

STATE OF MICHIGAN

SUPREME COURT

ANGLERS OF THE AU SABLE, INC., a Michigan nonprofit corporation; MAYER FAMILY INVESTMENTS, LLC, a Michigan limited liability company; and NANCY A. FORCIER TRUST,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a department in the Michigan Executive Branch, and STEVEN E. CHESTER, Director of the Michigan Department of Environmental Quality; and MERIT ENERGY COMPANY, a Delaware Corporation,
Defendants-Appellees.

S Ct Docket N° 138863, 138864, 138865,
138866

COA Docket No. 279301, 279306, 280265,
280266
(Consolidated)

L.C. Case N° 06-11697-CE(M)
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**Plaintiffs-Appellants Anglers of the Au Sable, Mayer Family, and Forcier Family
Response to Appellees Merit Energy Company and Department of Natural Resources &
Environment Motions for Rehearing**

February 1, 2011

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INTRODUCTION

Appellants urge this Court to find the proper resolution of Defendants' motions for rehearing to be as straight forward as it should be and, consistent with decades of Court practice and precedent, to deny them.

Defendants have utterly failed to satisfy their burden to demonstrate that there is any ground for rehearing this case. They presented absolutely no new issues or arguments that may be considered by this Court. Indeed, Defendant Merit's motion not only failed to present new arguments, it failed to present new language, as it was essentially entirely cut and paste, word for word, from its earlier brief. Defendant Michigan Department of Environmental Quality at least gave this Court the courtesy of rewriting its arguments, but it did not raise any new substantive argument. Indeed, both Defendants relied extensively on quotes from Justice Young's dissent, which only further demonstrates that they have raised no point that this Court did not fully consider in its initial disposition of this case. Merely repeating the identical arguments that this Court has already heard and considered is also insufficient to demonstrate that the Court's opinion resulted from the Court and the parties being "misled," in general, let alone that they were misled by an error that rose to the level of being "palpable."

As a result, Defendants' motions amount to nothing more than a plea for the Court to reopen and reconsider the merits of an otherwise final decision based on the transparent hope that a different disposition will result, not because the substance or merits of the arguments have changed, but simply because the composition of the Court has. This stands in direct contravention of a judicial custom best summarized by Justice Cooley's honorable Court in 1883, when it stated simply and clearly: "Held, unanimously, that a rehearing will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur."¹

Because Defendants' motions not only lack merit but also request that this Court disregard decades of Court practice, Appellants respectfully urge that they should be denied.

¹ *Peoples v Evening News Ass'n*, 51 Mich 11 (1883).

STATEMENT OF FACTS AND PROCEEDINGS

From the beginning, Appellants Anglers of the Au Sable and riparian landowners (“Anglers”) opposed Appellee Merit Energy Company’s (“Merit”) proposed discharge of 1.15 million gallons per day of treated waste water to Kolke Creek, a headwater stream that flows through Lynn Lake then forms the Au Sable River. Against Appellants’ opposition, Appellee Department of Environmental Quality (“DEQ”) authorized Merit’s discharge.

After 13 days of trial, the circuit court found that Merit’s proposed discharge would cause substantial harm and impairment, including flooding, erosion, sedimentation, pollution, and damage to aquatic wildlife and resources.² The court also found that Merit’s proposed discharge was unnecessary because Merit had other alternatives.³ As a result, the circuit court ruled that Merit’s proposed discharge was an unreasonable use under riparian law,⁴ and would violate the Michigan Environmental Protection Act, (“MEPA”)⁵ The circuit court enjoined Merit’s proposed discharge but ordered that it could propose a lower level of discharge and the circuit court would again determine reasonableness at that level.⁶ However, instead of applying the traditional “reasonable use” test to analyze the reasonableness of Merit’s proposed discharge, the circuit court used the “reasonable use *balancing* test” for groundwater disputes from *Mich Citizens for Water Conservation v Nestlé Waters*.⁷ This was notable because it extended the new test adopted in *Nestlé*

² Opinion and Order Granting Plaintiffs’ Motion for Injunction, May 29, 2007 (hereafter “Tr Ct Op”), Tr Ct Op, pp. 15-21, Appellants’ Appendix, pp. 19A-27A, July 19, 2010.

³ *Id.*, pp. 32, Appellants’ Appendix, p. 36A.

⁴ *Id.*, p. 21, Appellant’s Appendix, p. 21A.

⁵ MCL 324.1701, *et seq.*; Appellant’s Appendix, pp. 31-32, 35A-36A. The trial court ruled that Merit could not discharge to Kolke Creek because it had not been granted riparian rights under the easement from the MDNR. Tr Ct Op, p. 12, Appellants’ Appendix, p. 16A.

⁶ *Id.*, p. 32, Appellants’ Appendix, p. 36A.

⁷ *Mich Citizens for Water Conservation v Nestlé Waters*, 269 Mich App 25; 709 NW2d 174 (2005); rev’d in part and remanded on other grounds, 470 Mich 280; 737 NW2d 447 (2007). The *MCWC v Nestlé* Court created the new “reasonable use balancing test” for groundwater disputes. (continued...)

for *groundwater* disputes to riparian surface water disputes (disputes concerning lakes and streams). Michigan law has always treated groundwater and riparian surface water separately, and the reasonable use *balancing* test had never been used for riparian surface water disputes.

Appellees Merit and DEQ appealed the injunction and Anglers cross-appealed. Because this is a riparian surface water dispute, *not* a groundwater dispute, Anglers asked the Court of Appeals (“COA”) to rule that the circuit court’s use of the *Nestlé* “reasonable use balancing test” was incorrect and rule that the traditional riparian law “reasonable use test” is the proper test for riparian disputes. The COA affirmed the circuit court’s findings of fact and its injunction, but it also made two holdings that significantly changed existing Michigan riparian and environmental law. First, the Court held that the “reasonable use balancing test” is the proper test for riparian disputes.⁸ This, for the first time, extended the “reasonable use balancing test,” and all of its problems, to all surface water disputes within the State.⁹ Second, the COA dismissed DEQ from Anglers’ lawsuit, holding that DEQ’s issuance of a permit was not “conduct” sufficient to trigger MEPA¹⁰ based on *Preserve the Dunes v DEQ*.¹¹ This was a significant extension of *Preserve the Dunes* because *Preserve the Dunes* limited MEPA’s applicability only with regard to internal administrative decisions regarding eligibility for permits, but, in this case, the COA extended those limits to *all* DEQ permit approvals.

⁷ (...continued)

Under this new test, the COA, for the first time under Michigan groundwater law, allowed water to be freely severed from the land that it benefitted, converting Michigan reasonable use and correlative rights groundwater law into a rule akin to water allocation typically allowed in the western U.S. The new test in *MCWC v Nestlé* also included, for the first time, that “the harms inflicted on the riparian plaintiffs and the community in general are off set by the economic benefits to society and the local community.”²⁶⁹ Mich App at 77.

⁸ *Anglers of the Au Sable v Dep’t of Environmental Quality*, 283 Mich App 115, 152; 770 NW2d 359 (2009).

⁹ *Id.*, at 135-136.

¹⁰ *Id.*, at 128.

¹¹ *Preserve the Dunes v DEQ*, 471 Mich 508; 684 NW2d 847 (2004).

On May 10, 2009, Anglers filed Application for Leave to Appeal the COA's significant modification of both Michigan water law and MEPA. Anglers' Application requested the Court to overrule: (1) the COA's extension of the "reasonable use balancing test" to riparian surface water disputes; and (2) the COA's extension of *Preserve the Dunes* to DEQ permits.

On January 29, 2010, this Court granted leave to appeal and directed the parties to brief the following issues:

(1) whether Merit could be granted the right to discharge its off site groundwater on riparian land owned by the state; (2) what water law test should be applied to determine whether and extent to which Merit could discharge water; (3) whether plaintiffs have an action under the Michigan Environmental Protection Act ("MEPA"), MCL 324.1701(1), against DEQ; (4) whether *Michigan Citizens v Nestlé Waters*, 479 Mich 280 (2007), and *Preserve the Dunes v DEQ*, 471 Mich 511 (2004), were correctly decided.¹²

On March 5, 2010, Merit for the first time (after losing on the issue in trial court and Court of Appeals) admitted that it had an alternative to discharging its wastewater into Kolke Creek and claimed that this case was moot because it now would discharge elsewhere.¹³ After reviewing briefs on this issue from both sides, this Court denied Merit's motion to dismiss.¹⁴ No party requested that the Court reconsider the denial of Merit's motion. The parties then briefed the merits of the case, and the Court heard oral argument, where both the merits of the case and the mootness questions were discussed.

On December 29, 2010, this Court issued its opinion.¹⁵ The opinion upheld the trial court's decision that Merit's proposed 1.15 million gallon per day discharge of treated wastewater into

¹² *Anglers of the Au Sable v Dep't of Environmental Quality*, 485 Mich 1067; 777 NW2d 407 (2010).

¹³ Merit's Motion and Brief to Dismiss for Mootness.

¹⁴ *Anglers of the Au Sable v Dep't of Environmental Quality*, 486 Mich 982; 783 NW2d 502 (2010).

¹⁵ *Anglers of the Au Sable v Dep't of Environmental Quality*, ___ Mich ___; ___ NW2d ___, 2010 LW5393267; Slip Opinion, Mich S Ct. Nos. 138863, 138866 (hereafter referred to and cited as "Slip Op"), Dec. 29, 2010.

Kolke Creek constituted an unreasonable use, but it did so based on citations to the traditional “reasonable use test” for riparian surface water disputes.¹⁶ It also held that DEQ’s issuance of Merit’s permit was “conduct” in violation of the MEPA and overruled *Preserve the Dunes*.¹⁷ Justice Young dissented.¹⁸

Justice Mary Beth Kelly took office on January 1, 2011, replacing Justice Alton Davis, and Justice Brian Zahra took office on January 14, 2011, replacing Justice Maura Corrigan. A few days later, on January 19, Attorney General Bill Schuette reportedly announced that he would file a motion for rehearing to ask the Court to vacate its December 29, 2010 opinion.¹⁹ Appellees DEQ and Merit filed motions for rehearing.

STANDARD OF REVIEW ON MOTION FOR REHEARING

A motion for rehearing is governed by MCR 7.313(D). A motion for rehearing “should be denied *unless* a party has raised an issue of fact or law that was not previously considered but which may affect the outcome.”²⁰ The Court codified this fundamental principle in MCR 2.119(F)(3):

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from the correction of the error.

¹⁶ Slip Op, Davis, J., p. 13, n 15. The Opinion also again ruled that this case is not moot because Merit argued mootness in its brief and at oral argument. *Id.* at n 4.

¹⁷ Slip Op.(Davis, J.), pp. 7-9; Slip Op (Kelly, C.J.), pp. 3-8.

¹⁸ Dissenting Opinion, Dec. 29, 2010, p. 2 (Young, J., Corrigan, J. and Markman, J., concurring) (hereafter “dissenting Slip Op”).

¹⁹ According to the Detroit Free Press, “Republican Attorney Bill Schuette said Tuesday that he wants the new conservative majority of the Michigan Supreme Court to reconsider some decisions made last year, when the court had a liberal majority.” <http://www.freep.com/article/20110119/NEWS06/101190428/Attorney-General-Bill-Schuette-wants-new-state-Supreme-Court-to-revisit-old-rulings>

²⁰ *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass’n*, 484 Mich 1, 26; ___ NW2d ___ (2009) (Young, J., dissenting); *Nichols, Shepard & Co v Marsh*, 62 Mich 439, 440; 29 NW 37 (1886); *Thompson v Jarvis*, 40 Mich 526, 526 (1879).

MCR 2.119(F)(3) is essentially a two part test. First, if the motion merely presents the same issues already expressly or impliedly ruled upon then the motion will not be granted, although this Court does have some discretion concerning part one. If a majority of the Justices participating in the rehearing determine the issues are not the same, then the second part requires the moving party to demonstrate (a) “palpable error” that misled the Court and (b) that a “different disposition ... must result from the correction of the error.”²¹ This Court has long said that when there is a change of the make up of Justices of the Court after an opinion is decided and released, the change in the make up of the Court is not a ground for a rehearing.²²

ARGUMENT

I. As a Matter of Judicial Custom, Newly-Seated Justices Have Refrained From Deciding Motions to Rehear Cases When The Justice Did Not Participate In the Hearing and Decision of the Initial Case.

This case presents the somewhat unusual circumstance where the Justices of the Court who are being asked to decide a motion to rehear a case are not identical to the Justices who participated in oral argument and the development and issuance of the opinion under reconsideration. Notably, as a matter of practice, the United States Supreme Court follows a rule that new Justices who take office after a decision has been fully argued and decided do not participate in the motion for rehearing:

²¹ *McCormick v Carrier*, 485 Mich 851; 770 NW2d 357, 358 (2009) (Weaver, J., dissenting), at 357-358, (Corrigan, J., concurring), at 358. When reviewing motions for rehearing decided by lower courts a “palpable error” does not occur unless it is shown there has been an abuse of discretion “falling outside the range of principled outcomes.” *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); see also *Corporon v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009); see generally, *Moore v Secura Ins*, 482 Mich 507, 516, 759 NW2d 833 (2008).

²² *Peoples v Evening News Ass’n*, 51 Mich 11 (1883); *US Fidelity Ins & Guaranty*, *supra* (Young, J., dissenting); *University of Michigan Regents v Titan Ins Co*, 484 Mich 852, 854-855, 769 NW2d 646 (2009) (Young, J., dissenting, Corrigan, J., joining dissenting statement).

The newly appointed Justice may take no part in the consideration or decision of the petition for rehearing, but may participate in the final determination of the appeal on the merits after reargument.²³

It appears that Justices of this Court have also at times followed this custom. For example, in *Brd of Supervisors of Chippewa County v Bennett*,²⁴ where Justice Steere did not participate in the oral argument and decision of a calendared case, he took no part in the motion for rehearing on the decision.²⁵ Anglers submit that the motions for rehearing in this matter do not warrant a departure from this custom, and respectfully request that the newly-seated Justices of this Court consider this practice when deciding whether to participate in this motion for rehearing.

II. Appellees Have Not Met Their Burden to Demonstrate that a Rehearing is Justified.

Appellees have not met the requirements of MCR 2.119(F)(3). In order to have rehearing granted, they needed to provide something more than the same legal and factual issues already

²³ 2A Fed Proc, L Ed Sec 3:924, citing *Ryan Stevedoring Co Inc v Pan-Atlantic Steamship Co*, 349 US 926; 75 S Ct 769; 99 L Ed 1257 (1955)(Harlan, J., not participating on rehearing); 350 US 124; 76 S Ct 231; 100 L Ed 133 (1956)(All Justices participating). See also 2 Am Jur 2d, Appellate Law, § 835.

This custom has apparently been followed by at least some of the Justices of the Court in recent years. For example, the newly-seated Chief Justice John Roberts did not participate in a number of motions for reconsideration or rehearing for decisions the Court made before he was sworn in. See, e.g., *Small v Federal Communications Comm'n*, 546 US 1072; 126 S Ct 795; 163 L Ed 2d 649 (2005); *Perea v Bush*, 546 US 1028; 126 S Ct 714; 163 L Ed 2d 566 (2005); *Soro v Citicorp*, 546 US 1058; 126 S Ct 728; 163 L Ed 2d 624 (2005); *Reynoso v California*, 546 US 929; 126 S Ct 401; 163 L Ed 2d 286 (2005); *Jurconi v Glenhaven Lakes Club*, 546 US 929; 126 S Ct 401; 173 L Ed 2d 286 (2005). Justice Sotomayor also appears to have followed this rule. See, e.g., *Sims v City of New York*, ___ US ___; 130 S Ct 792; 175 L Ed 2d 551 (2009); *Arratia v Holder*, ___ US ___; 130 S Ct 43; 174 L Ed 2d 627 (2009); *Harris v Quarterman*, ___ US ___; 130 S Ct 43; 174 L Ed 2d 627 (2009); *Hieber v Stearns*, ___ US ___; 130 S Ct 44; 174 L Ed 2d 628 (2009); *Hillary v McNeil*, ___ US ___; 130 S Ct 35; 174 L Ed 2d 621 (2009); *In re Campbell*, ___ US ___; 130 S Ct 37; 174 L Ed 2d 622 (2009).

²⁴ *Brd of Supervisors of Chippewa County v Bennett*, 185 Mich 544, 544; 153 NW 814 (1915)(On Motion for Rehearing, Steere, J., taking no part in the case).

²⁵ Merit and DEQ do not address this issue in their motions for rehearing. Amicus MMA attempts to do so, but the cases it cites are generally inapposite. Brief of MMA, Jan. 19, p. 2. For example, in *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010), Justice Davis took office after oral argument *but before the opinion was released* and did not participate to avoid delay in the decision. Unlike this case, *Jackson* did not involve a motion for rehearing coming after the Court released its opinion and after new Justices took office.

decided by this Court *and* they needed to demonstrate palpable error by which this Court and the parties were misled. They have done nothing but reargue the issues already decided and in doing so failed to demonstrate any palpable error that misled this Court and the parties. Their motions should be denied.

A. Neither Appellee Merit Nor Appellee DEQ Have Raised Any New Factual Or Legal Issues that Have Not Already Been Briefed, Argued, and Decided by this Court.

Rehearing does not provide another proverbial bite at the apple; nor is it an avenue to address a disappointment over opposite views. Absent a material new issue not already argued and decided, expressly or by implication, the motion for rehearing must be denied.²⁶ Rehearing is an extraordinary remedy and should not be granted “*unless* a party has raised an issue of fact or law that was not previously considered but which may affect the outcome.”²⁷ As aptly stated in *Nichols, Shepard & Co*:

We discover no point which was not presented and considered on the original argument, and nothing, therefore, to call for a rehearing which would not authorize a similar application in any case where the opinion disappoints one or the other of the parties, as it must do inevitably.²⁸

Merit’s own motion and brief for rehearing concedes that it has not raised any new factual or legal issues.²⁹ In fact, its current motion is nearly identical to its original motion asking this Court to dismiss for mootness, except for its addition of quotes from Justice Young’s dissent, which obviously do not constitute new arguments that this Court has not already considered.³⁰ Merit’s

²⁶ MCR 2.119(F)(3).

²⁷ *US Fidelity Ins & Guaranty Co, supra* (Young, J., dissenting); *Nichols, Shepard & Co v Marsh, supra*; *Thompson v Jarvis, supra*; *McCormick v Carrier, supra*, 770 NW2d at 358 (Corrigan, J., dissenting).

²⁸ *Nichols, supra*, 62 Mich at 440.

²⁹ Merit brief, p 2

³⁰ Compare Merit’s Motion for Rehearing and Brief in Support (1-19-2011) with Merit’s Motion and Brief in Support of Motion to Dismiss for Mootness (3-05-2011). A party who seeks
(continued...)

purely voluntary statements or acts done in attempt to make this case moot have not changed. Merit simply hopes that this Court will reverse its denial of mootness even though this Court has twice said this case is not moot.³¹

Merit does not raise any new fact or legal issue not already expressly, or by reasonable implication, argued and decided by this Court. Indeed, it does not seem possible that it could do so, given that there are no new issues that fall outside the issues fully briefed, argued, and decided. Merit's motion should be denied.

DEQ's motion also concedes that there are no new issues. The DEQ admits that the mootness "issue has been addressed at length by the parties and the Court [and therefore], Defendant DEQ will not rehash arguments already made."³² It also admits that the issues on the merits were "extensively briefed by the parties, and [were] addressed in the majority and dissenting opinions."³³ The DEQ's motion basically repeats the arguments it has made throughout this case; namely, it argues that its permits should not be subject to MEPA, and that the "reasonable use *balancing* test" has, over time, replaced the "reasonable use test."³⁴

Merit and MDEQ have this case backwards. It was the COA that changed Michigan law and this Court that returned it to the state it existed in prior to the COA's decision. This Court reversed the Court of Appeals and ruled that DEQ's permit approvals are subject to MEPA as they always

³⁰ (...continued)
to moot a full adjudicated case and finally decided appeal has a heavy burden or justification to show mootness. *Friends of the Earth Inc, supra*, 528 US at 171.

³¹ Merit's brief on the merits also raised mootness and the issue was again debated in oral argument of this case on October 6, 2010. During oral argument, DEQ conceded that there was nothing to prevent Merit from discharging to Kolke Creek if it sought a new permit.

³² DEQ Motion on Rehearing, p 4.

³³ DEQ Motion on Rehearing, p 6.

³⁴ DEQ Motion on Rehearing, pp 6-12.

have been under Michigan law.³⁵ It also ruled that Merit's proposed discharge was unreasonable under the "reasonable use test" which has been Michigan's tool for resolving riparian surface water disputes for decades.³⁶

The only plausible reason Merit and DEQ have filed for a rehearing is because there has been a change in makeup of the Court, a fact or circumstance which is not grounds for rehearing.³⁷ The Appellees in the instant motion for rehearing are hoping the fishing will be better, despite the fact that their gear, the issues and arguments they have raised, remain the same. This Court has heard and ruled on these issues. The Motions for Rehearing should be denied.

B. Neither Appellee Merit Nor Appellee DEQ Have Demonstrated a Palpable Error by Which the Court and Parties Have Been Misled or that a Different Disposition Must Result from a Correction of the Error.

1. There is No Palpable Error that Has Misled the Court and Parties.

"The moving party must demonstrate a palpable error by which the court and the parties have been misled."³⁸ This Court construes the Michigan Court Rules using the same legal principles for construing statutes.³⁹ Unambiguous language is given its plain meaning and common words are given their ordinary meaning.⁴⁰ Every word must be given effect and interpretations creating surplus

³⁵ MCL 324.1701(1); *Ray v Mason County Drain Comm'r*, 393 Mich 294, 306; 224 NW2d 883 (1975); *West Mich Environmental Action Council Inc v Natural Resources Comm'n*, 405 Mich 741, 751; 275 NW2d 538 (1979).

³⁶ *Dumont v Kellogg*, 29 Mich 420 (1874); *Thompson v Enz*, 379 Mich 667, 677; 154 NW2d 473 (1967).

³⁷ *Peoples v Evening News*, *supra*, 51 Mich at 21; *University of Michigan Regents*, *supra*, at 854-855; *McCormick v Carrier*, *supra*, at 358. According to the Detroit Free Press Attorney General Schuette said that he "wants the new conservative majority of the Michigan Supreme Court to reconsider some decisions made last year, when the court had a liberal majority." *See* n 19, *supra*.

³⁸ MCR 2.119(F)(3).

³⁹ *CAM Const v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 554; 640 NW2d 256 (2002) quoting *Grievance Administrator v Underwood*, 462 Mich 188, 193-94; 612 NW2d 116 (2000).

⁴⁰ *Id.*

words must be avoided.⁴¹ If a term is not defined in the statute, a court may consult a dictionary to aid it in giving words their common or legal meaning.⁴²

Applying these principles to the unambiguous court rule, it is clear that a grant of rehearing requires more than an error in an order or opinion, or disagreement with the outcome of an order or opinion.⁴³ To begin with, the moving party must show that this Court and the parties were *mised* by an error that rises to the level of being *palpable*. Black's Law Dictionary, 6th Edition (1990), defines palpable as "easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest," and "misleading" as "delusive; calculated; to lead astray or to lead into error." In other words, the court rule requires that the Court and the parties have been deluded or led astray not by just any error, but by an error that is so clear and undisputable that it rises to the level of being obvious, patent, or plain.⁴⁴ Further, the fact that the rule requires that both *the Court and the parties* must have been misled is significant. This requires more than a mere belief that the Justices who signed the majority opinion erred in their legal reasoning and conclusions. Instead, it requires that the *entire* Court *and* the parties have been led astray by an obvious error. This type of error would probably generally arise from something of which neither the parties nor the Court were aware when the case was initially briefed and decided. Therefore, the court rule unambiguously contemplates that it must have become apparent that a clear error led the entire Court and the parties astray in their initial consideration of the case.

⁴¹ *State Farm Fire and Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

⁴² *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998).

⁴³ Somewhat related is this Court's principle that "the mere fact an earlier case was wrongly decided does not mean that overruling it is invariably appropriate." *Robinson v City of Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000).

⁴⁴ The palpable error standard appears to bear some similarity to this Court's formidable "plain error" standard for reviewing unpreserved claims of constitutional error, which requires a court to determine *both* that there is an error *and* that the error is plain, "meaning clear or obvious." See *People v Shafier*, 483 Mich 205, 219; 768 NW2d 305 (2009).

a. There Is No Palpable Error Concerning Mootness by Which the Court and the Parties Were Misled

Merit and DEQ ask this Court to rehear its December 29, 2010 Opinion and vacate the Opinion by ruling that this case is moot. Merit's motion is nearly identical to its Motion and Brief in Support of Motion to Dismiss for Mootness except that it added liberal quotes from Justice Young's dissent.⁴⁵ "Merit submits this motion to urge this Court to rehear this Opinion, *in light of* the arguments raised in the Dissenting Opinion of Justice Young and Merit's *previously filed* Motion to Dismiss and the facts contained in affidavits *previously filed* in this Court."⁴⁶ The DEQ admits that the mootness "issue has been addressed at length by the parties and the Court [and therefore], Defendant MDEQ will not rehash arguments already made."⁴⁷

There are several significant flaws in Appellees' argument that this Court should rehear this case because the issues are moot and the Court therefore lacked jurisdiction to render an opinion. Most fundamentally, mootness is not a jurisdictional issue in this case because it arose due to the voluntary actions of Appellees, and, regardless of whether the case is actually moot, this Court still had jurisdiction to hear the case. Further, the Court did not err in determining that the issues in this case are not moot, and even if it did, the error was not significant enough to constitute a palpable error by which this Court and the parties were misled. Therefore, rehearing is not warranted.

(1) Mootness is not a jurisdictional issue in this case.

As a preliminary matter, it is important to note that mootness is not a jurisdictional issue in this case for at least two reasons.

First, under Michigan jurisprudence, mootness is a prudential doctrine that this Court may waive. Although this Court has long firmly stated that "a court will not decide moot issues," it has

⁴⁵ Compare Merit's Motion for Rehearing and Brief in Support (1-19-2011) with Merit's Motion and Brief in Support of Motion to Dismiss for Mootness (3-05-2011).

⁴⁶ Merit brief, p 2 (emphasis added).

⁴⁷ DEQ Brief, p 4.

also recognized that a moot issue may nonetheless be justiciable under certain circumstances.⁴⁸ The very fact that this Court has recognized that an issue may be justiciable despite being moot necessarily implies that mootness is a prudential doctrine, which is within the Court's discretion to waive, as opposed to a constitutional requirement that a Court cannot ignore.⁴⁹

Consistent with this approach, this Court has held that it is within its discretion to reach a moot issue. For example, in *Durant v State*,⁵⁰ this Court stated that “[i]t appears that this issue is moot,” but “[w]e exercise our discretion to address the issue because it has been fully briefed and is capable of arising again in the future in situations in which delay in resolving the issue would adversely affect the Governor's compliance with [his constitutional] duty....”⁵¹ This approach to mootness is also consistent with this Court's recent recognition that, unlike the federal Constitution, the Michigan Constitution does not expressly limit the scope of the judicial power to cases and controversies, and, as a result, the justiciability limits that this Court has recognized based on the need for an actual controversy are not necessarily constitutionally compelled.⁵²

Second, even to the extent that the Michigan Constitution or the federal Constitution compels the mootness doctrine, the United States Supreme Court has expressly recognized that where an issue

⁴⁸ *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010).

⁴⁹ See, generally, *Mich Chiropractic Council v Comm'r of Office of Financial and Ins Services*, 475 Mich 363, 383-386; 716 NW2d 561 (2006) (Weaver, J., concurring). Accord *Honig v Doe*, 484 US 305, 330; 108 S Ct 592; 98 L Ed 2d 686 (1988) (Rehnquist, C.J., concurring) (“If it were indeed Article III which - by reason of its requirement of a case or controversy for the exercise of federal judicial power - underlies the mootness doctrine, the ‘capable of repetition, yet evading review’ exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are ‘capable of repetition, yet evading review.’”).

⁵⁰ *Durant v State*, *supra*, 456 Mich at 201, n 29.

⁵¹ See also, *Anglers of the Au Sable, Inc*, slip op at 13, Young, J., dissenting, explaining that “moot questions *generally* cannot be adjudicated” (emphasis added).

⁵² *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; ___ NW2d ___ (2010). Although not every Justice of the Court is in agreement with this decision, the dissenting Justices in that case have recently affirmed that it is currently the governing case on this issue. *Ader v Delta College Bd of Trustees*, ___ Mich ___; ___ NW2d ___ (2011).

becomes moot due to the voluntary cessation of the challenged conduct, it does not implicate constitutional justiciability limits, and, as a result, does not deprive a court of jurisdiction or of the power to hear the case. Instead, it is merely a prudential factor that a court may consider in deciding whether to exercise its judicial power. As the Court stated:

It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *Such abandonment is an important factor bearing on the question whether a court should exercise its power . . . , but that is a matter relating to the exercise rather than the existence of judicial power.* [Emphasis added.]⁵³

The Court recently affirmed these principles in *Friends of the Earth Inc v Laidlaw Environmental Services Inc.*⁵⁴

This Court's June 19, 2010 order in this case demonstrates that there is disagreement among the Justices over whether Defendants have met "the formidable burden of showing that it is absolutely clear the allegedly wrong behavior could not reasonably be expected to recur,"⁵⁵ such that the case is moot. But this disagreement is inapposite to whether this Court has the power to hear this case. Because Merit's claim of mootness was based on its voluntary cessation of the challenged conduct, regardless of whether the issue is actually moot, it is unquestionably within this Court's power to hear the case. The only question is whether, as a prudential matter, the Court will choose to exercise its discretion to do so.

(2) **There was no error in the Court's determination that the issues in this case are not moot, and even if there was, it does not rise to the level of "palpable" error by which the Court and the parties were misled.**

Given that mootness is not jurisdictional in this case, the question becomes whether or not it is nonetheless a basis for granting the motion for rehearing. Rehearing is not justified on this

⁵³ *City of Mesquite v Aladdin's Castle Inc*, 455 US 283, 288-289; 102 S Ct 1070; 71 L Ed 2d 152 (1982)

⁵⁴ *Friends of the Earth, supra*, 528 US at 189-190.

⁵⁵ *Friends of the Earth, supra*, 528 US at 171.

basis, however, because the Court did not err in determining that the issues in this case are not moot, and even if there were error, it would not rise to the level of *palpable* error by which the Court and the parties were misled.

To begin with, there was no error in this Court's determination regarding mootness. Indeed, neither Merit nor DEQ provide any actual error that misled this Court concerning mootness. This Court twice ruled that this case is not moot and Merit and DEQ simply disagree with the outcome. Without anything new, a motion for rehearing must be denied.⁵⁶ In addition, Merit could have retracted its voluntary mootness at any time and sought a permit to discharge to Kolke Creek. The DEQ attorney admitted the same at oral argument. Merit's vested right under the circuit court and Court of Appeals decisions would be binding on the parties but for this Court's Opinion, and, as a result, the issue is not moot. Further, Defendants have failed to meet "the formidable burden of showing that it is absolutely clear the allegedly wrong behavior could not reasonably be expected to recur," and their voluntary cessation of the challenged conduct does not moot the case.⁵⁷

Even if there were error, it is not *palpable* error by which the entire Court and the parties were misled. As discussed, because the mootness issues arose *after* this Court granted leave to appeal and due to Defendants' own actions, it is not a jurisdictional issue, and it is a matter of the Court's discretion to decide whether or not to exercise its judicial power. There was no palpable error in its decision to do so here that led the Court and the parties astray. To begin with, Defendants have not shown that there are any issues related to the mootness question of which the Court and the parties were unaware. The fact that there was a vigorous dissent demonstrates that there were

⁵⁶ *Taylor v Boardman*, 24 Mich 287 (1872). "The motion discloses nothing new. Leaving out of view all questions of form, and of diligence, we discover no ground on which we could reasonably act disturbing the case. The motion must be denied." *Id.*

⁵⁷ *Friends of the Earth Inc, supra*, 528 US at 171. See also *City of Erie v Pap's AM*, 529 US 277, 287-288; 120 S Ct 1382; 146 L Ed 2d 265 (2000).

Anglers will refrain from making the same arguments concerning the merits of the mootness issue in detail for a third time. Instead, Anglers directs this Court to the motions and briefs and simply asks this Court to deny Merit and DEQ's motion for failure and inability to demonstrate that any palpable error misled this Court concerning mootness

differing opinions; it does not establish that there was a clear or plain error instead of a mere difference in opinion in whether to exercise this discretion. And it indicates that the Court and the parties were not *mised* by any error, given that all of the Justices and the parties were aware of the issues raised in the dissent when the case was originally decided.

Moreover, there was no error that was palpable. Most simply, it was not palpable error for the Court to hear the case because of the strength of the merits of the question of whether the case was actually moot. But it also was not palpable error for a couple of other reasons.

First, the underlying purposes of the prudential mootness doctrine are simply not served by dismissing this case for mootness at this late date. The United States Supreme Court has recognized that, because one of the purposes of the mootness doctrine is to protect scarce judicial resources, a court that is exercising its discretion to decide whether to hear a moot case should consider whether “abandon[ing] the case at an advanced stage may prove more wasteful than frugal.”⁵⁸ The Court explained that, although this concern does not justify hearing a case where mootness is jurisdictional, it may be relevant when the court has discretion to decide whether to hear an otherwise moot case. *Id.* Indeed, at least one Justice of this Court has agreed that the scarcity of judicial resources should be considered as a factor in whether the Court should hear a case presenting important public questions that have become moot due to the parties’ own actions. As Justice Markman has stated, “[w]hen this Court grants leave, conducts oral arguments, and considers draft opinions with regard to a case on appeal, the Court is doing what it possesses the resources to do in less than three percent of all applications for leave to appeal,” and, when the Court undertakes these actions, it makes “clear its belief that this case deserves the investment of scarce judicial resources and that it is in the public interest that we do this.”⁵⁹ As a result, the Court should not “allow the litigants to avail themselves

⁵⁸ *Friends of the Earth*, 528 US at 191-192.

⁵⁹ *People v \$1,923,235.62 in US Currency*, 469 Mich 851, 851; 666 NW2d 182 (2003).

the full process of the court, and then permit them to remove the case from the court's jurisdiction at the very last possible moment" by taking actions that moot the issues presented in the case.⁶⁰

There is surely no clearer example of an instance where dismissing a case for mootness would "prove more wasteful than frugal" and allow litigants to lay to waste the investment "of scarce judicial resources" utilized "in the public interest" than when the Appellee seek dismissal based on mootness in a motion for rehearing, *after* the court has already received multiple briefings on the issues, *after* the Court has issued an order specifically addressing the mootness issue, *and after* a full opinion has already been issued on the merits of the case.⁶¹

Second, the issue is not really properly before this Court. The issue was decided by this Court in a separate decision, issued on June 18, 2010, and affirmed by the majority opinion issued on December 29, 2010. Defendants did not file a motion for reconsideration with regard to the June order. Perhaps mootness may be raised at any point when it is a *jurisdictional* issue, see *People v Richmond*,⁶² but there is no justification for raising it at this point in this proceeding when it is not jurisdictional.

Angler respectfully urges that the motion for rehearing should not be granted on the basis of mootness. Mootness is not a jurisdictional issue in this case, and there is no other reason to grant the motion for rehearing on this basis, particularly given that this Court has already issued a full opinion on the merits in this case and Defendants have presented no argument or fact of which the Court and the parties were not fully aware when the case was decided.

⁶⁰ *Id.*

⁶¹ The other main justification for the mootness doctrine - ensuring advocacy by interested parties - is not a concern in cases where a party who prevailed in the lower court voluntarily moots an issue for which leave to appeal has been granted in a higher court. As the United States Supreme Court has recognized, in addition to obvious issues related to good faith, the party has, at a minimum, an interest in preserving the favorable lower court decision. See generally *City of Erie v Pap's AM*, 529 US at 287-289.

⁶² *Richmond*, 486 Mich at 35 n2

b. There Is No Palpable Error Concerning the Merits of the Opinion by Which the Court and the Parties Were Misled.

Merit's motion only seeks rehearing on mootness and therefore Merit apparently does not claim that any palpable error misled this Court and the parties in its Opinion on the merits. The DEQ seeks rehearing of this Court's Opinion on the merits, but again does not demonstrate any palpable error that misled this Court. It admits that the issues on the merits were "extensively briefed by the parties, and [were] addressed in the majority and dissenting opinions."⁶³ DEQ's motion then simply sets out disagreements with this Court's Opinion concerning the relationship between DEQ and MEPA. It neither argues nor demonstrates anything that misled this Court and the parties, but instead just lists the reasons it disagrees with this Court's Opinion. Disagreement with a Michigan Supreme Court Opinion does not mean that palpable error misled the Court and the parties.⁶⁴

Again, Anglers will not reargue the merits of this case, and, in any event, directs this Court to the briefs of the parties which establish that Merit and DEQ have failed to demonstrate palpable error. Anglers ask this Court to deny DEQ's motion for failure and inability to demonstrate that any palpable error misled this Court concerning the merits.

C. A Different Disposition Does Not Necessarily Follow or Result.

If a party can overcome the burden of demonstrating a palpable error by which this Court was misled then it must further demonstrate that a different disposition of the motion must result. "The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from the correction of the error."⁶⁵ Again, Merit and DEQ simply restate their previous briefs and disagree with the outcome of this case. Neither Merit nor DEQ demonstrated that a that palpable error misled this Court such that a different disposition must result.

⁶³ DEQ brief, p 6.

⁶⁴ *Nichols, Shepard & Co v Marsh*, 62 Mich at 440.

⁶⁵ MCR 2.119(F)(3).

III. Even If this Court Determines this Case Is Moot, the Court of Appeals Decision must Be Vacated along with the Decision of this Court in Order to Grant Finality to the Trial Court Judgement and Bind Appellee Merit to its Voluntary Intentions and Actions Showing Mootness.

If this Court decides to refrain from exercising its judicial power to hear this case, the equities demand that this Court also vacate the Court of Appeals decision. Doing so would be consistent with a long-standing rule of the United States Supreme Court and the previous practices of this Court in similar situations.

In those limited cases where it has decided not to exercise its power to hear a case mooted by the voluntary actions of the appellee after leave is granted, the United States Supreme Court has issued orders vacating the federal Court of Appeals decision and modifying judgments, under the venerable vacatur doctrine.⁶⁶ In determining whether a lower court decision should be vacated if the case later becomes moot, the United States Supreme Court “dispose[s] of moot cases in the manner ‘most consonant to justice’ ... in view of the nature and character of the conditions which have caused the case to become moot,” and “[t]he principal condition to which [the Court] ha[s] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action.”⁶⁷ It is unquestioned that the lower court decision must be vacated when “without fault of the plaintiff in error, the defendant in error, after the proceedings below, caused the case to become moot.”⁶⁸ The important purposes served by this doctrine are self-evident: it is contrary to the ends of justice to allow a party to create voluntary mootness in order to insulate a favorable decision from review at the expense of the other party. Indeed, this rule assures “the ends of justice exact that the

⁶⁶ *Vacatur* is an equitable remedy employed “to prevent a judgement, unreviewable because of mootness, from spawning any legal consequences.” *US v Munsingwear*, 340 US 36, 41; 71 S Ct 104; 95 L Ed 36 (1950); *Arizonans for Official English v Arizona*, 520 US 43; 117 S Ct 1055, 1071; 137 L Ed2d 170 (1997)(prevent “eliminating a judgement the loser was stopped from opposing”); see also *Remus Joint Venture v McNally*, 116 F3d 180, 186-187 (CA 6, 1997)(Proper exercise of vacatur must also protect opposing party’s rights and interests so as to prevent the party who seeks voluntary mootness from avoiding preclusive and other effects of a trial court judgement).

⁶⁷ *US Bancorp Mortgage Co v Bonner Mall Partnership*, 513 US 18, 24; 115 S Ct 386; 130 L Ed 2d 233 (1994) (citations omitted).

⁶⁸ *Id.* at 25 (quotations and citation omitted).

judgement below should not be permitted to stand when without any fault of the petitioner there is no power to review it upon the merits.”⁶⁹

This Court has apparently also followed this doctrine in the past when an issue becomes moot after leave to appeal has been granted. For example, in *\$1,923,235.62*, this Court cited a United States Supreme Court case in support of its decision to dismiss an appeal and vacate the Court of Appeals opinion after the parties’ voluntary actions mooted the case.⁷⁰ This Court has apparently followed this principle in other cases, as well.⁷¹

If this Court decides not to exercise its power to hear this case, then United States Supreme Court precedent and the past practices of this Court strongly favor vacating the Court of Appeals decision and declaring that it is has no precedential effect. Otherwise, Anglers will continue to be adversely affected by the COA decision, despite the fact that the decision was insulated from review on the merits. In addition, exercising its equitable and supervisory powers, and based on the representations of Merit and DEQ, this Court should affirm the trial court injunctive remedy and modify the injunction so that it permanently and finally prohibits Merit or its assigns from any discharge of wastewater from its production facilities into Kolke Creek. Doing otherwise would allow Defendants to insulate a favorable decision from review and waste the limited judicial resources of this state and encourage these and future litigants to manipulate the judicial power of the Supreme Court for their own advantage. The Court should shut the door firmly on any such possibility.

⁶⁹ *US v Hamburg-Amerikanische*, 239 US 466, 477-478; 36 S Ct 212; 67 L Ed 387 (1916); *Bancorp, supra*, 513 US, at 24.

⁷⁰ *\$1,923,235.62, supra*, 469 Mich at 851, citing *Verret v Oil Transport Co Inc*, 365 US 768; 81 S Ct 911; 6 L Ed 2d 83 (1961).

⁷¹ See, e.g., *In re Investigative Subpoenas*, ___ Mich ___; ___ NW2d ___ (2011); *Friends of Crystal River v Kuras Properties*, 456 Mich 950; 577 NW2d 684 (1998).

IV. The Arguments of DEQ and Amicus MMA Rehash the Same Misrepresentations, Exaggerations, Legislative and Political Speculations about Law and Fact Outside the Record of this Appeal That They Have Already Argued.

The DEQ and the Michigan Manufacturer's Association (MMA) both make exaggerated and unsupported claims concerning the alleged impacts of this Court's December 29, 2010 Opinion. Anglers chooses not to engage those arguments directly because they are not part of this case or controversy. MMA makes claims that the Court's Opinion will: 1) open "the floodgates to a torrent of litigation....," 2) "...virtually paralyze the use of water in manufacturing processes," and 3) "substantially affect not only the manufacturing sector, but the economy of the State of Michigan as a whole, including employment levels, economic growth, tax revenue, and the ability of Michigan industries to compete in the regional, national, and global marketplaces." MMA Brief, pp vii-viii. MMA's concerns about the economy, employment, growth, taxes, and competition, as well as its desire to include new studies that are not part of the record, are better suited to legislative policy deliberations than this lawsuit.

The MMA brief seeks to inject its policy concerns into this Court's MEPA interpretation. In similar prior attempts, this Court has made it clear that policy concerns over MEPA are "a matter for the Legislature to address."⁷²

[O]ur function is not to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy. Our task is to discern the intent of the Legislature from the language of the statute it enacts.⁷³

The MMA brief also seeks to inject its policy concerns into this Court's water law analysis. It claims that the Opinion was a shift and change in the common law which will have horrible consequences. However, the Opinion remained faithful to Michigan water law and did not create a new rule. It discussed this Court's Michigan water law cases and the reasonableness standard that

⁷² *Nemeth v Abonmarche Development Inc*, 457 Mich 16, 43; 576 NW2d 641 (1998).

⁷³ *Hanson v Brd of County Road Comm'rs of County of Mecosta*, *supra*, 465 Mich at 504.

has been part of Michigan law for more than 100 years.⁷⁴ It then noted that it was expressly limiting its Opinion to the case at hand which was a discharge of contaminated wastewater into the uncontaminated Kolke Creek.⁷⁵ Finally, it did not create any “categorical rule,” but simply concluded that Merit’s proposed discharge was unreasonable under Michigan riparian water law and nothing more.⁷⁶ This was not a change in the common-law as evidenced by Anglers extensive briefing. MMA’s request to consider multiple and far reaching policy implications on the current state of Michigan’s water law which would apply equally both before and after this Court’s Opinion is one better left to the Legislature.⁷⁷

CONCLUSION AND RELIEF

For the reasons set out above, Anglers request that this Court deny the motions for rehearing fully. Alternatively, if for any reason this Court rules that this case is moot as a result of the voluntary representations and actions of Merit and DEQ, then Anglers request that this Court vacate the Court of Appeals decision in its entirety and order a complete injunction against Merit prohibiting forever its discharge into Kolke Creek.

⁷⁴ *Dumont v Kellogg*, *supra*, 29 Mich at 421-422; *Hall v City of Ionia*, 38 Mich 493 (1878); *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902); *Stock v City of Hillsdale*, 155 Mich 375, 119 NW 435 (1909); *Kennedy v Niles Water Co*, 173 Mich 473, 475-477 (1913); *Hoover v Crane*, 362 Mich 36; 106 NW2d 563 (1960). Michigan riparian law follows reasonable use law which determines reasonableness based on the harms and effects between common riparian users on the stream or lake, and limits diversions out of the watershed, not as a per se rule, but where the harm is based on the impairment of the integrity of flow and level. Appellants’ Brief on Appeal, pp. 9-12. Riparian law does not, contrary to the erroneous claims of DEQ, Merit and MMA, include a “balancing” test, as found in Restatement of Torts 2d, Sec. 858 (groundwater guideline), that would offset, and cancel, the traditional and long-standing actionable harm to riparian uses and water. Appellants’ Brief on Appeal, pp. 21-24.

⁷⁵ Slip Op., p 14, n16.

⁷⁶ Slip Op., p. 13, n15. The decision simply applies the reasonable use test and finds Merit’s proposed discharge unreasonable based on the resulting impairment and pollution, and the diversion of treated contaminated groundwater from another uncontaminated stream. Reasonableness is determined in “view of all the factual circumstances.” *Dumont*, *supra*, n 50, at 425. That is exactly what and all the Court did by its decision in this case.

⁷⁷ *Woodman ex rel Woodman v Kera LLC*, 486 Mich 228, 245; 785 NW2d 1 (2010).

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