

151. *Id.* at 2535.

152. *Id.* at 2540.

153. 549 U.S. 497 (2007).

154. *Id.* at 521-26 (holding that Massachusetts suffered a current and imminent "particularized injury in its capacity as a [coastal] landowner" whose property was being eroded by rising sea levels; that the EPA's failure to regulate emissions from new model vehicles contributed to those injuries, satisfying causation; and that this risk of injury would be reduced with a decision in Massachusetts' favor).

155. *Id.* at 505.

For private litigants in the federal court, the *Lujan* standard has posed an uphill battle. In *Native Village of Kivalina v. ExxonMobile*,[156] plaintiffs alleged that defendant's contributions to global warming caused sea levels to rise to a point where coastal erosion rendered the Village of Kivalina uninhabitable.[157] The court declined to reach the merits of plaintiffs' claim finding that causation was too attenuated to support standing.[158] Unlike the Second Circuit in *American Electric Power*, the District Court rejected the plaintiffs' theory that defendants' contribution to their future injury satisfied the causation requirement or was a akin to the common law nuisance indivisible injury scenario.[159] Moreover, plaintiffs were unable to demonstrate to the satisfaction of the court that their injury could be traced back to the defendant given the fungible nature of greenhouses gases and their emission by a multitude of sources.[160]

The month after *Native Village of Kivalina* was decided, the Fifth Circuit held that private litigants could sufficiently allege all elements of the *Lujan* test, including causation, in their case against a fossil-fuel producing oil company. In *Comer v. Murphy Oil USA*,[161] plaintiff landowners alleged that the defendant's contributions to global warming contributed to rising sea levels and the strength of Hurricane Katrina, leading to property damage.[162] The court found plaintiff's proffered chain of causation was nearly identical to that upheld in *Massachusetts v. EPA*,[163] and concluded that a finding of causation would not be precluded simply because the defendant "is only one of several persons

156. 663 F. Supp. 2d 863 (N.D. Cal. 2009).

157. *Id.* at 868.

158. *Id.* at 876 ("[T]he harm from global warming involves a series of events disconnected from the discharge itself. In a global warming scenario, emitted greenhouse gases combine with other gases in the atmosphere which *in turn* results in the planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which *in turn* causes the Arctic sea ice to melt, which *in turn* allegedly renders [the village of] Kivalina vulnerable to erosion.").

159. *Id.* at 879-80 (holding that contribution could only sufficiently allege causation in situations where a statutory scheme exists and the defendants' discharges are in excess of a minimum statutory requirement).

160. *Id.* at 880 ("In view of the Plaintiffs' allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time, the pleadings make clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time.").

161. 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010) *and appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

162. *Id.* at 859.

163. *Id.* at 865.

who caused the harm,"[164] adopting the line of reasoning used by the Second Circuit in *American Electric Power.* Unfortunately, the victory earned by private plaintiffs in *Comer* was short-lived. The defendants successfully moved for a rehearing en banc, thus vacating the Fifth Circuit panel decision.[165] The rehearing was ultimately denied due to a loss of quorum and the district court decision originally dismissing plaintiff's claim for standing and justiciability reasons was reinstated.[166]

3. The Future of Federal Climate Change Litigation

By holding that the Clean Air Act displaces federal common law nuisance claims as they apply to greenhouse gas emissions, the United States Supreme Court's ultimate decision in *American Electric Power* effectively eliminated a federal arena for climate change litigants, at least on nuisance grounds.[167] Despite its grant of standing to plaintiffs both in this case and in *Massachusetts v. EPA*, the majority opined that the EPA, as an expert agency, was better suited to establish greenhouse gas emissions caps than were individual judges.[168] In-depth analysis of whether greenhouse gas regulation is within the scope of judicial expertise or is an issue that is too multi-faceted for the court is beyond the reach of this Note.[169] The Supreme Court however, seems to have

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164. *Id.* at 866 (citing JAMES M. MOORE ET AL., MOORE'S FEDERAL PRACTICE §101.41[1] (3d ed. 2008)). Importantly, the Fifth Circuit panel upholding plaintiffs' standing in *Comer* required only an "indirect causal relationship" between plaintiff's alleged injury and defendant's conduct at the pleading stage. *Id.* at 864. Thus, to survive *Lujan* causation, the traceability requirement does not rise to the level of proximate causation needed to succeed on the merits of a claim. *Id.* This relaxed standard begs the question for our MEPA plaintiff: even if a climate change claim brought under MEPA could survive a rigorous application of the *Lujan/Lee* test, what would its ultimate chances of success on the merits be if it must meet a more stringent causation standard?

165. Comer v. Murphy Oil USA, 598 F.3d 208 (5th Cir. 2010).

166. Comer v. Murphy Oil USA, 607 F.3d 1049, 1055 (5th Cir. 2010).

167. As the court explained, litigants remain free to challenge EPA's eventual emissions caps in federal court under certain provisions in the Clear Air Act. Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2538 (2011).

168. *Id.* at 2539-2540.

169. At one end of the spectrum, legal scholars are skeptical that a judge can accurately apply "vague standards of tort law" to greenhouse gas emissions and still remain "consistent with separation of powers and the limits of the judicial function." Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 203 (2010). This question, which involves determining the appropriate regulatory level of greenhouse gas emissions by industries, requires policy judgments made "by political institutions deriving their legitimacy from something other than a court's reasoned elaboration from precedents that bear little or no resemblance to the complex . . . issues inherent in climate change litigation." Donald G. Gifford, *No "Ordinary Tort"—Climate Change Tort Actions and*

expressed its preference with regard to the most appropriate forum for climate change disputes even where, as here, the plaintiffs before it have met the *Lujan* federal standing requirements.

Despite its arguable impact on federal climate change litigation as a whole, the Supreme Court's decision in *American Electric Power* will likely have only a limited impact on a MEPA plaintiff's chances for success in Michigan. Not only did the Court agree that the plaintiffs in *American Electric Power* had standing to bring their climate change claim, it also expressly left state law nuisance claims undisturbed.[170] Thus, the elimination of the federal common law of nuisance as a viable means of bringing climate change litigation should have no effect on similar claims brought in Michigan under MEPA or any other Michigan state law. Nevertheless, a MEPA plaintiff is an individual citizen with a necessarily circumscribed level of harm, at least compared to the harm alleged by plaintiff-states in *Massachusetts v. EPA*[171] and *American Electric Power v. Connecticut.*[172] Thus, he may face the same difficulties meeting the *Lujan* standing requirements that other private litigants have recently faced in federal court.

IV. CONCLUSION

Given the numerous challenges facing a MEPA climate change plaintiff, the unfortunate reality is that his chances for success are meager despite the generous language of the statute and the promising policy objectives behind its passage.[173] Success is possible if the Michigan Supreme Court maintains its resolve to apply citizen-suit provisions without regard even to prudential standing principles, as stated in

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the Supreme Court, TORTS PROF. BLOG (Sept. 20, 2010), http://lawprofessors.typepad.com/tortsprof/2010/09/guest-blogger-don-gifford-on-no-ordinary-tortclimate-change-tort-actions-and-the-supreme-court.html.

On the other hand, some legal scholars are claiming that court intervention is necessary in the absence of a comprehensive legislative response to greenhouse gas regulation, and could act as the "impetus" required to finally compel lawmakers to act. *See* Doug Kendall & Hanna McCrea, *The Climate Report: Attractive Nuisance*, THE ATLANTIC, Apr. 20, 2010, *available at* http://www.theatlantic.com/special-report/the-climate-report/archive/2010/04/attractive-nuisance/39210/.

170. *Am. Elec. Power Co.*, 131 S. Ct. at 2540.

171. Massachusetts v. EPA, 549 U.S. 497, 521-24 (2007).

172. *See* Connecticut v. Am. Elec. Power Co., Inc, 582 F.3d at 318, for a full description of the harm alleged by the plaintiff states.

173. *See* Brief on Appeal of Joseph L. Sax as *Amicus Curiae* In Support of the Plaintiffs-Appellees, *supra* note 15, at 3-4.

Lansing Schools.[174] However, asking the Michigan Supreme Court to sustain a consistent stance on standing appears too much to hope for, given its tendency to overrule decisions after a major shift in political composition.[175] Therefore, a MEPA plaintiff's claim must be able to survive the *Lujan* standing requirements, but federal case law[176] and legal scholarship[177] suggest that *Lujan* application in this context will not reach a favorable result.

Considering the purpose behind MEPA and its clear statutory language, this outcome is disappointing and contrary to the intent of its authors. The difficulty with accepting *Lujan* requirements in Michigan is that the Michigan Constitution, which lacks "case" or "controversy" language, does not mandate the adoption of federal standing requirements.[178] Both the Michigan Supreme Court majority[179] and the United States Supreme Court have recognized this fact.[180] Ultimately, applying *Lujan* to Michigan law is a policy choice – one with which the Michigan Supreme Court appears destined to continually battle.

With regard to MEPA plaintiffs specifically, applying the *Lujan* standard nullifies the plain meaning of the MEPA's "any person" language[181] and contravenes the 1963 Michigan Constitution.[182] This application also violates the purpose behind MEPA's enactment: to allow citizens easy access to the court system to supplement environmental protection efforts taken by the State itself.[183] In the face of state and federal legislative silence, MEPA's citizen-suit provision *was* Michigan's best line of defense against an environmental inevitability

174. Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010).

175. *See* Sedler, *supra* note 128, at 1941.

176. *E.g.*, Native Vill. of Kivalina v. ExxonMobile Co., 663 F. Supp. 2d 863, 877-80 (N.D. Cal. 2009).

177. *See* Gifford, *Climate Change*, *supra* note 169, at 233; Gifford, *No "Ordinary Tort,"* *supra* note 169.

178. *See* Mahoney, *supra* note 16, at 232.

179. Dodak v. State Admin. Bd., 495 N.W.2d 539, 559 (Mich. 1993).

180. ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . ."). *But see* LAURENCE TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 133 (3d ed. 2000) (finding a state separation-of-powers doctrine implicit in the language of the Guarantee Clause of the U.S. Constitution).

181. MICH. COMP. LAWS ANN. § 324.1701(1) (West 2010)

182. MICH. CONST. art. IV, § 52 ("The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.").

183. *See* Brief on Appeal of Joseph L. Sax as *Amicus Curiae* in Support of Plaintiffs-Appellees, *supra* note 15, at 4-5; Terry, *supra* note 19, at 1299-1300.

that is potentially catastrophic in nature.[184] Rendering MEPA ineffective in the hands of regular citizens leaves Michigan's environmental and economic[185] future in danger.

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184. *See* Center for Integrative Environmental Research, *supra* note 5; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 1, at 43-54.

185. *See* Center for Integrative Environmental Research, *supra* note 5 and accompanying text.