

STATE OF MICHIGAN\IN
IN THE COURT OF APPEALS

MICHIGAN CITIZENS FOR WATER
CONSERVATION, a Michigan nonprofit
corporation; R.J. DOYLE and BARBARA
DOYLE, husband and wife; and JEFFREY R.
SAPP and SHELLY M. SAPP, husband and wife,
Plaintiffs-Appellees/Cross-Appellants,

Case No. 254202

Mecosta County Circuit Court
Case No. 01-14563-CE
Honorable Lawrence C. Root

v

NESTLE WATERS NORTH AMERICA INC.,
a Delaware corporation,
Defendant-Appellant/Cross-Appellee,
and

DONALD PATRICK BOLLMAN and NANCY
GALE BOLLMAN, a/k/a PAT BOLLMAN
ENTERPRISES,
Defendants.

**BRIEF OF AMICUS CURIAE MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY**

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Statement of Basis of Jurisdiction of the Court of Appeals

Amicus Curiae Michigan Department of Environmental Quality agrees with the statement of jurisdiction of Defendant-Appellant/Cross-Appellee Nestle Waters North America Inc.

Statement of Questions Involved

- I. Pursuant to its broad authority to regulate activities affecting the waters of the State, the Legislature enacted Part 301 of the Natural Resources and Environmental Protection Act. Among other activities, Part 301 requires a permit to "enlarge or diminish an inland lake or stream." Did the Circuit Court correctly rule that the Department of Environmental Quality's historical interpretation of that requirement – limiting it to contexts where the activity took place on the bottomland of the lake or stream itself – was inconsistent with the plain language of the statute, and that any activity that reduces the level of a lake or stream is regulated by Part 301?**

Amicus Curiae's answer: Yes

- II. Both riparians and owners of property above groundwater have a qualified property interest in the use of water. When there is a conflict between surface uses by riparians and groundwater uses by owners, should that conflict be evaluated using a reasonableness test that balances the competing interests involved?**

Amicus Curiae's answer: Yes

- III. The Michigan Environmental Protection Act places authority in the courts to develop a common law of environmental protection and to define the standards to be applied in a particular case. The use of rote factors or bright line rules by the courts is inconsistent with this responsibility. Is a court authorized under the Michigan Environmental Protection Act to adopt part or all of an environmental statute as a relevant standard to be applied and, in applying that standard, should a court evaluate the impacts on natural resources from both a local and statewide perspective?**

Amicus Curiae's answer: Yes

Statement of Facts

Amicus Curiae Michigan Department of Environmental Quality (DEQ) believes the relevant underlying facts have been adequately described by the parties for purposes of addressing the issues raised by DEQ. DEQ does not necessarily agree with or adopt certain characterizations of those facts in the briefs.

Introduction

This case concerns water, a natural resource found in many forms and of great importance to the State of Michigan. Michigan – the Great Lakes State – is defined by its water resources. The State is bordered by the Great Lakes, inland seas that hold 20 percent of the earth's freshwater supply. Within the State there are more than 11,000 lakes and ponds, 36,000 miles of streams and 5.5 million acres of wetlands. Aquifers beneath the State hold large reservoirs of groundwater.

While the State's water resources are abundant, they are not infinite. In addition to its environmental and natural resource values, water is used for many purposes in Michigan, including public water supply, thermoelectric power, agriculture, manufacturing, and recreation. The Great Lakes are also subject to similar uses in other States and provinces in the Great Lakes Basin. Increasing conflicts between these and other uses are inevitable as demand continues to grow. These conflicts will be especially acute in areas where local water supplies have already been depleted through extensive use.

The public interest in the protection of water resources for use of the public as a whole is established and traces its roots to Roman law. The State's clear authority and obligation to protect and conserve water resources stems from three primary sources. The first source is the police power – the wide-ranging sovereign authority to provide for the public health, safety, and welfare. The second is the Constitutional imperative to protect the State's natural resources from pollution, impairment, and destruction. Const 1963, art 4, § 52. And the third is the common law Public Trust Doctrine, by which navigable waters are held in trust for the benefit of the public.

Part 301, Inland Lakes and Streams, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, MCL 324.30101 *et seq*, is one of many

statutes enacted by the Legislature to protect the public interest in water resources, specifically inland lakes and streams. Among the requirements of the statute is that a permit be issued to "[c]reate, enlarge or diminish an inland lake or stream." MCL 324.30102(d). The Michigan Department of Environmental Quality (DEQ) acknowledges that it has historically misapplied this provision to exclude many activities that reduce the level or volume of inland lakes and streams. The Circuit Court correctly held that DEQ's historical interpretation was overly restrictive and that an activity that causes a decrease in the level of an inland lake or stream requires a permit.

The public's interest in water serves as the foundation for doctrines limiting private water rights to rights to use of water, rather than absolute ownership. A significant issue in this matter is how to preserve a conflict between an overlying owner's use of groundwater and a riparian owner's use of surface water. The Circuit Court correctly recognized that Michigan courts apply a wide-ranging balancing test to determine the reasonableness of a use when confronted with conflicts between riparian uses and conflicts between groundwater uses. But rather than extend that test, the Circuit Court fashioned a new rule that gives absolute protection to surface water uses when they are impacted by off-site groundwater uses.

This Court should acknowledge the interconnections between groundwater and surface water by holding that a balancing test designed to evaluate the reasonableness of uses applies to groundwater-riparian conflicts. As it has evolved in Michigan cases, this test balances a number of factors to weigh the competing interests of the users, including the purpose and nature of the use, the harm caused by the use, the benefit of the use, the existence of other uses, and the condition of the water body. Domestic uses, or traditional uses on the land, are given preference as against other uses. While the Circuit Court made detailed findings of fact on the extent and

nature of harm to the surface water body, the Court did not address the other factors. Therefore, the matter should be remanded to the Circuit Court with instructions to do so.

Finally, it is not apparent on what basis the Circuit Court determined that Nestle's groundwater use violated Part 17, Michigan Environmental Protection Act (MEPA), of NREPA, MCL 324.1701 *et seq.* The Circuit Court relied heavily on Part 301 and Part 303, Wetland Protection, of NREPA, MCL 324.30301 *et seq.*, for its MEPA analysis. After *Preserve the Dunes, Inc v Michigan Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), Parts 301 and 303 could be used in at least two ways: (1) the Circuit Court could determine that the statutes contain relevant and applicable pollution standards, in which case a violation would be a *prima facie* showing; or (2) some or all of the substantive standards could be used to define an appropriate standard by which to measure environmental harm. The MEPA claim should be remanded so that the Circuit Court can clarify its use of Parts 301 and 303 as statutory standards.

Assuming Parts 301 and 303 are appropriate standards, the Court failed to adequately support its MEPA analysis in its decision. On remand, the Court should apply specific facts to the statutory criteria to support its determination that Plaintiffs-Appellees Michigan Citizens for Water Conservation, *et al* (collectively MCWC) made a *prima facie* showing. The Court should also explain why Nestle did not put forth evidence sufficient to support the defenses provided by MEPA.

The Circuit Court should not be instructed to apply what Nestle suggests is a "statewide perspective," i.e., treating water as a non-distinct, fungible resource. While evaluating impacts from a statewide perspective may be relevant under the circumstances of a given case, it is not the sole "perspective" and is inappropriate here to the extent it ignores local environmental effects. The resources at issue – wetlands and streams – offer distinct benefits to the local

environment that cannot be served by wetlands and streams on the other side of the State.

Indeed, assuming Parts 301 and 303 are appropriate statutory standards, they clearly require evaluation of the individual resource.

Argument

I. To protect the public's paramount interest in the waters of the State, the State has the inherent and constitutional authority to regulate a variety of activities affecting those waters. Pursuant to this authority the Legislature enacted Part 301 of the NREPA, which, among other things, regulates activities that "enlarge or diminish an inland lake or stream." The Circuit Court correctly held that DEQ's historical interpretation of that provision is overly restrictive and inconsistent with the unambiguous statutory language. If a groundwater withdrawal will diminish an inland lake or stream it requires a permit under Part 301.

A. Standard of Review

The question of the scope of the State's authority under Part 301 of the NREPA involves the interpretation of a statute and review of an administrative agency's interpretation of that statute through administrative rule. Questions of statutory interpretation are reviewed *de novo*. *Manske v Dep't of Treasury*, 265 Mich App 455, 457; 695 NW2d 92 (2005). Deference is provided to an agency's interpretation of a statute or rule it implements, but only if the language of the statute or rule is ambiguous. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65-66; 678 NW2d 444 (2003).

B. The State possesses broad authority to regulate activities that affect the waters of the State, which includes the groundwater and surface water within its borders. The Legislature has extensively regulated the use of these waters through statute.

The Attorney General recently addressed the question of the extent of the authority of the State to regulate the withdrawal and uses of the waters of the State. OAG 2004, No 7162, p ____, 2004 Mich AG LEXIS 18 (September 23, 2004). As discussed in that opinion, the public has a significant interest in, and the State has broad authority over, all waters, surface and ground, within its borders.

Protection of water resources for the benefit of the public as a whole, with a corresponding limitation on the right to private appropriation, has a long pedigree that can be traced to Roman law. The sixth century Institutes of Justinian declared, "By law of nature these

things are common to all mankind – the air, running water, the sea, and consequently the shore of the sea." The Institutes of Justinian bk 2, tit 1, pts 1-6, at 65 (J. Thomas trans 1975). In *People v Hulbert*, 131 Mich 156, 160-173; 91 NW 911 (1902), the Supreme Court surveyed numerous cases discussing the common law rules regarding water use that had evolved from this principle:

Flowing water, as well as light and air, are in one sense 'publici juris' [owned by the public]. They are a boon from Providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of the soil belonging him. The property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property and incidental to it. The law is laid down by Chancellor Kent, in 3 Com. 439, thus: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water. * * * He has no property in the water itself, but a simple usufruct as it passes along.' *People v Hulbert* at 160 [Quoting *Wood v Waud*, 3 Exch 748.]

Thus, the public's interest in water resources is long recognized and it has long been established that surface water riparians have a right of use – a usufructory right – in water on and below their property, and not absolute ownership. See, e.g., *Preston v Clark*, 238 Mich 632, 639; 214 NW 226 (1927) (riparians have right of use incident to the land). This principle has also been applied to overlying property owner's use of groundwater. See, e.g., *United States Aviex Co v Travelers Insurance Co*, 125 Mich App 579, 590-591; 336 NW 2d 838 (1982) ("[Supreme] Court clearly rejected the right of absolute ownership over percolating ground water"). A usufruct is defined as a "right of enjoying a thing, the property of which is vested in another, and

to draw from the same all the profit, utility, and advantage it may produce, provided it be without altering the substance of the thing." *Black's Law Dictionary*, Abridged Fifth Edition (1983).¹

The recognition of the common interest in water and the corresponding limitation on private rights of appropriation is readily understood because of the fundamental role water plays – not only for basic needs like drinking water, irrigation of crops, and as sources of fish and wildlife, but for commerce and recreation. And from these ancient principles has evolved the clear authority and obligation to protect water resources.

In Michigan, that authority stems from three primary sources. First, is the fundamental and inherent sovereign authority to provide for the public health, safety, and welfare – the police power. *Pollard v Hagan*, 44 US 212; 11 L Ed 565 (1845); *Clements v McCabe*, 210 Mich 207; 177 NW 722 (1920). Const 1963, art 4, § 51, imposes on the Legislature a broad directive to enact laws to protect the public health, safety, and welfare:

The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

The police power authority is wide-ranging – the United States Supreme Court has described it as "one of the most essential powers of government, one that is the least limitable." *Hadacheck v Sebastian*, 239 US 394, 410; 36 S Ct 143; 60 L Ed 348 (1915). *See also, People v Brazee*, 183 Mich 259; 149 NW 1053 (1914). As one example of the exercise of this authority in

¹ Nestle apparently purported to purchase a "subsurface and water rights deed" from the overlying owner and also purchased a lease of the surface for a period of 99 years. (Appellant's Brief of Nestle Waters North America Inc. at 5.) MCWC argued at trial that the surface owners, Defendants Bollmans, could not convey the right to extract groundwater separately from ownership of the overlying land. Opinion Following Bench Trial (Judgment/Order) (November 25, 2003) at 41. The Circuit Court denied the motion in its opinion. Because MCWC did not appeal that ruling that issue is not before the Court. However, it is clear under Michigan law that there can be no title to groundwater separate from the usufruct granted overlying owners.

relation to water, numerous judicial decisions and opinions of the Attorney General have recognized the importance of a clean and ample supply of water to the preservation of the public health and welfare. *Columbus v Mercantile Trust & Deposit Co*, 218 US 645; 31 S Ct 105; 54 L Ed 1193 (1910); *Hudson County Water Co v McCarter*, 209 US 349; 28 S Ct 529; 52 L Ed 828 (1908), quoted in *Obrecht v Nat'l Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960); *Palmer Park Theater Co v Highland Park*, 362 Mich 326; 106 NW2d 845 (1961); *Attorney General ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503; 141 NW 890 (1913); OAG, 1959-1960, No 3327, p 154 (August 5, 1959); OAG, 2001-2002, No 7117, p 115 (September 11, 2002).

The second source is the constitutional recognition of the "paramount public concern" with the natural resources of the State, and the obligation of the Legislature to protect these resources. Const 1963, art 4, § 52, provides:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

This constitutional provision imposes a duty on the Legislature to protect the water and other natural resources from pollution, impairment, and destruction. See OAG, 1969-1970, No 4590, p 17, 19-27 (January 27, 1969) (discussing the debates of the Constitutional Convention of 1961 relative to the mandatory character of art 4, § 52). The former Michigan Environmental Protection Act, now Part 17 of the NREPA, MCL 324.1701 *et seq*, was passed in response to this mandate. See *Ray v Mason County Drain Comm'r*, 393 Mich 294, 304; 224 NW2d 883 (1975). ("Michigan's Environmental Protection Act marks the Legislature's response to our constitutional commitment to the "conservation and development of the natural resources of the state * * *.") That statute invokes the "public trust" in the natural resources of the State. See, e.g., MCL

324.1701 (providing for "protection of the air, water, and other natural resources and *the public trust in these resources* from pollution, impairment, or destruction.").

Finally, the common law Public Trust Doctrine imposes an obligation to protect and conserve the navigable waters of the State on behalf of the public. The Public Trust Doctrine emanates from the ancient doctrine that navigable waterways are public highways that should be held in trust for the people, and that the sovereign has a duty to preserve these waterways for the benefit of the people. Under this doctrine, the State and its Legislature have not only the authority, but an affirmative obligation to protect the public interest in navigable waters. *Illinois Central Ry Co v Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892); *Nedtweg v Wallace*, 237 Mich 14, 17-20; 208 NW 51 (1927); *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926); OAG, 1961-1962, No 4040, p 381 (May 7, 1962).

Pursuant to these sources of authority, and reflecting the paramount public interest in water resources, the Legislature has enacted numerous laws that regulate the waters of our State for the benefit of the public, including the preservation and protection of water for domestic use, navigation, recreation, aesthetics, fishing, agriculture, commerce, and industry. *See, e.g.*, Part 31, Water Resources Protection, of the NREPA, 1994 PA 451, MCL 324.3101 *et seq*, and Part 301, Inland Lakes and Streams, of the NREPA, MCL 324.30101 *et seq*; and Part 127 of the Public Health Code, Water Supply and Sewer Systems, 1978 PA 368, MCL 333.12701 *et seq*, and the Safe Drinking Water Act, 1976 PA 399, MCL 325.1001 *et seq*. *See also*, OAG 2004, No 7162, *supra*, for additional statutory authority.

As will be more fully discussed below, Part 301 is the primary statute through which the State protects inland lakes and streams. It comprehensively regulates activities impacting inland

lakes or streams, including requiring a permit for activities that "enlarge or diminish an inland lake or stream."

C. Part 301 of the NREPA requires a permit to enlarge or diminish an inland lake or stream. DEQ recognizes that its interpretation of the administrative rule defining this phrase is inconsistent with the unambiguous terms "enlarge or diminish" in the statute.

1. Background on Part 301 of the NREPA, its administrative rules, and DEQ's interpretation of the statute and regulations.

The substantive provisions of Part 301 of the NREPA have remained essentially unchanged since the amendments that created the modern version of the statute in 1972 – the former Inland Lakes and Streams Act (ILSA), 1972 PA 346, MCL 281.951 *et seq.* The purpose of ILSA was broadly stated as:

AN ACT to regulate inland lakes and streams; to protect riparian rights and the public trust in inland lakes and streams; to prescribe powers and duties; to provide remedies and penalties; and to repeal certain acts and parts of acts. [1972 PA 346.]

The definition of "inland lake or stream" is unchanged from the original act (former MCL 281.951(f)) and covers all inland lakes and streams over five acres in size. *See now*, § 30101(f) of Part 301, MCL 324.30101(f).

The provision at issue here, § 30102 of Part 301, is substantively unchanged from the original section (former MCL 281.953) and prohibits certain acts:

Except as provided in this part, a person without a permit from the department shall not do any of the following:

- (a) Dredge or fill bottomland.
- (b) Construct, enlarge, extend, remove, or place a structure on bottomland.
- (c) Erect, maintain, or operate a marina.
- (d) Create, enlarge, or diminish an inland lake or stream.
- (e) Structurally interfere with the natural flow of an inland lake or stream.
- (f) Construct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream, or where any part of

the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing inland lake or stream.

(g) Connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar water with an existing inland lake or stream for navigation or any other purpose.

The permitting criteria are also unchanged from the original act (former MCL 281.957) and are now contained in § 30106 of Part 301:

The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state. This part does not modify the rights and responsibilities of any riparian owner to the use of his or her riparian water. A permit shall specify that a project completed in accordance with this part shall not cause unlawful pollution as defined by part 31.

The administrative rules promulgated under the former ILSA did not define "enlarge or diminish." See 1979 AACS 281.811-843; 1982 AACS R 281.811-843. In 1985 the administrative rules were amended. The proposed amendments initially did not include a definition of "enlarge or diminish an inland lake or stream". The second version of the proposed amendments, approved by the Natural Resources Commission and published in the Michigan Register, included a definition of "enlarge or diminish an inland lake or stream" as follows:

(1)(e) "Enlarge or diminish an inland lake or stream" means, *but is not limited to*, the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of water's surface area or storage capacity, the placement of fill or structures or the manipulation, operation, or removal of structures or fill to increase or decrease water levels in a lake, stream, or impoundment. [May 5, 1985 Draft.]

After public notice and public comment, and review by the former Joint Committee on Administrative Rules and the Attorney General, however, the definition in the final version of the rules later approved by the Natural Resources Commission was identical except it excluded the phrase, "but is not limited to":

(1)(e) "Enlarge or diminish an inland lake or stream" means the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of water's surface area or storage capacity or the placement of fill or structures, or the manipulation, operation, or removal of fill or structures, to increase or decrease water levels in a lake, stream, or impoundment.
[September 19, 1985 Draft, attached as Appendix 2.]

The administrative record contains no explanation for this change and the definition was promulgated as quoted above and remains the definition today. The effect of deleting the phrase "but is not limited to" was to limit regulated increases or decreases in water levels to those effected through the specifically described acts. Subsequent to promulgation of Rule 1(e), the Department of Natural Resources, and later DEQ, implemented § 30102(d) as reflected in the DEQ decision document concerning Nestle's permit application. August 8, 2001 Response to Public Comments Document, Defendant's Ex Dn. That document stated at p 13:

Thus, Part 301 does not regulate potential changes in water level or water volume of an inland lake or stream unless caused by dredging, filling, or manipulation of structures on bottomlands.

That statement reflects DEQ's historical interpretation of the terms "enlarge or diminish," through Rule 1(e), to require that dredging take place or that fill or a structure be placed on bottomlands before regulating the enlargement or diminishment of a lake or stream.

Consistent with that interpretation, without evaluating potential decreases in lake or stream levels, DEQ did not require permits because the wells at issue were not on bottomlands of an inland lake or stream. As discussed below, this interpretation is not consistent with the plain

language of the statute. DEQ recognizes this error and has begun the process of review and evaluation of potential amendments to its administrative rules.

2. The Circuit Court correctly applied the rules of statutory construction in determining that DEQ's administrative rule definition of "enlarge or diminish an inland lake or stream" was not consistent with Part 301 and that an activity that diminishes, as that term is commonly understood, an inland lake or stream, is regulated.

In 2000-2001, DEQ reviewed and permitted the groundwater extraction wells involved in the present case pursuant to the Safe Drinking Water Act. That review and approval required DEQ to, *inter alia*, evaluate the proposed extraction system for purposes of ensuring that the water to be produced met drinking water standards and that it would not adversely impact other parties using the aquifer for drinking water. DEQ ultimately determined that the wells could be approved under the Safe Drinking Water Act and that determination is not at issue in the underlying case. August 8, 2001, Response to Public Comments Document, Defendant's Ex Dn.

But DEQ declined to exercise regulatory authority over the wells under Part 301 of the NREPA. MCL 324.30102(d). As noted, DEQ's decision to decline jurisdiction under Part 301 was not based on a factual determination that the operation of Nestle's groundwater extraction wells would not have the potential to diminish regulated inland lakes and streams, but instead upon the agency's interpretation of what constitutes "diminish[ment]" of an inland lake or stream through Rule 1(e) of the Part 301 administrative rules.

The statutory provision at issue is short and straightforward. Section 30102(d) of Part 301 provides:

Except as provided in this part, a person without a permit from the department shall not do any of the following:

* * *

(d) Create, enlarge, or diminish an inland lake or stream.

The fundamental goal of statutory construction is to discern legislative intent and the first, and potentially dispositive, step in determining that intent is to review the language. *In Re MCI*, 460 Mich 396, 411; 596 NW2d 164 (1999). This Court in *Manske*, 265 Mich App at 458, recently enumerated rules of statutory construction relevant in this matter:

The primary goal of statutory interpretation is to give effect to the intent of the legislature. The intent of the Legislature is discerned from the plain language of the statute. If the statute is unambiguous, this Court presumes that the Legislature intended the meaning plainly expressed, and further judicial construction is neither permitted nor required. Where a plain reading of a statute yields more than one reasonable meaning, judicial interpretation is appropriate. If a term is not defined by the statute, it is appropriate to consult a dictionary for definitions of statutory terms. [Citations omitted.]

In construing the same section of Part 301 at issue here, § 30102(d), this Court applied these rules in determining that the term "enlarge," which is not defined by the statute, should be given its ordinary meaning as found in a dictionary. *Keisel Intercounty Drain Drainage District v Dep't of Natural Resources*, 227 Mich App 327, 336-339; 575 NW2d 791 (1998). Applying this same analysis in the instant case – Part 301 also does not define the term "diminish" – it is appropriate to consult a dictionary for the meaning of the term. *The American Heritage College Dictionary*, Third Edition, p 390 (2000), defines "diminish," in pertinent part, to mean "[t]o make smaller or less or to cause to appear so." The same dictionary defines "small" as "[b]eing below the average in size or magnitude" and "less" as "[n]ot as great in amount or quantity." *Id.* at 1284, 778.

According to the plain meaning of these terms, any activity that causes an inland lake or stream to fall below its average size or magnitude or reduces it in amount or quantity will "diminish" an inland lake or stream and require a permit under Part 301. Thus, according to the plain meaning, to "diminish" an inland lake or stream means to engage in an activity that reduces the level or volume of that water body, and a person cannot do so without a permit under Part

301. Moreover, "[a] necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2000) (citation omitted). Contrary to DEQ's historical interpretation, the language of the statute contains no limitations on the type or location of the activity that diminishes an inland lake or stream.

Finally, this construction is also supported by additional rules of statutory construction: Statutory provisions should be read in context and harmonized with other provisions, and statutory language should not be rendered surplusage. *See, e.g., Keisel*, 227 Mich App at 334, 337. Dredging, filling, and the placement of structures are already regulated by different provisions of § 30102. MCL 324.30102(a) ("Dredge or fill bottomland"); (b) (Construct . . . or place a structure on bottomland"); and (e) ("Structurally interfere with the natural flow of an inland lake or stream"). Reading § 30102 as whole, the existence of these other provisions demonstrates the intent that subsection (d) cover different activities. Further, as dredging, filling, and the placement of structures are already regulated under §§ 30102(a), (b), and (e), if "enlarge or diminish" were limited to circumstances where those activities are taking place, it would be unnecessary and surplusage.

In light of the plain meaning of the term "diminish" in Part 301, DEQ's interpretation of that term through Rule 1(e) – only regulating diminishment of an inland lake or stream through the placement of fill or manipulation of structures on the bottomland of an inland lake or stream – is contrary to the statute. Although an administrative agency's interpretation of a statute is entitled to due deference, such deference is not provided where the language is plain and unambiguous. *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 65-66; 678 NW2d

444 (2003). Moreover, it is obviously of some significance in this case that the agency itself no longer supports its historical interpretation.

The Circuit Court correctly analyzed the question of the extent of Part 301 jurisdiction under § 30102(d). The plain language of the section requires a permit if an activity will diminish the volume or level of an inland lake or stream.

3. DEQ has begun the process of amending its administrative rules to conform to the proper interpretation of Part 301.

Prior to the trial and decision in this matter, DEQ had been internally reviewing its position on the scope of § 30102(d). The underlying matter, as well as additional situations where lake or stream levels were being increased or decreased, but without dredging or placing fill or structures on bottomland, had led the agency to critically evaluate its position. Recognizing the significance of its potential shift in interpretation and the complicated nature of this issue, DEQ has engaged in a deliberate process of reviewing and evaluating potential amendments to the Part 301 administrative rules.²

The difficulty in evaluating impacts to surface water bodies from groundwater withdrawals is demonstrated by the Circuit Court's understandable struggle with the technical and factual issues before it. As indicated by the evidence presented by the parties, there are a number of factors that can influence the level or volume of a lake or stream. Fluctuations in levels or volumes of lakes and streams occur seasonally and are overlain by longer-term fluctuations due to longer-term climatic changes. Water bodies are not uniformly influenced by precipitation and/or groundwater and retain and discharge water at differing rates. Finally, there

² In the interim, DEQ is eschewing reliance on Rule 1(e) and applying § 30102(d), as written, to new activities that clearly increase or decrease the levels of inland lakes and streams. For example, permits are being required for lake augmentation wells, where groundwater is pumped into lakes to increase the lake level above the ordinary high water mark, even though the outlets are placed above bottomlands.

are technical questions related to the best method and accuracy of the measurement and analysis of data, including, for example, the use of computer modeling.

DEQ's rule amendments will define "enlarge or diminish" to be consistent with the plain meaning of those terms – any activity that demonstrably increases or decreases the level or volume of an inland lake or stream will undergo regulatory review. Developing this regulatory approach may include some effort to exclude certain *de minimus* activities, for example residential drinking water wells and other domestic uses. Further, the DEQ may utilize its authority under § 30106(5) of Part 301 to create "minor project categories," allowing streamlined permitting for activities that are "similar in nature and have minimal adverse environmental impact." MCL 324.30105(6). Finally, through rule or guidance DEQ hopes to eventually memorialize appropriate methodologies for measuring the impacts of various activities, like groundwater withdrawals.

II. Both riparians and owners of property above groundwater have a qualified right in the use of water. When there is a conflict between surface uses by riparians and groundwater uses by owners, that conflict should be evaluated using a reasonableness test that balances the competing interests involved.

In addition to the question of regulatory authority over Nestle's activities, this case raises the important question of how to resolve a conflict between two qualified rights to use water: the right of an overlying owner to use groundwater and the right of a riparian owner to use surface water. This is a question of first impression in Michigan. While disputes between groundwater users and disputes between surface water users were treated very differently in early American decisions, Michigan courts have over time turned to a balancing test for both types of disputes. This test balances a number of factors to weigh the competing interests of the users, including the purpose and nature of the use, the harm caused by the use, the benefit of the use, the

existence of other uses, and the condition of the water body. Domestic uses, or traditional uses on the land, are given preference as against other uses.

Because groundwater and surface water are part of one large water system, this balancing test should also be applied to conflicts between riparian uses and groundwater uses. Such a result is consistent with scientific understanding of the connections between groundwater and surface water. While the Restatement Torts, 2d rule on conflicts between riparian uses and groundwater uses is helpful to the extent it also prescribes a balancing test, the Restatement is not controlling. The Court should look to the factors already discussed in previous cases to weigh the competing interests in this matter.

A. Standard of Review

The appropriate common-law standard to apply to conflicts between an overlying property owner's use of groundwater and a riparian owner's use of surface water is a question of law that is reviewed *de novo*. See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Moning v Alfonso*, 400 Mich 425, 436; 254 NW2d 759 (1977) (reasoning that because the common-law of negligence was created by judges, the courts must decide the common-law rule).

B. Michigan courts have long recognized that riparian owners have a right to use the adjacent water that is qualified by other uses of the water.

As previously discussed, a riparian owner, whose property adjoins a watercourse, has a qualified right to use the water. Because a riparian owner does not have absolute ownership of water, the right of use is qualified by other uses. Michigan has adopted the "reasonable-use" rule for conflicts between riparian owners. *Hoover v Crane*, 362 Mich 36, 40; 106 NW2d 563 (1960). The riparian's use of a watercourse may not unreasonably interfere with other riparians' uses of the same watercourse. *Id.* This rule is a flexible doctrine, and the reasonableness of a

particular use depends on the facts of the case. *Id.* The Court considers factors such as "what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other." *Id.* Uses for "natural purposes" – those uses "absolutely necessary for the existence of the riparian proprietor and his family, such as to quench thirst and for household purpose" – are preferred over other uses. *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967).

Michigan early on disavowed the "natural flow" rule followed by some English and American courts. This rule focuses on the effects of a riparian's use on the natural flow of the watercourse. In the rule's most draconian form, a use is unreasonable if it diminishes the quantity of the water flow or alters the quality of the water, regardless of the injury to the downstream riparian. A. Dan Tarlock, *Law of Water Rights and Resources*, § 3:55. In 1874, Justice Cooley recognized that such a rule effectively gives a monopoly on the stream's uses to the last downstream proprietor. *Dumont v Kellogg*, 29 Mich 420, 423 (1874). While the upper proprietors are very limited in their use because they cannot impair the natural state of the water source, the last proprietor downstream can do so with impunity. *Id.* Justice Cooley made clear that Michigan follows a reasonableness rule, not a natural flow rule:

It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress. [*Id.* at 425.]

C. Over time, Michigan courts have also recognized that owners of property overlying groundwater have a right to use the water qualified by other uses.

Like a surface riparian, in Michigan an owner of property overlying groundwater also has a usufruct in the water that is qualified by other groundwater uses. The property owner may not unreasonably interfere with another property owner's use of groundwater. Although it has not always been clear how Michigan courts determine whether a use is reasonable, the most recent decision to consider the issue applied a balancing test similar to the riparian reasonable-use doctrine. *Maerz v United States Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982). Place of use is only one of many factors to consider when determining reasonableness. *Id.* at 720.

Michigan decisions on groundwater conflicts can only be understood against the evolving rules of liability used by American courts. Most courts began by applying the English rule, a per se rule that allows overlying owners to use groundwater regardless of injury to other users. Many courts found the rule too draconian, however, and modified it over time to allow liability in certain cases but not in others. This trend culminated in the Restatement Torts, 2d rule. The Restatement rule rejects per se rules of liability in favor of a balancing test.

1. The trend in American decisions has been to resolve conflicts over groundwater by weighing the competing interests of the users.

At early common law, American courts used the English rule to resolve groundwater conflicts. The per se rule treats groundwater as part of the subsurface, like soil or minerals, and thus gives the overlying proprietor absolute ownership of the water. The English rule is founded upon "the principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property." *Acton v Blundell*, 12 Mees & W 324; 152 Eng Rep 1223 (1843). Thus, a "person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure." *Id.* In reality, the English rule operates

as a rule of capture. A proprietor can extract as much groundwater as he wants even if that use takes water below the property of adjacent owners.

Many American courts recognized the unfairness of the English rule and modified it to allow certain exceptions for other groundwater users. Some courts, while continuing to profess adherence to the English rule, allowed an exception for malicious acts. *E.g.*, *Gagnon v French Lick Springs Hotel Co*, 163 Ind 687; 72 NE 849 (1904). Others applied riparian law to uses of groundwater by characterizing the water as an "underground stream" rather than as "percolating waters." *Henderson v Wade Sand & Gravel Co*, 388 So 2d 900, 901 (Ala, 1980). In New York, an early decision avoided the consequences of the English rule by applying the State's riparian doctrine to groundwater pumping that dried up surface waters. *Smith v Brooklyn*, 18 AD 340; 46 NYS 141 (NY App Div, 1897), *aff'd* 160 NY 357; 54 NE 787 (1899).

In the late nineteenth and early twentieth centuries, most common law states adopted a modification of the English rule, known as the American rule. Although sometimes denominated as the "rule of reasonable use," the American rule does not balance competing interests as the riparian reasonable-use doctrine does. Instead, the American rule divides the uses of groundwater into uses on or in connection with the overlying land, and all other uses. Tarlock, *supra* at § 4:9. A use on or in connection with the overlying land, even if it causes harm to other users, is per se reasonable as long as it is for a beneficial purpose. *Id.* But any other use that causes harm is per se unreasonable. *Id.* In effect, the American rule narrows the absolute dominion over groundwater granted by the English rule to only those uses on or in connection with the overlying land.

Some states adopted a correlative rights rule that combined elements of the riparian balancing test with the place of use restriction found in the American rule. The correlative rights

rule originated in the landmark California case of *Katz v Walkinshaw*, 141 Cal 116; 74 P 766 (1903). As explained in *Katz*, all owners have the right to a "fair and just proportion" of a common groundwater supply "as may be necessary for some useful purpose in connection with the land from which it is taken." *Id.* at 134, 136. Unlike the American rule, that does not limit uses on the land even if they harm others who are also using water on their land, the correlative rights rule subjects competing uses on overlying lands to a riparian-like rule of reasonable use. *Id.* at 136. Owners that use groundwater on overlying lands have paramount rights as against those who wish to use the water for other purposes, such as to transport the water to lands outside the basin. *Id.* at 135. Only if there is a surplus of water that is not needed by those with paramount rights may groundwater be used for purposes not in connection with the overlying land. *Id.* at 135-136.

More recently, the Restatement Torts, 2d rule combines the American rule and the correlative rights rule by imposing liability for withdrawals that unreasonably cause harm through lowering of the water table or that exceed a reasonable share of the common groundwater supply. 4 Restatement Torts, 2d, § 858(1)(a)-(b), p 258. Reasonableness is to be determined by weighing riparian factors. *Id.* at § 858(2). Unlike the American or correlative rights rules, however, the Restatement does not give automatic protection to uses on overlying lands as against other uses. This exception to liability is too broad, the Restatement explains, because it protects uses for domestic purposes, as well as large withdrawals by an overlying industrial plant or apartment house. *Id.* at § 858, cmt(e). Applying reasonableness factors ensures that the "salient factor is not the place of the use but the withdrawal of water in unprecedented quantities for purposes not common to the locality." *Id.*

2. While Michigan case law has not always been clear, Maerz applied a reasonableness balancing test similar to the riparian reasonable use doctrine.

In 1917, Michigan joined other States in rejecting the harsh nature of the English rule. In *Schenk v Ann Arbor*, 196 Mich 75; 163 NW 109 (1917), the City of Ann Arbor purchased land three miles away from the city to supplement its municipal water supply. *Id.* at 76-78. The city first conducted test pumping to determine how much water was available from the wells. *Id.* at 77-78. Because the tests were successful, the city planned to build a pumping station and pipe the water to the city. *Id.* at 78. Nearby farmers, whose wells had been affected by the test pumping, asked the Court for damages and an injunction to halt the city's plan. *Id.* at 79-80.

Recognizing that the English rule would leave the farmers with no remedy, the Court reviewed cases from other States that discussed various modifications to the rule. One such decision was *Meeker v East Orange*, 77 NJL 623; 74 A 379 (1909), in which the New Jersey Court adopted the "rule of reasonable user." *Schenk* quotes extensively from *Meeker*. While commentators assumed that the "rule of reasonable user" adopted by *Meeker* was the American rule, New Jersey later interpreted *Meeker* as a correlative rights decision in *Woodsum v Pemberton Twp*, 172 NJ Super 489; 412 A2d 1064 (1980), *aff'd* 1777 NJ Super 639; 427 A2d 615 (1981).

After reviewing the exceptions to the English rule, the Court in *Schenk* determined that the city's use of groundwater was qualified by the "rule of reasonable user." *Schenk* at 91. The Court began its holding by noting that the city "proposes to use none, or at most only an inconsiderable, part of the water upon, or for the benefit of, the land from which it takes it, or for its own benefit as landowner." *Id.* at 81. In addition, the pumping clearly affected nearby wells. "Under such circumstances, the right of the landowner, to the injury or detriment of other

landowners, to take from his own land such percolating waters as he may thus be able to collect, is not an unqualified, but is a qualified, right." *Id.* at 81-82.

While *Schenk* is probably best understood as one of many cases across the United States that applied the American rule to hold municipalities liable for the effects of groundwater pumping, later Michigan decisions have not adhered to the bright line distinctions of the American rule. Instead, Michigan courts have evaluated the reasonableness of each use and weighed the benefits and costs of each to determine the extent of liability. The place of use, while an important factor, has not been determinative.

Five years after *Schenk*, the Supreme Court confronted another dispute over a municipality's use of groundwater. In *Bernard v St Louis*, 220 Mich 159; 189 NW 891 (1922), a city's use of groundwater for municipal purposes harmed a hotel's use of spring waters for its sanitarium. Under a strict application of the American or even the correlative rights rule, the city's use of water was unreasonable because it was not on or in connection with the overlying land. The Court, however, evaluated both uses and determined that there could be an adequate supply for both parties if the city limited its pumping and the hotel did not allow its spring water go to waste. *Id.* at 163. Therefore, the city was to compensate the hotel for its expenses in obtaining a supply of water, but only for a supply adequate for the hotel's reasonable use. *Id.* at 165. The hotel was directed to conserve water. *Id.*

Similarly, in *Hart v D'Agostini*, 7 Mich App 319; 151 NW2d 826 (1967), a well went dry after nearby water was pumped out of the ground for the construction of a sewer trunk line. Under the American rule, if the pumping was on or in connection with the overlying land and for a beneficial purpose, there could be no liability regardless of harm. While the Court of Appeals analyzed the purpose and place of use, it also weighed a number of factors, including the extent

of the harm to the well owners, the necessity of the use, and the benefit of sewer construction to the area. *Id.* at 323. Moreover, the Court made clear that no person has an absolute right to groundwater: "In our increasingly complex and crowded society, people of necessity interfere with each other to a greater or lesser extent. Subterranean water, which is no respecter of property lines, is often impossible to extract without water from adjoining lands percolating across the property line." *Id.* at 321. This rationale applies equally to all groundwater users, not just those who are affected by others' on-site uses.

Maerz, supra, confirmed that conflicting groundwater uses should be resolved using a riparian-like reasonableness balancing test. In *Maerz*, pumping from a limestone quarry caused a nearby water well to go dry. *Maerz* at 712. Relying on *Schenk*, the lower court applied the American rule and determined that the quarry's use of groundwater was per se reasonable because the use was on or connected to the overlying land and for a beneficial purpose. *Id.* at 712. In reversing the lower court, the Court of Appeals concluded that previous Michigan cases had not applied categorical rules to groundwater uses based on the location of use. *Id.* at 715-720.

Citing the Restatement rule with approval, the Court determined that the proper rule for groundwater disputes is a balancing of competing interests. Because the principles in the Restatement rule "are consistent with the Michigan adjudications on the subject and the general trend of decisions in other states, are less harsh and arbitrary and more fair and just than the English rule or lesser modifications of the English rule," *Maerz* held that these principles "should be followed in Michigan." *Id.* at 720. The Court specifically noted the rule's incorporation of riparian reasonableness factors such as "the economic and social value of the use, the extent and

amount of harm it causes, the practicability of avoiding the harm, and the justice of requiring the user causing the harm to bear the loss." *Id.* at 720, n 4.

Although *Maerz* rightly determined that Michigan has in practice applied a balancing rule to groundwater disputes, the Court erred in stating that Michigan follows the correlative rights rule. As an initial matter, such a conclusion requires a strained reading of *Schenk*. As discussed above, it appears much more likely that *Schenk* applied the American rule to find that the city's off-site use of water was unreasonable. Moreover, the Court in *Maerz* referred interchangeably to the correlative rights rule and the Restatement rule. The two differ – crucially – in how they treat the place of use of groundwater. While the correlative rights rule gives paramount rights to owners using groundwater on overlying lands as against those who use the water for other purposes, place of use is only one factor in the reasonableness test of the Restatement rule.

D. Conflicts between surface uses by riparians and groundwater uses by overlying owners should be evaluated using a balancing test.

The Circuit Court correctly recognized that conflicts between riparian uses and conflicts between groundwater uses are subject to a balancing test to determine reasonableness. Opinion at 47. But rather than extend that test to the dispute at bar, the Circuit Court fashioned a new rule that gives absolute protection to surface water uses when they are impacted by off-site groundwater uses:

In cases where there is a groundwater use that is from a water source underground that is shown to have a hydrological connection to a surface water body to which riparian rights attach, the groundwater use is of inferior legal standing than the riparian rights. In such cases, as here, if the groundwater use is off-tract and/or out of the relevant watershed, that use cannot reduce the natural flow to the riparian body. [*Id.* at 48.]

This rule combines elements of the natural flow theory in riparian law with the per se place of use restriction in certain groundwater law. Both have been disavowed by courts in Michigan.

This Court should hold that the balancing test from both riparian disputes and groundwater disputes applies when there is a conflict between an overlying property owner's groundwater use and a riparian's surface water use. This test balances a number of factors to weigh the competing interests of the users, including the purpose and nature of the use, the harm caused by the use, the benefit of the use, the existence of other uses, and the condition of the water body. Domestic uses, or traditional uses on the land, are given preference as against other uses. Such a test would not only be consistent with the trend of previous decisions, it would recognize the scientific reality that groundwater and surface water are part of the same water system.

1. The Circuit Court's per se rule is not supported by Michigan case law, whether in the form of dicta or otherwise.

The Circuit Court acknowledged that "there is no controlling Michigan law directly on point to this case." *Id.* at 44. Of the four cases the Court found to be "the core of near-relevant case law in Michigan," the Court distinguished *Maerz* as a conflict between two groundwater users who were "*in paria materia* in relationship to the water." *Id.* at 44, 47. While *Maerz* is not directly on point because it concerns a conflict between groundwater users, the Court failed to recognize that the riparian owner and the owner of property overlying groundwater both have rights in the use of water. The Court instead relied on dicta from three cases: *Dumont*, *Schenk*, and *Hoover*. None of the cases, when read in context, support the Court's legal rule.

As discussed in Argument II.A, *supra*, *Dumont* is a seminal riparian rights case in which Justice Cooley held that riparian conflicts should be governed by a reasonable use rule, not a natural flow test. Rather than logically extending this holding to the case at bar, the Circuit Court focused on two situations that Justice Cooley stated were clearly unreasonable under riparian law. These situations are diversion of a stream so that a downstream proprietor is no

longer a riparian, and interference with a riparian's rights by a stranger. Opinion at 45 (quoting *Dumont*, *supra* at 422). Contrary to the implication in the Circuit Court's Opinion, neither exception applies to this case. A stream has not been diverted and turned away so as to destroy the riparian interests below. Moreover, a groundwater user such as Nestle is not a stranger, but a holder of a qualified right in the use of water assuming ownership of the overlying land.

In fact, *Dumont* supports applying a balancing test to the case at bar. Justice Cooley criticized the natural flow test because it would "give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream." *Dumont* at 423. This reasoning is as applicable to the current dispute as to a dispute between riparians. In effect, the Circuit Court's natural flow rule gives riparian users a monopoly over the water system as if groundwater users did not exist.

The Circuit Court next relies on "important dicta" from *Schenk*: a quote from the New Jersey decision, *Meeker*. As discussed in Argument II.B, *supra*, *Meeker* adopted the "rule of reasonable user" for groundwater conflicts. The Court in *Schenk* quoted extensively from *Meeker* before determining that the city's groundwater use was qualified by the "rule of reasonable user." Part of the quote describes the effect of the rule: "[the rule of reasonable user] does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken . . . if [the owner of adjacent or neighboring land's] wells, springs or streams are thereby materially diminished in flow." *Schenk*, *supra* at 84 (quoting *Meeker*, *supra* at 638-639). MCWC also relies on a passage in *Schenk* discussing the holding of an early New York decision: "[In *Smith*] it was held that, whatever may be the rule with respect to the right of a landowner to use the water percolating through the earth, and thereby to affect the sources of wells or springs upon his

neighbor's land, he may not divert and diminish the natural flow of a surface stream by preventing its usual and natural supply. . . ." *Schenk* at 84-85.

These quoted passages are best understood as part of *Schenk's* survey of other States' exceptions to the English rule and not as implicit approval of the details of the exceptions themselves. *Schenk* only applied the "rule of reasonable user" to find the city liable for the effects of its pumping on other groundwater users. Moreover, Michigan explicitly disavowed the natural flow theory in *Dumont*, while courts in New Jersey and New York have continued to use natural flow language in their discussions of riparian rights. *See, e.g., Hackensack Water Co v Nyack*, 289 F Supp 671, 677-678 (SD NY 1968).³ Thus, it is not surprising that New Jersey and New York decisions involving riparian uses would include such language, but it would have been a dramatic shift in Michigan law for the *Schenk* Court to adopt elements of a natural flow rule after *Dumont*.

Finally, the Circuit Court relies on dicta from *Hoover*, in which the Supreme Court applied the reasonable use doctrine to a dispute between two riparians. In determining that the use of water for irrigation was reasonable, the Court stated:

Both resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed. There is, however, no doubt that the irrigation use does occasion some water loss due to increased evaporation and absorption. Indeed, extensive irrigation might constitute a threat to the very existence of the lake in which all riparian owners have a stake; and at some point the use of the water which causes loss must yield to the common good. [*Hoover* at 42.]

³ Connecticut also has continued to use natural flow language. *See, e.g., Adams v Greenwich Water Co*, 138 Conn 205; 85 A2d 177 (1951). This explains why the Court in *Collens v New Canaan Water Co*, 155 Conn 477; 234 A2d 825 (1967), applied that State's riparian natural flow doctrine to find that a groundwater use that reduced the natural flow of the river was unreasonable.

Taken in context, this passage shows that the Supreme Court balanced the reasonableness of the two competing uses. Keeping water within the watershed is one factor that makes the use more reasonable, not the determinative factor. Water that remains within the watershed is more likely to return to the lake. Far from supporting a rigid distinction between on-site and off-site uses, this passage in *Hoover* acknowledges that irrigation may one day be considered unreasonable even though the use remains within the watershed.

2. A balancing test acknowledges the interconnected nature of groundwater and surface water in the larger water system.

Lack of scientific knowledge about the source and movement of groundwater was a primary reason for the disparate treatment of groundwater and surface water at early common law. While surface water could be followed as it flowed across property, groundwater was by nature hidden, and its movements appeared inexplicable. The science of hydrology has now advanced so that hydrologists can, with some reliability, map groundwater reservoirs and predict the flow of water. More importantly, hydrologists now know that groundwater and surface water are not distinct entities. Each is part of an interrelated water system; groundwater use may affect a surface water body, and surface water use may affect a groundwater reservoir. Thus, a balancing test would reflect the evolution of scientific knowledge in this area.

Early decisions premised the English rule of capture on the lack of knowledge concerning groundwater. In the 1843 English decision of *Acton v Blundell*, *supra*, the Court reasoned that groundwater "does not flow openly in the sight of the neighboring proprietor [as does surface water], but through the hidden veins of the earth, beneath its surface. No man can tell what changes these under-ground sources have undergone, in the progress of time." 12 Mees & W 350. Seven years later, the Connecticut Supreme Court contended that groundwater could not be subject to riparian law because it was such a mysterious substance:

Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are so secret, changeable and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules, as has been done with streams upon the surface. [*Roath v Driscoll*, 20 Conn 533, 541 (1850).]

While groundwater systems are complex and hydrologists may differ in their conclusions, the science of hydrology is able to better explain those "influences" that seemed so "secret, changeable and uncontrollable" to the early courts. Hydrologists can now detect the presence of groundwater by drilling wells in different locations and marking the depth of the water table on contour maps. From these maps, the direction of groundwater flow can be predicted at a given time. As happened at trial, hydrologists can give expert testimony and use computer models to estimate the complexities of a constantly changing groundwater system.

Moreover, the science of hydrology has shown that surface water and groundwater are typically part of a unified hydrologic system. A surface water body may discharge water to a groundwater system, or the groundwater system may recharge a surface water body. Thus, any use of water has the potential to impact other water resources and the benefits those water resources provide. Rather than continue to maintain an artificial distinction between the two locations of water, this Court should adopt a balancing test that acknowledges the wider impacts of a water use. As demonstrated at trial, expert testimony can be used to estimate the effects of a given use on the water system.

Acknowledging the interconnections between groundwater and surface water in this way does not necessarily imply that uses of groundwater and surface water will be equally protected by the balancing test. Because in many instances surface water bodies provide benefits – such as wildlife and fish habitat and recreation – that water beneath the surface does not, riparian uses

may receive more protection. For example, when there is a conflict between riparian uses and groundwater uses, a court will weigh not only the purpose and nature of the competing uses, but the existence of other uses and the social and environmental benefits of the water body. Unlike the Circuit Court's per se test, however, a balancing test would not accord riparian uses an automatic preference as against groundwater uses.

3. The Restatement rule is helpful to the extent it reflects a balancing test already in use in Michigan, but it is not controlling.

The Restatement rule governing conflicts between groundwater users and riparian users is helpful because it prescribes a balancing test similar to the one used by Michigan courts to resolve conflicts between riparian uses and conflicts between groundwater uses. This Court should not adopt the rule as Michigan law, however, because the Restatement rule imposes an unnecessary threshold requirement of "direct and substantial effect" on the surface water body, when the extent and amount of harm should be one part of the balancing analysis.

The Restatement rule states:

(1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

* * *

(c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water. [Restatement Torts, 2d, § 858(1)(c).]

Liability is to be determined using riparian principles of reasonableness. *Id.* at § 858(2).

The comments explain that the rule "restates the conditions for recognizing that ground water and surface water are often closely interrelated and should be treated as a single source." *Id.* at § 858, cmt(c). Rather than using "doubtful and unscientific categorizations," the rule is intended to substitute a "pragmatic test for determining the interconnection." *Id.*

Contrary to Nestle's claim, *Maerz* did not adopt the Restatement rule as Michigan law for conflicts between groundwater users. After reviewing Michigan decisions on groundwater conflicts, the Court found that the "principles expressed in [the Restatement rule] are consistent with the Michigan adjudications on the subject and the general trend of decisions in other states . . . and should be followed in Michigan." *Maerz* at 720. A fair reading of this sentence is that the Court treated the Restatement as a secondary source that could shed light on Michigan decisions, not as the primary source of law in Michigan for all groundwater conflicts.

Even if *Maerz* can be read to adopt the Restatement rule for conflicts between groundwater users, *Maerz* certainly did not adopt the rule governing conflicts between groundwater users and surface water users. At issue in *Maerz* was whether a groundwater use on or in connection to the overlying land was per se reasonable even though it harmed another's groundwater use. The Court reviewed past Michigan decisions on conflicts between groundwater users but did not discuss any riparian cases. In fact, when first discussing the Restatement rule, the Court quoted only what it labeled the "pertinent part" of section 858 – subsections (1)(a) and 1(b). *Id.* at 715, n 1. As noted above, the rule governing conflicts between groundwater users and surface water users is found in subsection (1)(c).

Although the portions of the Restatement rule addressed in *Maerz* are consistent with Michigan law, reflecting a true balancing test, the threshold requirement contained in subsection 1(c) – that there be a "direct and substantial effect upon a watercourse or lake" - appears to deviate from a balancing test by imposing an unclear and perhaps overly burdensome hurdle. The Restatement's additional requirement is peculiar because the "extent and amount of the harm" is one of the riparian principles balanced to determine the unreasonableness of the harm. Restatement Torts, 2d, §§ 858(2) and 850(A)(e). Thus, a groundwater use that otherwise

satisfies the balancing principles is not unreasonable unless it causes significant harm. See *id.* § 850(A), cmt(g). Rather than import another special requirement for these conflicts, the Court should rely on a balancing test to determine reasonableness. Any surface water user should still be required to introduce scientific evidence to show that a groundwater use is the cause of harm to a surface water use and the extent of harm to the surface water body.

The Court should hold that disputes between use of groundwater by overlying owners and use of surface water by riparians are governed by a reasonableness balancing test. In determining the reasonableness of a use, courts should be guided by the factors discussed in previous decisions on water use conflicts. These factors include the purpose and nature of the use, the harm caused by the use, the benefit of the use, the existence of other uses, and the condition of the water body. Domestic uses, or traditional uses on the land, are preferred. Because the Circuit Court only made factual findings regarding the extent and nature of the harm caused by the use, the matter should be remanded for the Court to make further findings with respect to the other factors and to apply the balancing test.

III. Under MEPA, courts must determine the standard of environmental quality to apply to the alleged harmful conduct. A court may adopt a standard from the statute if it contains a pollution control standard or if, after independent review, the court determines that the standard adequately protects the natural resource. Parts 301 and 303 provide relevant standards under either of these methods. In evaluating potential impacts to natural resources under MEPA, a "statewide" perspective is not required.

A. Standard of Review

Statutory interpretation of MEPA is a question of law that is reviewed *de novo*. *Preserve the Dunes, supra* at 508.

B. Courts are vested with the responsibility of developing a common law of environmental quality under MEPA. In evaluating whether the parties have met their respective burdens, courts must determine the appropriate standard to be applied to the facts of the case.

MEPA grants the public the right to bring actions against any person "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." MCL 324.1702(1). The courts are vested with "the important task of giving substance to the standard [of environmental quality] by developing a common law of environmental quality." *Ray v Mason County Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975). It is the court's responsibility to "fashion standards in the context of actual problems as they arise in individual cases and to take into consideration changes in technology which the Legislature at the time of the act's passage could not hope to foresee." *Id.* at 307.

MEPA claims are decided using a burden-shifting approach. First, the plaintiff must make a "prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources. . . ." MCL 324.1703(1). If a prima facie showing is made, then a defendant may rebut the plaintiff's showing with contrary evidence and may also show by affirmative defense that there is no feasible and prudent alternative to the conduct and the "conduct is consistent with the promotion of the public health, safety, and welfare in light of the State's paramount concern for the protection of its natural resources." *Id.*

General rules of evidence govern the establishment of a prima facie case and the defendant's rebuttal. MCL 324.1703(1); *Ray, supra* at 309. A prima facie case is one that is "sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant's favor." *Id.* at 309. The evidence necessary to meet this burden will vary depending on the nature of the alleged impairment to the natural resource. *Id.* A plaintiff need not establish

actual environmental degradation; probable damage to the environment is sufficient. *Id.* Once a prima facie showing is made, the burden of going forward with the evidence shifts to the defendant. *Id.* at 311. The defendant must put forth enough evidence to rebut plaintiff's showing. *Id.*

C. In light of the Supreme Court's decision in *Preserve the Dunes*, the Circuit Court should clarify its use of statutory standards. Assuming Parts 301 and 303 are appropriate standards of environmental quality in this case, the Circuit Court did not adequately support its burden-shifting analysis.

The Circuit Court, in large measure, followed the appropriate analytic framework and basic principles outlined above. But its analysis is inadequate in two respects: First, particularly in light of the subsequent Supreme Court opinion in *Preserve the Dunes, supra*, the Circuit Court's rationale for adopting Parts 301 and 303 as appropriate standards under MEPA should be clarified. Second, assuming Part 301 and 303 provide appropriate MEPA standards in this case, the Court failed to undertake an adequate analysis as required by *Ray, supra*, because it did not apply specific facts to support its decision that MCWC established a prima facie case. The Court also did not adequately support its conclusion that Nestle failed to rebut MCWC's prima facie case.⁴

The Court properly stated that its task was to "find[] or establish[] a standard or standards to measure Defendant's water-extraction activities against to determine if such actions result in the impairment of the natural resources involved in this case." Opinion at 54. The Court then stated that it would look to Parts 301 and 303 to determine whether the statutes had a relevant standard, and if so, would decide whether to adopt the standard. *Id.* at 54-55. In its discussion of the specific statutes, however, the Court did not explain how these statutes provided relevant

⁴ The Circuit Court determined that Nestle failed to plead or present proofs regarding the availability of feasible and prudent alternatives. Opinion at 63-64. Nestle does not dispute this ruling in its brief.

standards but simply recited and applied the statutory requirements to determine whether a permit should have been granted by the DEQ. *Id.* at 55-60. The Court then found a prima facie showing on the basis that the conduct was subject to the permit requirements and a permit would not have been granted. *Id.*

Both Nestle and MCWC discuss the Supreme Court's decision in *Preserve the Dunes*, *supra*, a decision that addressed the utilization of statutory criteria as standards under MEPA but was not issued until after the Circuit Court's opinion. In *Preserve the Dunes* the Supreme Court discussed its prior decision in *Nemeth*. *Nemeth* held that if a court determines a pollution control standard is valid, applicable and reasonable, MCL 324.1701(2)(a), a party could make a prima facie case by showing that conduct would violate a statute containing a pollution standard. *Nemeth* at 35-36. Unfortunately, Nestle and MCWC provide little analysis and, in conclusory fashion, simply assert that *Preserve the Dunes* supports their respective positions.

At issue in *Preserve the Dunes* was whether a violation of a permit eligibility requirement of Part 637, Sand Dune Mining, of the NREPA, MCL 324.63701 *et seq*, specifically a "grandfathering" provision – could establish a prima facie case under MEPA. The Supreme Court determined on two separate – but interrelated – grounds that such a violation could not meet plaintiff's burden. First, the Supreme Court reasoned that Part 637 did not contain a pollution control standard, and thus a violation of the statute did not establish a prima facie case as did a violation of the former Soil Erosion and Sedimentation Control Act⁵ in *Nemeth*. *Id.* at 516-517. In the course of this determination, the Court indicated that the prima facie "rule" established in *Nemeth* was based solely on §1701(2) of MEPA, and, because that provision only refers to "a standard for pollution," *Nemeth* was limited to statutes containing pollution control

⁵ Now Part 91, Soil Erosion and Sedimentation Control, of the NREPA, MCL 324.9101 *et seq*.

standards. *Id.* at 516. Second, the Supreme Court reasoned that MEPA is concerned only with conduct that harms the environment, not with improper administrative decisions. *Id.* at 518-519. A violation of permit eligibility requirements is unrelated to whether mining will harm the environment. *Id.*

The Court in *Preserve the Dunes* read *Nemeth's* prima facie rule as limited to statutes containing pollution control standards and, therefore, found the rule inapplicable to the statute and circumstance before the Court. But, contrary to Nestle's argument, *Preserve the Dunes* does not foreclose the possibility that Parts 301 and 303 contain pollution control standards under *Nemeth*. Like the soil erosion statute at issue in that case, both Parts 301 and 303 are primarily directed to protection of water quality and aquatic resources. For example, one of the identified benefits provided by wetlands is "pollution treatment by serving as a biological and chemical oxidation basin." MCL 324.30302(1)(b)(iv).

Moreover, neither *Nemeth* nor *Preserve the Dunes* purport to otherwise bar the use of statutory standards in defining a standard of environmental protection under MEPA. A court may then use this standard to determine whether plaintiff has made a prima facie showing of impairment. Indeed, there is nothing in *Nemeth* or *Preserve the Dunes* that would preclude a court from deciding that the substantive standards of an environmental protection statute, en toto, should be the environmental standard in a given case. It is entirely logical and appropriate for a court to adopt substantive statutory standards if, after independent review, the court finds them helpful.

Thus, even assuming a violation of Part 301 or Part 303 does not automatically establish a prima facie case, the Circuit Court could adopt the substantive standards of these Parts as the standard to be applied to the withdrawals at issue in this case. Unlike the permit eligibility

requirements at issue in *Preserve the Dunes*, substantive permitting criteria in Parts 301 and 303 measure environmental harm – in fact, the agency is directed to use the criteria to determine whether the proposed conduct harms the natural resource.

Substantive permitting criteria can be found in § 6 of Part 301 and § 11 of Part 303. Under Part 301, the DEQ must evaluate the "possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters" in determining whether to grant a permit. MCL 324.30106. The DEQ may not grant a permit if the project "will unlawfully impair or destroy any of the waters or natural resources of the state." *Id.*

Part 303 provides even more specific guidance, directing the DEQ to consider several criteria in determining whether the activity is in the public interest, including the "probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activities in the watershed," "the size of the wetland being considered," and "[p]roximity to any waterway." MCL 324.30311(2)(d), (f), and (h). In addition, a permit cannot be issued if there will be an unacceptable disruption to aquatic resources. MCL 324.30311(4). This determination is based on consideration of the public interest criteria discussed above, as well as the legislative findings contained in § 30302. As noted, among the values provided by wetlands are pollution control.

Accordingly, there are at least two ways a court could use Parts 301 and 303 in undertaking a MEPA analysis. The statutes could be determined to contain relevant and applicable pollution standards and, therefore, a violation of the statutes would be a *prima facie* showing under *Nemeth*. Or, some or all of the substantive statutory standards could be used by the court in defining an appropriate standard by which to measure environmental harm. The

Circuit Court appeared to simply assume that it could adopt Parts 301 and 303 as MEPA standards. In light of *Preserve the Dunes*, further analysis is required to explain why Parts 301 and 303 are appropriate standards in this case.

Neither *Nemeth* nor *Preserve the Dunes* allow a violation of a statute to be used as a per se violation of MEPA. Once a prima facie showing has been made, the defendant still has the opportunity to rebut by showing that regardless of the violation, there is no actual or likely pollution, impairment or destruction. *Nemeth* at 36, n 10. The defendant may also rebut the case by showing there is no feasible and prudent alternative to the conduct. *Id.*

Contrary to Nestle's contention,⁶ the Circuit Court did not find a per se violation of MEPA based on violations of Parts 301 and 303. After determining that a permit could not be granted for the groundwater withdrawals under Part 301, the Court concluded: "Such finding sets out a prima facie case under MEPA that the Defendants have not rebutted, as spelled out in great detail in the factual-analysis portions of this opinion above. . . . Thus, the Defendants are in violation of the standard adopted herein, thus making them subject to appropriate remedies being ordered by this Court in this case." Opinion at 58. Similarly, after finding that a permit could not be granted for the withdrawals under Part 303, the Court concluded: "Plaintiffs are hereby found to have presented a prima facie case under MEPA using this WPA standard. It is also found that the Defendants have not rebutted this prima facie case as discussed in detail in the factual-analysis portions of this opinion above." *Id.* at 60.

Assuming that Parts 301 and 303 can be used as appropriate standards, the Circuit Court's findings are inadequate under *Ray, supra*. Although the Court cited the statutory criteria and referred to its prior factual determinations in holding that MCWC established a prima facie

⁶ Appellant's Brief of Nestle Waters North America Inc. at 43.

showing, the Court did not apply specific facts to each of the criteria. The Court also did not explain how its earlier factual findings supported its conclusion that Nestle did not meet its burden on rebuttal. "The judicial development of a common law of environmental quality, as envisioned by the Legislature, can only take place if circuit court judges take care to set out with specificity the factual findings upon which they base their ultimate conclusions." *Ray, supra* at 307. A reference to the "factual-analysis portions of this opinion" is not enough to aid this Court in its review, or to aid future courts in the "judicial development of a common law of environmental quality." *Id.*⁷

Therefore, the MEPA claim should be remanded to the Circuit Court to clarify its rationale for adopting Parts 301 and 303 as appropriate standards. In addition, the Circuit Court should make specific findings to support its conclusion that MCWC made a prima facie showing and that Nestle failed to rebut the showing.

D. The standard of environmental quality should take into account the specific characteristics of the resource affected by the conduct. While a statewide perspective on impairment may be relevant in some circumstances, it is not required. The wetlands and streams in this case have distinct benefits to the local environment that are appropriately considered in determining whether Nestle's conduct violated MEPA.

The standard of environmental quality to be applied in any given case is flexible and determined by the specific facts. *Nemeth, supra* at 37; *Ray, supra* at 307. Nestle suggests that a "statewide" perspective must be used in evaluating potential impairment of natural resources under MEPA. Reply Brief of Nestle Waters North America Inc. at 8-9. It then suggests that water in its various forms – groundwater, streams, lakes, etc - is essentially a generic, fungible resource it describes as "water resources." *Id.* From these premises Nestle then argues that the

⁷ To be clear, this is not directed to the adequacy of the Court's factual findings and whether they could ultimately support a conclusion that MEPA has been violated. Rather, it is the failure to conduct an analysis of those findings as they relate to the standards it adopted.

impacts of its project have a "miniscule effect on state-wide water resources." *Id.* Under this erroneous logic virtually no individual impact to water resources would ever rise to the level of impairment under MEPA.

While evaluating impacts from a statewide perspective may be relevant under the circumstances of a given case, it is not the rule and is inappropriate here to the extent it ignores local environmental effects. The resources at issue – wetlands and streams – offer distinct benefits to the local environment that cannot be served by wetlands and streams on the other side of the State. If a court were to lump all "water resources" together in its analysis, as Nestle suggests, it would create the perverse result of allowing any stream or wetland to be destroyed as long as those resources – or any type of water – existed somewhere else in the State. Streams and wetlands that serve important functions in their surrounding environments would never be protected from impairment until all of the State's "water resources" were scarce. As the Supreme Court noted in *Nemeth*, a resource need not be scarce or unique to be protected under MEPA. *Nemeth, supra* at 34. "Indeed, one of the primary purposes of the MEPA is to protect our natural resources *before* they become 'scarce.'" *Id.*

In the 1980's, panels of this Court disagreed over whether to apply a certain "perspective" to MEPA cases. Some decisions declared a statewide perspective was required when considering impairment. *E.g., Thomas Twp v John Sexton Corp*, 173 Mich App 507, 517; 434 NW2d 644 (1988) (draining an abandoned clay pit); *Kimberly Hills Neighborhood Ass'n v Dion*, 114 Mich App 495, 507; 320 NW2d 668 (1982) (development of natural area). Others disagreed and argued that a local perspective should be considered. *E.g., Rush v Sterner*, 143 Mich App 672, 680 n 1; 373 NW2d 183 (1985) (impoundment of trout stream); *City of Portage v*

Kalamazoo Co Road Comm, 136 Mich App 276, 283, n 2; 355 NW2d 913 (1984) (removal of trees).⁸

The Supreme Court has now made clear that rote use of factors is discouraged, as unthinking use of any factor can stifle the development of the common law of environmental quality. *Nemeth, supra* at 37. Indeed, requiring a choice between a statewide or local perspective creates a false dichotomy. Both "perspectives" are likely to be relevant in determining whether there has been or is likely to be an impairment. Conduct may cause impairment because it affects the specific resource at issue and the local environment, even if the statewide impact is minimal. A resource may possess unique characteristics locally or provide particular benefits to a local community, the loss of which would not necessarily be felt statewide. For example, the loss of wetland benefits in a highly developed area may have significant impacts even if there were relatively large areas of wetland statewide. Conversely, MEPA should protect a type of wetland or stream that is scarce statewide even if it is locally abundant. For example, if there were three high-value trout streams in the State, but they all existed in one small area, destruction of one of them would likely be considered impairment of a rare statewide resource, even if those streams remained relatively abundant from a local perspective.

Requiring a statewide perspective, particularly as described by Nestle, would so dilute potential impacts that it would be difficult, if not impossible, to show impairment. In fact,

⁸ On remand, in *Preserve the Dunes v Michigan Dep't of Environmental Quality*, 264 Mich App 257; 690 NW2d 487 (2004), this Court found that the unique statute it was directed to apply – the Sand Dune Mining Act – dictated that removal of a dune formation itself through mining should be evaluated by reference to the total "critical dune areas" in the state. The Court, however, went on to evaluate other impacts – to wildlife, plants, etc. – without prescribing a particular "perspective." Thus, contrary to Nestle's assertions, the Opinion does not support a rule requiring application of a statewide perspective.

forcing a choice between any particular perspective is inconsistent with *Nemeth*. Instead, it is appropriate to evaluate the local and statewide impacts.

Assuming Parts 301 and 303 are relevant to the MEPA analysis in this case, both statutes contemplate evaluation of both the impacts to the individual resources at issue and their immediate environs, as well as to resources statewide. Part 301 directs the DEQ to "consider the possible effects of the proposed action upon *the* inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters." MCL 324.30106 (emphasis added). Similarly, while acknowledging the interconnections between wetlands and other water resources statewide, Part 303 permitting criteria require evaluation of local impacts, including:

(d) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated activities *in the watershed*.

* * *

(g) The amount of remaining wetland in *the general area*.

* * *

(i) Economic value, both public and private, of the proposed land change to *the general area*. [MCL 324.30311(2)(d), (g), and (i) (emphasis added).]

MEPA does not require that a "statewide" or any other perspective be applied in evaluating potential impacts to the environment. Instead, the impact to both the local environment, as well as the State's overall resources should be relevant concerns. To the extent Parts 301 and 303 provide potentially relevant standards, the impacts to the local environment should be considered.

Conclusion and Relief Sought

The Circuit Court correctly held that DEQ's previous interpretation of § 30102(d) of Part 301 of the NREPA was inconsistent with and restricted the scope of that provision. A permit under Part 301 is required if an activity will diminish an inland lake or stream, which, according to its plain meaning, means any activity that reduces the level or volume of an inland lake or stream. This Court should affirm the Circuit Court's interpretation of this provision of Part 301.

The Circuit Court failed to apply the proper test in analyzing the respective rights of the parties to this case – a groundwater user and a surface water riparian. This Court should make clear that water-use conflicts between surface and groundwater users should be resolved through application of the balancing test that has developed in cases deciding both groundwater and surface water disputes. The Restatement Torts, 2d should only be used to the extent it reflects principles already developed in Michigan cases. This issue should be remanded to the Circuit Court with direction to apply the balancing test to its existing factual findings.

Finally, the analysis undertaken by the Circuit Court in reaching the conclusion that Nestle's activities violated MEPA is not apparent. The Court must clarify its use of Parts 301 and 303 in light of the Supreme Court's decision in *Preserve the Dunes, supra*. Further, a complete MEPA analysis would require that the specific statutory criteria to be used as standards be analyzed by reference to the relevant facts. The Circuit Court neither provided such an analysis nor did it support its conclusion that Nestle had failed to demonstrate the available defenses under MEPA. Accordingly, the MEPA issue should be remanded to the Circuit Court

for additional analysis. On remand, the Court should evaluate the potential pollution or impairment in light of both the local and Statewide impact to the natural resources at issue.

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