

Date: February 4, 2009

PRESS RELEASE

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Michigan Supreme Court Reverses Itself on the Anglers of the Au Sable's Case to Stop Merit Energy Cos. Plan to Discharge Millions of Gallons of Oil-Field Waste Water into Headwaters of the Au Sable River

Today the Michigan Supreme Court reversed its Order that required the Michigan Court of Appeals to review Otsego County Circuit Judge Dennis Murphy's vacation of Merit Energy Company's permit to discharge treated waste water into Kolke Creek. Merit's discharge permit is now finally and fully vacated.

In 2005, the Michigan Department of Environmental Quality issued Merit a permit to discharge 1.15 million gallons of waste water into Kolke Creek, the headwaters of the Au Sable River. Anglers of the Au Sable, Inc. and local property owners fought to stop Merit's discharge and the MDEQ's approval. After losing a contested case in front of an MDEQ Administrative Law Judge, Anglers and the property owner, Janney Mayer Simpson, appealed to the Otsego County Circuit Court.

In 2008, Otsego County Circuit Judge Dennis Murphy vacated Merit Energy Company's permit. He ruled that MDEQ illegally issued the permit and that the permit would violate the Michigan Environmental Protection Act ("MEPA"). Merit's proposed 1.15 million gallon discharge would cause erosion and flooding to riparian property, and would harm the delicate aquatic and wetland ecosystem of Kolke Creek. Kolke Creek is a very important body of water because it forms the headwaters of Michigan's famed Au Sable River.

In the fall of 2008, Merit asked the Michigan Court of Appeals to consider an appeal of Judge Murphy's decision, but the Court of Appeals denied Merit's request for lack of merit on the grounds presented. Merit asked the Court of Appeals reconsider its denial, but the Court of Appeals again declined to hear Merit's appeal.

Merit then asked the Michigan Supreme Court to consider its appeal of Judge Murphy's decision. In lieu of granting leave to hear the appeal, the Supreme Court ordered that the Court of Appeals hear the case. On December 31, 2008, Anglers and property owner Simpson asked the Supreme Court to reconsider its decision. Today, the Supreme Court reversed its earlier order and has denied Merit's appeal. Merit's permit to discharge to Kolke Creek is illegal and is vacated.

"The Supreme Court got it right this time," Rusty Gates, President of the Anglers' group said. "The Au Sable River will remain protected unless the MDEQ decides to give Merit another chance to ruin this great river."

“It took some convincing, but the Supreme Court saw its errors and made the right decision,” said Jim Olson, attorney for the Anglers from the Traverse City law firm of Olson, Bzdok & Howard, PC. “This is a great day for the Au Sable River and the citizens of Michigan.” “Today our laws worked.”

“My clients are very pleased that Merit no longer has a permit that would allow them to destroy their property,” said Susan Hlywa Topp, attorney for Janney Mayer Simpson from the Gaylord firm of Topp Law, PLC. “Hopefully the MDEQ will not allow Merit to again convince them that it is a good idea to discharge waste water into the headwaters of the Au Sable River.”

As for the future, “Merit and the Department should stop looking at Kolke Creek as a ditch and start looking at it as a pristine headwaters ecosystem. Merit is already discharging the waste water on site where it belongs and it should continue to do so,” said Jeff Jocks, also of Olson, Bzdok & Howard who tried the case with Mr. Olson for the Anglers. “Let this end.”

Rusty Gates said, “If Merit goes back to the MDEQ for another permit, the Anglers of the Au Sable will be there to intervene and stop it again.” “We are also watching similar contaminated sites that are close to other trout streams in Northern Michigan. Any attempt to discharge would bring an immediate response. We will not give up!”

End

Order

Michigan Supreme Court
Lansing, Michigan

February 4, 2009

Marilyn Kelly,
Chief Justice

137725(30)(38)

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

ANGLERS OF THE AUSABLE, INC.,
MAYER FAMILY INVESTMENTS, LLC,
and NANCY A. FORCIER TRUST,
Plaintiffs-Appellees,

v

SC: 137725
COA: 284315
Otsego CC: 07-012072-AA

DEPARTMENT OF ENVIRONMENTAL
QUALITY,
Defendant-Appellee,

and

MERIT ENERGY COMPANY,
Defendant-Appellant.

On order of the Court, the motion for immediate consideration is GRANTED. The motion for reconsideration of this Court's December 11, 2008 order is considered, and it is GRANTED. We VACATE our order dated December 11, 2008. On reconsideration, the application for leave to appeal the September 24, 2008 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CORRIGAN, J. (*dissenting*).

I dissent from the Court's order granting plaintiffs' motion for reconsideration, vacating our earlier remand order, *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 482 Mich 1078 (2008), and denying leave to appeal. I continue to believe that our order remanding to the Court of Appeals for consideration as on leave granted was correctly entered.

In 2004, defendant Merit Energy purchased a central production facility in Otsego County, Michigan, known as the Hayes 22 CPF, from Shell Oil & Gas Company. Several crude oil and brine spills over the past decades have contaminated the

groundwater beneath the facility with hydrocarbons. The contamination now forms a large plume that has contaminated two residential drinking wells and continues to spread. As part of its purchase of the facility, Merit entered into a settlement agreement with the Michigan Department of Environmental Quality (MDEQ), under which Merit agreed to treat the contaminated groundwater. Merit then hired Gosling Czubak Engineering, which assessed the extent of the contamination and designed a remediation plan. Merit sought and obtained the permits necessary to carry out the remediation plan, including a certificate of coverage (COC) from the MDEQ, which permitted Merit to discharge the treated water into bodies of water connected to the AuSable River, as contemplated by the remediation plan. The MDEQ issued the COC under the auspices of a general permit, the “applicability” of which was “limited to discharges of wastewater contaminated by gasoline and/or related petroleum products” that met additional criteria specified in the general permit. On appeal from an administrative decision, the trial court reversed and effectively vacated the COC. It reasoned that the COC exceeded the scope of the general permit because it allowed Merit to discharge treated water containing chloride. The Court of Appeals denied Merit’s delayed application for leave to appeal.

The trial court erred by vacating the COC on the ground that it exceeded the scope of the general permit. The administrative law judge pointed out in his opinion and order, which decided plaintiffs’ administrative challenge to the COC in favor of Merit and the MDEQ, that the amount of chloride discharged into the bodies of water would be significantly less than the amount of chloride in drinking water! Thus, the chloride is apparently not a “contaminant” requiring treatment under the applicable statutory standard. In addition, the trial court ruled in plaintiffs’ favor in their separate civil action under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.* Appeals of that ruling are pending before the Court of Appeals, and it appears that the trial court relied to a significant extent on its findings in the MEPA action in deciding the administrative appeal. In order to insure consistency in the outcomes of the administrative and civil actions, the trial court’s rulings in both cases should be submitted to the same panel of the Court of Appeals.

Additionally, the trial court appears to have invalidated the COC without fully addressing the MEPA provision that allows a court to review an administrative action for a MEPA violation. This provision states:

In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and

prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare. [MCL 324.1705(2).]

The trial court thoroughly analyzed the “alleged pollution, impairment, or destruction” caused by the conduct authorized by the COC. Yet it failed to consider whether a “feasible and prudent alternative” existed. The administrative law judge never reviewed the permit issuance under MCL 324.1705(2), so the court based its finding that the COC impermissibly conflicted with MEPA on evidence presented in the separate MEPA civil suit. The use of this evidence is troubling because no evidence regarding a “feasible and prudent alternative” (or lack thereof) was presented, or even relevant, in the civil suit. MCL 324.1701, under which plaintiffs brought the civil suit, does not condition relief upon a lack of alternatives. Thus, I do not believe the court’s use of evidence from the civil trial provided it with a sufficient basis for reaching its decision under MCL 324.1705(2). The Court of Appeals should also address this issue to insure that MCL 324.1705 is properly followed.

Accordingly, I continue to favor a remand to the Court of Appeals as on leave granted. I would deny plaintiffs’ motion for reconsideration.

YOUNG and MARKMAN, JJ., join the statement of CORRIGAN, J.



d0128

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 4, 2009

Handwritten signature of Corbin R. Davis in cursive.

Clerk