STATE OF MICHIGAN

IN THE SUPREME COURT

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KENNETH ALTMAN, DAWN SCHUMANN, GEORGE SCHUMANN, MARJORIE SCHUHAM, and LAKESHORE CAMPING,

Plaintiffs-Appellants,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellee.

MSC: 159033

COA: 341310

Court of Claims
LC No.: 17-000140-MZ

AMICUS CURIAE BRIEF
BY THE MICHIGAN WATERFRONT ALLIANCE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

STATEMENT OF JURISDICTION iii

STATEMENT OF QUESTIONS PRESENTED iv

INTEREST OF AMICUS CURIAE 1

STATEMENT OF FACTS 2

INTRODUCTION 2

ARGUMENT 2

I. ADMINISTRATIVE REVIEW AND APPROVAL OF A PERMIT CAN FORM THE BASIS OF A CAUSE OF ACTION UNDER MCL 324.1701(1) IN ACCORD WITH THIS COURT'S DECISION IN *PRESERVE THE DUNES* 2

A. The Michigan Environmental Protection Act 2

B. Historic Interpretation of MEPA 5

C. *Preserve the Dunes* 9

D. The *Anglers* Cases 12

E. Application of *Preserve the Dunes* 14

II. IF *PRESERVE THE DUNES* HOLDS THAT ADMINISTRATIVE REVIEW AND APPROVAL OF A PERMIT CAN NEVER SUPPORT A CLAIM UNDER MCL 324.1701(1), THEN *PRESERVE THE DUNES* SHOULD BE OVERRULED 18

CONCLUSION 24

INDEX OF AUTHORITIES

Page(s)

Cases:

Anglers of the AuSable, Inc v Department of Environmental Quality (Anglers I),
488 Mich 69; 793 NW2d 596 (2010) 2, 12, 13, 19

Anglers of the AuSable, Inc v Department of Environmental Quality (Anglers II),
489 Mich 884; 796 NW2d 240 (2011) 2, 13, 14

Eyde v Michigan,
393 Mich 453; 225 NW2d 1 (1975) 18

Lansing Schools Education Association v Lansing Board of Educaction,
487 Mich 349; 792 NW2d 686 (2010) 22

Nemeth v Abonmarche Development, Inc,
457 Mich 16; 576 NW2d 641 (1998) 8, 9, 19

Peterson v Magna Corp,
484 Mich 300; 773 NW2d 564 (2009) 23

Preserve the Dunes, Inc v Department of Environmental Quality,
471 Mich 508; 684 NW2d 847 (2004) ..... *passim*

Ray v Mason County Drain Commissioner,
393 Mich 294; 224 NW2d 883 (1975) 3, 4, 18, 20

West Michigan Environmental Action Council, Inc v Natural Resources Commission,
405 Mich 741; 275 NW2d 538 (1979) ..... *passim*

Wortelboer v Benzie County,
212 Mich App 208, 221; 537 NW2d 603 (1995) 19, 20

Statutes:

MCL 324.1701 ..... 4, 18, 20
MCL 324.1702 10
MCL 324.1704 ..... 4, 20, 21
MCL 324.1705 ..... 4, 5
MCL 324.1706 ..... 4, 21
MCL 324.35302 15
MCL 324.35304 ..... 15, 18
MCL 324.63702 ..... 10, 11, 16, 17
MCL 324.63704 ..... 10, 11, 16, 17
MCL 324.63709 ..... 10, 11, 16, 17

Constitutional Provisions:

Const 1963, art 4, § 52 ..... 3, 20

STATEMENT OF JURISDICTION

Amicus Curiae, the Michigan Waterfront Alliance, Inc., relies upon the basis of jurisdiction set forth in Plaintiffs-Appellants' Application for Leave to Appeal and Supplemental Brief.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER ADMINISTRATIVE REVIEW AND APPROVAL OF A PERMIT CAN EVER FORM THE BASIS OF A CAUSE OF ACTION UNDER MCL 324.1701(1) IN LIGHT OF THIS COURT'S DECISION IN *PRESERVE THE DUNES.*

The Court of Appeals answered no.

Plaintiffs-Appellants answer yes.

Defendant-Appellee will answer no.

Amicus Curiae answers yes.

II. ASSUMING THE ANSWER TO THE FIRST QUESTION IS NO, WHETHER THIS COURT SHOULD OVERTURN ITS DECISION IN *PRESERVE THE DUNES.*

The Court of Appeals did not answer.

Plaintiffs-Appellants do not answer.

Defendant-Appellee will answer no.

Amicus Curiae answers yes.

INTEREST OF AMICUS CURIAE

The Michigan Waterfront Alliance, Inc. (MWA) is a Michigan nonprofit corporation comprised, directly and indirectly, of thousands of waterfront property owners, lake associations, and conservation-minded citizens with the goal of preserving Michigan's vast treasure of water resources. For over twenty years, MWA has sought to contribute to the creation and preservation of state laws and policies designed to protect, preserve, and promote the sustainable use of inland waters in Michigan. MWA actively pursues its primary mission and the interests of its members through pro-active involvement in Michigan's legislative process, participation in legal matters throughout the state with significant statewide ramifications, and engagement of natural resources management, or environment-focused state agencies or departments.

MWA has filed this *amicus curiae* brief to answer the first question presented in this Court's October 22, 2021 Order and whether this Court should overturn its decision in *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004). MWA does not take any position with regard to the specific question of whether Plaintiffs-Appellants have stated a cause of action under MCL 324.1701 in their pleadings.

This case will have statewide impact and significance on the ability of individuals and organizations to protect "the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction" from administrative agency permitting decisions that allow environmentally harmful activity to occur. MWA is directly interested in the outcome because it will decide whether the organization can further its mission of protecting Michigan's precious freshwater resources by holding state agencies accountable for their permitting decisions and demanding that they fulfil their vital public trust obligation to preserve the State's natural inland lakes and streams for future generations.

STATEMENT OF FACTS

Amicus Curiae, the Michigan Waterfront Alliance, Inc., relies upon and adopts by reference the statements of facts and procedural history set forth in Plaintiffs-Appellants' Application for Leave to Appeal and Supplemental Brief.

INTRODUCTION

Properly interpreted, this Court's decision in *Preserve the Dunes, Inc v Department of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004) is consistent with this Court's longline of cases allowing a cause of action under the Michigan Environmental Protection Act (MEPA) to be asserted against an administrative agency based on a permitting decision where it is alleged that the applicant's conduct has impaired, polluted, or destroyed the environment, or is likely to do so.

To the extent that this Court interprets *Preserve the Dunes* to preclude a MEPA action based on issuance of a permit under any circumstances, then that decision was contrary to this Court's established precedent and should be overruled, once again, for the reasons set forth by this Court in *Anglers of the AuSable, Inc v Department of Environmental Quality (Anglers I)*, 488 Mich 69; 793 NW2d 596 (2010), vacated on other grounds (mootness) in *Anglers of the AuSable, Inc v Dep't of Environmental Quality (Anglers II)*, 489 Mich 884, 884; 796 NW2d 240 (2011).

ARGUMENT

I. ADMINISTRATIVE REVIEW AND APPROVAL OF A PERMIT CAN FORM THE BASIS OF A CAUSE OF ACTION UNDER MCL 324.1701(1) IN ACCORD WITH THIS COURT'S DECISION IN *PRESERVE THE DUNES*.

A. The Michigan Environmental Protection Act

This appeal involves the proper interpretation and reach of the Michigan Environmental Protection Act (MEPA) in Part 17 of the Natural Resources and Environmental Protection Act,

MCL 324.1701 *et seq.*, which creates a cause of action for protection of the environment through the following citizen-suit provision in MCL 324.1701(1):

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

This statutory cause of action effectuates the responsibility imposed upon the Michigan Legislature to protect the state's natural resources in Article 4 of the Michigan Constitution:

> 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. [Const 1963, art 4, § 52.]

This Court described the conception of MEPA and its roots in the constitutionally mandated duties and common law public trust doctrine in *Ray v Mason County Drain Commissioner*, 393 Mich 294, 305-06; 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. . . .
>
> Michigan's EPA was the first legislation of its kind and has attracted worldwide attention. The act also has served as a model for other states in formulating environmental legislation. The enactment of the EPA signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be diligent and dedicated defenders of the environment. The EPA has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected—the public.
>
> The Act provides private individuals and other legal entities with standing to maintain actions in the Circuit Courts for declaratory and other equitable relief against anyone for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

> The Act also empowers the Circuit Courts to grant equitable relief, or . . . impose conditions on the defendant that are required to protect the air, water and natural resources.

By its plain language, MEPA not only grants universal standing to any person or entity to bring an action against anyone for the protection of the environment, "it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities." *Id.* at 306.

"To prevail on a MEPA claim, 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." *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 514; 684 NW2d 847 (2004). If a plaintiff is able to make an unrebutted prima facie showing, MEPA not only authorizes declaratory and equitable relief, but also allows the court to direct the adoption of corrective standards, impose conditions on a defendant to protect the environment, and prohibit certain conduct from polluting, impairing, or destroying the environment. *See* MCL 324.1701(1), .1701(2), .1704(1), and .1705(2).

A lawsuit under MEPA "is supplementary to existing administrative and regulatory procedures provided by law." MCL 324.1706. In fact, Section 1704 of MEPA specifically addresses the relationship between MEPA lawsuits and other administrative and regulatory proceedings:

> (2) If administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court may direct the parties to seek relief in such proceedings. Proceedings described in this subsection shall be conducted in accordance with and subject to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. If the court directs parties to seek relief as provided in this section, the court may grant temporary equitable relief if necessary for the protection of the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction. In addition, the court retains

jurisdiction of the action pending completion of the action to determine whether adequate protection from pollution, impairment, or destruction is afforded.

(3) Upon completion of proceedings described in this section, the court shall adjudicate the impact of the defendant's conduct on the air, water, or other natural resources, and on the public trust in these resources, in accordance with this part. In adjudicating an action, the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this part.

(4) If judicial review of an administrative, licensing, or other proceeding is available, notwithstanding the contrary provisions of Act No. 306 of the Public Acts of 1969 pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

Further, Section 1705 of MEPA provides guidance on how MEPA issues may be raised and evaluated in ongoing or available administrative and regulatory proceedings or an action for judicial review:

(1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

(2) 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.]

MEPA's role and function within the robust administrative and regulatory system has evolved and developed over the half century following its enactment.

B. Historic Interpretation of MEPA

In *West Michigan Environmental Action Council, Inc v Natural Resources Commission (WMEAC)*, 405 Mich 741; 275 NW2d 538 (1979), this Court considered an action brought by environmental associations to restrain the state from issuing permits to allow an oil company to

drill for oil and gas in the Pigeon River Country State Forest. The issue, according to the Court, was whether the plaintiffs had made a prima facie showing under MEPA to establish that the state's issuance of drilling permits would constitute a likely an impairment or destruction of natural resources. *Id.* at 747-50.

In analyzing this issue, the Court considered whether the action by the state in granting permits to drill wells for oil and gas was a part of the conduct that was alleged as being likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust therein. *Id*. at 750. At trial, the parties presented evidence on the likely effect of the drilling of the wells contemplated by the permits. *Id.* at 751. Based on the record evidence, this Court found that the issuance of permits was actionable conduct under MEPA because the permits authorized activity by the permit holder (i.e., the drilling of wells) that "is likely to lead to pollution, impairment or destruction of the natural resources of the Pigeon River County State Forest." *Id*. As such, the Court held that the plaintiffs were able to establish a prima facie MEPA claim against the state based on the issuance of permits to drill wells to a third-party oil company. *Id.* at 760.

Following this determination, the Court in *WMEAC* considered whether the trial court erred in deferring "to the DNR's conclusion that no pollution, impairment or destruction of the air, water or other natural resources or the public trust therein was likely to result from the contemplated drilling." *Id.* at 752. This Court made clear that a trial judge is not expected or permitted to rely on the experience and expertise of an agency when reviewing a MEPA claim; rather, the trial court must make an independent determination as to whether the alleged conduct is likely to lead to pollution, impairment, or destruction of the air, water, or other natural resources or the public trust therein. *Id.* Indeed, "the court has a responsibility to 'adjudicate' and 'determine' whether 'adequate protection from pollution, impairment or destruction has been afforded.' Courts can

discharge their responsibility to make such determinations only if they make independent, De novo judgments." *Id.* at 753.

According to the *WMEAC* Court, "the usual standards for review of administrative actions under the Administrative Procedures Act are inapplicable once [a MEPA] case has been filed in a circuit court. [MEPA] would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands." *Id.* at 754. As such, the Court held that the trial court erred by not exercising its own independent judgment and instead relying upon the determination made by the state agency. But instead of remanding the case to the trial court for an analysis of the environmental pollution, impairment, or destruction, the Court concluded that judgment in favor of the plaintiffs was required on the record presented. *Id.*

In reviewing the record, the Court noted that the evidence showed the following: (1) the permitted well drilling would push elk from their natural range; (2) the elk herd's absence from the area would likely last for an extended time and it was not certain that the elk would eventually return; and (3) available elk habitat in Michigan is finite and shrinking. *Id.* at 755-762. As a result of the foregoing, the Court found the record established the contemplated well drilling would result in "apparently serious and lasting, though unquantifiable, damage" to the elk herd such that "an unknown number of elk will not survive." *Id.* at 760. The Court held that evidence showing unknown and unquantifiable damage that was likely to occur to at least some degree was sufficient to render the state agency's issuance of permits to drill wells a likely impairment or destruction of a natural resource. *Id.* Accordingly, the Court issued "an order restraining the state from issuing any permits to drill for oil or gas." *Id.* at 762.

Nearly two decades later, this Court considered whether the plaintiffs could establish a prima facie case of actual or likely pollution, impairment, or destruction under MEPA by showing that the defendants violated the Soil Erosion and Sedimentation Control Act (the SESCA). *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 19, 25; 576 NW2d 641 (1998). More specifically, the issue before the Court in *Nemeth* was whether a violation of the SESCA could, by itself, amount to a violation of MEPA. *Id.* at 24. In resolving this question, the Court looked to the provisions and purposes of the SESCA and the rules promulgated pursuant thereto. *Id.* at 25.

Noting that "that the purpose of the SESCA is to prevent environmental harm caused by sedimentation and erosion," the Court found that the trial court properly determined the SESCA to be the appropriate pollution control standard applicable in this case." *Id.* at 30. The Court explained that "MEPA specifically authorizes a court to determine the validity, reasonableness, and applicability of any standard for pollution or pollution control *and* to specify a *new* or *different* pollution control standard if the agency's standard falls short of the substantive requirements of MEPA." *Id.* at 30 (internal quotations omitted) (emphasis original).

Furthermore, the *Nemeth* Court explicitly rejected the defendants' argument that the plaintiffs' MEPA claim was deficient because the SESCA, itself, did not provide for a private cause of action. *Id.* at 31. "The absence of a cause of action under the SESCA does not preclude its use as an appropriate 'pollution control' standard for a claim under the MEPA." *Id.* Nor did the plaintiffs' MEPA claim fail simply because it was based on a "technical violation" of the SESCA. *Id.* at 36.

Holding that the plaintiffs established a prima facie claim under MEPA, the Court in *Nemeth* summed up its holding as follows:

> Where the purpose of the statute used as a pollution control standard is to protect our natural resources or to prevent pollution and environmental degradation, a

> violation of such a statute can establish a prima facie case under the MEPA. The major purposes of the SESCA are to protect water and soil through the prevention and control of erosion and sedimentation. Thus, a violation of the SESCA can establish a prima facie case under the MEPA, provided that the trial judge has deemed the SESCA standards appropriate, applicable, and reasonable. [*Id.*]

In his partial concurrence with the majority's decision,[1] Justice Cavanagh made clear that this application of MEPA was approved by the entire *Nemeth* Court:

> The entire Court agrees that the Legislature enacted the MEPA to "protect our natural resources before they become 'scarce.'" In doing so, the Legislature chose to give standing to individual citizens to pursue actions to halt environmental harm, rather than rely solely on the various state agencies that are charged with protecting our environment. The Legislature seems to have implicitly recognized that there would be times when such agencies could not, or would not, act and that the overriding concern for preserving the quality of our environment mandated the availability of private action in such cases. [*Id.* at 46-47 (CAVANAGH, J., concurring in part and dissenting in part).]

In support of his reasoning, Justice Cavanagh relied on the historic examination of MEPA by the "father of environmental law" and author of MEPA (also popularly known as the "Sax Act"), Professor Joseph Sax, who wrote the following shortly after MEPA's enactment:

> Previously these agencies had been given a sweeping mandate to enforce environmental standards as they thought best, and their decisions were subject to judicial review only for arbitrary and abusive use of their authority or for violation of explicit statutory language. Now these agencies must be prepared to defend themselves against charges that their decisions fail to protect natural resources from pollution, impairment, or destruction. [*Id.* at 47, citing Sax & Conner, *Michigan's environmental protection act of 1970: A progress report*, 70 Mich L Rev 1004, 1005 (1972).]

C. *Preserve the Dunes*

In 2004, this Court revisited its MEPA jurisprudence in *Preserve the Dunes, Inc v*

[1] Justice Cavanagh's partial dissent from the majority opinion in *Nemeth* was based on the fact that the Court's majority declined to hold that attorney fees are apportionable in MEPA actions. *Nemeth*, 57 Mich at 48 (CAVANAGH, J., concurring in part and dissenting in part). Justice Cavanagh would have enabled individuals bringing MEPA actions to recover their attorney fees incurred to protect the environment for the benefit of all. *Id.*

Department of Environmental Quality, 471 Mich 508; 684 NW2d 847 (2004) in order to resolve the following question:

> [W]hether MEPA authorizes a collateral challenge to the DEQ's decision to issue a sand dune mining permit under the sand dune mining act (SDMA), MCL 324.63701 *et seq.*, in an action that challenges flaws in the permitting process unrelated to whether the conduct involved has polluted, impaired, or destroyed, or will likely pollute, impair, or destroy natural resources protected by MEPA. [*Id.* at 511.]

The plaintiff in *Preserve the Dunes* initiated a judicial action under MEPA against the Michigan Department of Environmental Quality (the DEQ) and a private company after the DEQ approved the company's application for a sand dune mining permit under the SDMA. *Id.* at 512. In its complaint, the plaintiff "alleged that the DEQ violated MEPA when it approved [the company's] amended mining permit." *Id.* At trial, the circuit court found that "any adverse impact on the natural resources which will result from the sand mining will not rise to the level of impairment or destruction of natural resources within the meaning of MEPA." *Id.* at 513.

By way of background, it is important to understand the permit application process under the SDMA. As described by the Court, the DEQ's SDMA permit review is a three-step process:

First: The DEQ must determine whether the applicant is eligible to apply for a permit under either MCL 324.63702(1)(a) or (b) because the applicant is either a past owner or operator of a sand dune mining permit.

Second: If the DEQ determines that the applicant is eligible to apply, the applicant must submit a permit application in accordance with the requirements of MCL 324.63704(2).

Third: If the DEQ determines that the applicant satisfies the application requirements under § 63704(2), then the DEQ must determine whether "the applicant's proposed conduct is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, as provided by part 17." *Preserve the Dunes*, 471 Mich at 515. If it does, then the DEQ is prohibited from approving the permit application under MCL 324.63709.

After reviewing this three-step process, the Court in *Preserve the Dunes* examined its decision in *Nemeth v Abonmarche Development* and explained why the same analysis premised on MCL

324.1702 was inapplicable because, unlike the SESCA, the SDMA did not contain a pollution control standard. 471 Mich at 516. This Court reiterated that its reasoning in *Nemeth* was still focused on the harmful conduct by the defendant that offends MEPA. *Id.*at 517-19. In the case of a statutory scheme that contains "a standard for pollution or for an antipollution device or procedure," such as the SESCA, a prima facie MEPA case may be established based solely upon the violation of that scheme because the scheme provides for measures designed to protect against impairment, pollution, and destruction of the environment. The same cannot be said for the SDMA, which does not include measures designed to protect the environment.

In finding that the plaintiffs had failed to establish a prima facie MEPA claim, the Court expressly rejected the dissent's conclusion that its interpretation of MEPA "insulates [SDMA] permit eligibility determinations from judicial review." *Id.* at 519. Instead, the Court reasoned that the DEQ's decisions under the first two steps[2] of the three-step process for SDMA permit application review "are unrelated to whether the applicant's proposed activities on the property violate MEPA." *Id.* Only the DEQ's decision in the third step of the SDMA permit review process involves a determination by the DEQ as to whether the applicant's proposed activity would likely impair, pollute, or destroy natural resources or the public trust therein.

Whereas the DEQ's determinations in steps one and two of the three-step process—under §§ 63702(1) and 63704(2)—may not be challenged by an action under MEPA, an improper administrative decision by the DEQ in step three—under § 63709—would provide a basis for a MEPA claim because the DEQ's determination would be related to conduct that is likely to impair, pollute, or destroy the environment. This Court put a fine point on its reasoning in *Preserve the*

[2] *Step one* is whether the applicant is eligible to apply under § 63702(1), and *step two* is whether the applicant has submitted the required application and materials under § 63704(2).

Dunes with the following two sentences that have led to problems in MEPA jurisprudence in the years following the Court's decision: "An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Id.* at 519.

When read in the proper context and in connection with the remainder of the opinion in *Preserve the Dunes*, these two sentences are entirely consistent with the Court's prior cases interpreting MEPA. Indeed, the Court's language makes perfect sense upon review of the Court's earlier explanation as to why two of the three steps in the three-step SDMA permit review process would not support a MEPA claim because they are unrelated to conduct that may or may not impair, pollute, or destroy the environment, and upon the realization that the third step in the SDMA permit review process involves a determination by the DEQ as to whether the permit applicant's proposed conduct would offend MEPA. But alas, these two sentences are easily misconstrued when viewed on their own without a clear understanding of the permit review process in the SDMA. This has certainly been true in this case.

D. The *Anglers* Cases

A few years after *Preserve the Dunes*, this Court revisited the issue of whether the decision of a state agency could support a MEPA claim in *Anglers of the AuSable, Inc v Department of Environmental Quality (Anglers I)*, 488 Mich 69; 793 NW2d 596 (2010). Specifically, the plaintiffs in *Anglers I* brought suit against the DEQ and a private company after the DEQ approved the company's corrective action plan to remediate 1.15 million gallons of plume water per day through the use of a process called air stripping. *Id.* at 73-74. The plan involved discharging the treated water into the AuSable River water system. Because the proposed air stripping remediation process was not completely effective in decontaminating the polluted water, the company's corrective action plan included the discharge of remediated, but still partially contaminated, water

into the river. *Id.*

On appeal from the Court of Appeals, this Court asked the parties to discuss whether *Preserve the Dunes* was correctly decided. *Id.* at 76. In reviewing that decision, the Court stated that "[t]he *Preserve the Dunes* dissent correctly concluded that the majority's holding 'that permit eligibility is unrelated to whether the conduct permitted will harm the environment is untenable.'" *Id.* at 77. The Court then examined the decision in *Preserve the Dunes* in the context of its MEPA jurisprudence, stating:

> Before a majority of this Court decided *Preserve the Dunes*, this Court had previously decided other cases in which a permit application had been the subject of a MEPA action. Until *Preserve the Dunes*, this Court had never ruled that a permit decision was insulated from a MEPA action. The majority's decision in *Preserve the Dunes* frustrated the legislative intent behind MEPA, and it represented a departure from this Court's precedent. [*Id.* at 77-78.]

Accordingly, the Court held: "Because the *Preserve the Dunes* decision to insulate DEQ permit decisions from MEPA violated the Legislative intent behind MEPA, conflicted with previous caselaw regarding MEPA, and subverted the will of the people contained in article 4 of Michigan's constitution, we overrule it." *Id.* at 80.

Almost immediately subsequent to this Court's decision in *Anglers I*, there was a change in the composition of the Court such that the dissenting minority group in *Anglers I* had become the majority group during the period in which the defendants were able to file motions for rehearing of the *Anglers I* decision. The new majority of this Court granted the defendants' motions for rehearing and vacated this Court's earlier decision rendered a few months prior. *Anglers of the AuSable, Inc v Dep't of Environmental Quality (Anglers II)*, 489 Mich 884, 884; 796 NW2d 240 (2011). Specifically, the *Anglers II* Court dismissed the appeal on grounds of mootness because:

> (a) defendant has quit-claimed its easement interest back to the riparian owner; (b) defendant no longer has the physical means of discharging water into Kolke Creek or the Au Sable River; (c) defendant is now disposing of the water by alternative

> means; (d) defendant no longer has a permit that allows discharge into Kolke Creek or the Au Sable River; and (e) the Department of Environmental Quality has attested that "there no longer exists the possibility of surface water discharge to Kolke Creek or the Au Sable River." [*Id.* at 885.]

This Court's decision in *Anglers II* to vacate its earlier decision in *Anglers I* was not based on any substantive legal argument as to the merits or whether *Anglers I* properly overturned this Court's decision in *Preserve the Dunes*. As a consequence, Michigan law on this subject has been unclear for the past decade. Although the Court's decision to vacate *Anglers I* restored the precedential effect of *Preserve the Dunes*, the practical import of that decision has been substantially diminished given this Court's previously declared opinion that it was incorrectly decided. This uncertainty persists today because the *Anglers I* decision has never been rejected or challenged on the merits.

E. Application of *Preserve the Dunes*

In the instant case, Defendant Michigan Department of Environmental Quality (the DEQ) issued development permits to a private developer under the Sand Dunes Protection and Management Act (SDPMA), MCL 324.35301 *et seq.*, to transform a critical sand dunes area into a residential subdivision.[3]

The SDPMA sets forth a comprehensive set of standards and procedures aimed at protecting against the impairment or destruction of critical dune areas, which the Legislature has deemed to be "a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this

[3] *Lakeshore Group, et al v Dep't of Environmental Quality*, unpublished per curium opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 341310), p 1. A copy of the unpublished opinion is attached as Exhibit A to Plaintiffs-Appellants' Application for Leave to Appeal.

resource." MCL 324.35302(a). As the Court of Appeals recognized,[4] the DEQ may not issue a use permit under the SDPMA if it determines that the proposed use "will significantly damage the public interest" in the area. MCL 324.35304(1)(g).

Further, a permit seeking to construct a dwelling on a post-1989 lot "on the first lakeward facing slope" cannot be granted. MCL 324.35304(3). To approve construction of a structure, it must be located "behind the crest of the first landward ridge of a critical dune area that is not a foredune." MCL 324.35304(4). In their complaint, Plaintiffs-Appellants allege that the DEQ issued permits that violated these provisions.[5]

Plaintiffs initiated this action against the DEQ, in part, under MEPA, alleging that the issuance of the permits "is likely to result in the pollution, impairment and/or destruction of the critical sand dunes."[6] The trial court granted the DEQ's motion for summary disposition under MCR 2.116(C)(8), concluding that this Court's decision in *Preserve the Dunes* precluded Plaintiffs from filing a direct judicial challenge to the DEQ's permitting decision.[7] The Court of Appeals affirmed the trial court's ruling.[8] As explained below, the trial court and Court of Appeals both erroneously interpreted *Preserve the Dunes* as holding that an administrative review and approval of a permit can never form the basis of a MEPA claim.

In its opinion, the Court of Appeals correctly noted that in *Preserve the Dunes*, the Court stated that "MEPA controls the DEQ's permitting decisions because the DEQ is prohibited from approving a permit if the *applicant's conduct* violates MEPA."[9] And yet, despite this acknowledgment,

[4] *Lakeshore Group*, unpub op at 2.
[5] Lakeshore Complaint, ¶¶ 34-35, attached as Exhibit F to Plaintiffs-Appellants' Application for Leave to Appeal.
[6] *Id.* at ¶ 17.
[7] *Lakeshore Group*, unpub op at 2.
[8] *Lakeshore Group*, unpub op at 4.
[9] *Lakeshore Group*, unpub op at 3.

the Court of Appeals paradoxically interpreted this Court's precedent as follows:

> [I]t is clear that, to be actionable under MEPA, the defendant's actions must pollute, impair, or destroy natural resources. As our Supreme Court pointed out, the "action" of an administrative decision does not pollute, impair, or destroy natural resources; at most, the "action" of an administrative decision authorizes conduct that does so. Simply put, the issuance of a permit is too far removed from the environmental harm to be actionable as "conduct" under MEPA.[10]

This is not a proper reading of this Court's holding in *Preserve the Dunes.*

The *Preserve the Dunes* ruling was much more limited than the Court of Appeals has interpreted. The Court in *Preserve the Dunes* simply held: "MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determination of *permit eligibility*." 471 Mich at 519 (emphasis added). And the basis for this Court's determination was that the "DEQ determinations of permit eligibility under §§ 63702(1) and 63704(2) are unrelated to whether the applicant's proposed activities on the property violate MEPA." *Id.* As explained above, those two sections of the SDMA describe the first two steps in the DEQ's three-step permit review process—neither of which requires the DEQ to determine whether the proposed permit activity would run afoul of MEPA.[11]

For this reason, this Court determined that the DEQ's eligibility determination in *Preserve the Dunes* under the first two steps of the three-step SDMA permit review process could not be

[10] *Lakeshore Group*, unpub op at 4.

[11] Notably, the plaintiffs in *Preserve the Dunes* did not challenge the DEQ's determination that the applicant satisfied the requirements under § 63704(2) of the SDMA. *Preserve the Dunes*, 471 Mich at 519, n 6 ("PTD does not challenge TechniSand's satisfaction of the requirements under § 63704(2)."). Instead, their MEPA claim was based solely upon the DEQ's allegedly erroneous determination that the permit applicant met the eligibility requirement under § 63702(1). This is important because the Court nevertheless referred to both §§ 63702(1) and 63704(2) as not being able support a MEPA claim, whereas it separately addressed the DEQ's third step in the three-step permit review process under § 63709. This supports the Court's conclusion that a MEPA claim could be based upon the DEQ's determination under § 63709 because that decision would be related to the applicant's conduct that is likely to impair, pollute, or destroy critical sand dune areas, or the public trust therein.

actionable under MEPA "because that inquiry is outside the purview of MEPA." *Id.* at 524. As the Court explained: "The focus of MEPA is to protect our state's natural resources from harmful conduct. It offers no basis for invalidating an issued permit for reasons unrelated to the permit holder's conduct." *Id.* But this does not support the Court of Appeals' sweeping conclusion that the issuance of a permit by the DEQ can never be actionable under MEPA.

To be sure, the Court in *Preserve the Dunes* did not hold that MEPA offers no basis for invalidating an issued permit for reasons *related* to the permit holder's conduct. Just the opposite, in fact, this Court expressly stated that the DEQ's permit decision under the third step of the SDMA permit application review process would be subject to a MEPA claim, stating: "MEPA, in part 17, MCL 324.1701 *et seq.*, expressly controls the DEQ's § 63709 determinations." *Id.* at 515-16. Unlike the DEQ's determinations of permit eligibility under §§ 63702(1) and 63704(2) of the SDMA, the DEQ's determination under § 63709 would be *related* to whether the applicant's proposed activities violate MEPA because that section prohibits the DEQ from issuing a permit if the applicant's proposed conduct is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources.

In sum, this Court's decision in *Preserve the Dunes* holds that administrative review and approval of a permit can form the basis for a prima facie MEPA claim when the determination is related to whether the proposed activity by the permit applicant would likely harm the environment. Based on this proper interpretation of *Preserve the Dunes*, this Court should reverse the Court of Appeals' decision because Plaintiffs' claim against the DEQ under MEPA is based on an administrative decision related to whether the applicant's proposed activities violate MEPA. Specifically, Plaintiffs' complaint alleges that the DEQ violated MEPA by issuing SDPMA permits to the applicant despite the fact that the applicant's proposed use: (i) will significantly

damage the public interest in the subject critical dune areas, contrary to MCL 324.35304(1)(g); (ii) involves construction of a structure on the first lakeward facing dune and/or behind the crest of the first landward ridge of a foredune, contrary to MCL 324.35304(3) and (4); and (iii) is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, contrary to MCL 324.1701(1).

Based on this Court's decision in *Preserve the Dunes* and the relevant caselaw related to MEPA outlined above, Plaintiffs are able to sustain a MEPA claim against the DEQ for its issuance of unlawful permits in this case.

II. IF *PRESERVE THE DUNES* HOLDS THAT ADMINISTRATIVE REVIEW AND APPROVAL OF A PERMIT CAN NEVER SUPPORT A CLAIM UNDER MCL 324.1701(1), THEN *PRESERVE THE DUNES* SHOULD BE OVERRULED.

The Court of Appeals committed reversible legal error when it relied on *Preserve the Dunes* to hold that administrative review and approval of a permit can never support a prima facie claim against an administrative agency under MCL 324.1701(1). If *Preserve the Dunes* did require such a result, it should be overruled—for a second time—because it is contrary to the legislative intent behind MEPA, departed from this Court's precedent, and violates the Legislature's mandatory duty to protect the environment pursuant to Article 4, Section 52 of the Michigan Constitution.

Before *Preserve the Dunes* was decided, this Court had decided a number of other cases in which a permit application was the subject of a MEPA action, and the Court had never previously ruled that administrative review and approval of a permit was entirely insulated from a MEPA action. See, e.g., *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975); *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 304-05; 224 NW2d 883 (1975); *West Mich Environmental Action Council v Natural Resources Comm (WMEAC)*, 405 Mich 741, 751; 275 NW2d 538 (1979); and

Nemeth v Abonmarche Dev, Inc, 457 Mich 16, 16; 576 NW2d 641 (1998). As Chief Justice Kelly stated in her concurring opinion in *Anglers of the AuSable, Inc v Department of Environmental Quality (Anglers I)*, 488 Mich 69, 88; 793 NW2d 596 (2010) (KELLY, C.J., concurring): "*Preserve the Dunes* represented a sea change in one area of the law and toppled settled interpretations of MEPA that had existed for nearly 30 years."

In one of its early MEPA cases, for example, this Court held that the plaintiffs had made a prima facie showing under MEPA on a claim against the state based on the issuance of permits to a third-party oil company to drill wells in the Pigeon River County State Forest. *WMEAC*, 405 Mich at 760. In *Wortelboer v Benzie County*, 212 Mich App 208, 221; 537 NW2d 603 (1995), the Michigan Court of Appeals relied on the Court's decision in *WMEAC* in order to determine when an administrative action is sufficient to constitute conduct likely to lead to the pollution, impairment, or destruction of natural resources, stating:

> [T]he facts of *West Michigan Environmental Action Council, supra*, demonstrate when an administrative action is sufficient to invoke the MEPA. In that case, there was no subsequent step after issuance of permits before the actual drilling could start. Thus, the issuance of permits itself constituted actionable conduct sufficient to invoke the MEPA. It is apparent that although administrative conduct is sufficient to invoke the MEPA, the determinative point is whether that administrative action is the last hurdle in moving from the paperwork to the outdoors.

The Court of Appeals concluded: "Administrative action, such as the issuance of permits to drill wells, is a sufficient basis on which to invoke the MEPA." 212 Mich App at 220, citing *Attorney General ex rel Natural Resources Comm v Balkema*, 191 Mich App 201, 206; 477 NW2d 100 (1991) and *WMEAC*, 405 Mich at 760. Notably, the *Preserve the Dunes* majority did not overrule, disapprove, or even mention *Wortelboer* or *WMEAC*, which held issuance of a well permit is sufficient to invoke MEPA. This was because those cases had included a caveat consistent with

Preserve the Dunes: The defendant's action must "rise to the level of impairment or destruction of a natural resource." *WMEAC*, 405 Mich at 760; *Wortelboer*, 212 Mich App at 220.

Prior to *Preserve the Dunes*, this Court had previously recognized and honored the legislative intent behind the enactment of MEPA. In *Ray v Mason County Drain Commissioner*, for example, this Court stated:

> Michigan's EPA was the first legislation of its kind and has attracted worldwide attention. The act also has served as a model for other states in formulating environmental legislation. The enactment of the EPA signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be diligent and dedicated defenders of the environment. The EPA has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected—the public.

The purpose of MEPA is to "protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction." MCL 324.1704. MEPA imposes a duty on both public and private actors "to prevent or minimize degradation of the environment." *Ray*, 393 Mich at 306. MEPA implements the Michigan Constitution's command to the Legislature to protect the state's natural resources in Const 1963, art 4, § 52, which declares:

> 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.

The Legislature fulfilled this duty, in part, by enacting MEPA and granting universal standing to any person to bring an action against anyone, including the state and its administrative agencies, for the protection of the environment under MCL 324.1701(1):

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air,

> water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

There is absolutely nothing in the plain language set forth above that could even remotely be construed as preventing MEPA from being applied to administrative decisions of state agencies. To the contrary, the other sections of MEPA demonstrate that the Legislature plainly intended to reign in the unbridled power and discretion that state agencies had previously wielded.

Indeed, a lawsuit under MEPA "is supplementary to existing administrative and regulatory procedures provided by law." MCL 324.1706. When a MEPA action is initiated, the court retains jurisdiction pending completion of any separate administrative, licensing, or other proceedings to determine the legality of the defendant's conduct in order to "determine whether adequate protection from pollution, impairment, or destruction is afforded." MCL 324.1704(2). And upon completion of such proceedings, "the court shall adjudicate the impact of the defendant's conduct on the air, water, or other natural resources, and on the public trust in these resources, in accordance with this part." MCL 324.1704(3). In finding that administrative review and approval of a permit was insulated from MEPA, the *Preserve the Dunes* majority frustrated the plain legislative intent set forth in the text of MEPA.

In light of the foregoing, this Court should expressly overturn or narrowly limit its previous decision in *Preserve the Dunes* in order to restore precedent and follow the intent of the Legislature in enacting MEPA. If the Court does not do so, the DEQ and other agencies will once again be unconstrained in their administration of environmental policy, which is directly contrary to the Legislature's reason for enacting MEPA and the citizens of this state in adopting Article 4, Section 52 of the Michigan Constitution to make protection of the environment and natural resources an objective of the highest priority.

In any event, the current uncertainty resulting from the *Anglers* cases and the technical revival of *Preserve the Dunes* is untenable and must be clarified by this Court. And it falls upon this Court to decide whether *Preserve the Dunes* or *Anglers I* should give meaning to the Legislature's intent moving forward. Amicus Curiae respectfully implore the Court to adopt the view of the latter because the preservation and protection of this state's natural resources for future generations should take priority over the need or desire to give deference to the actions of administrative agencies. The DEQ should not be insulated from actions by Michigan citizens aimed at protecting the air, water, and other natural resources or the public trust therein.

Under the longstanding doctrine of stare decisis, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 366; 792 NW2d 686 (2010). But "stare decisis is neither an inexorable command, nor a mechanical formula of adherence to the latest decision." *Id.* As this Court has explained:

> Ultimately, it attempts to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors. To reflect this balance, while there is a presumption in favor of upholding precedent, this presumption may be rebutted if there is a special or compelling justification to overturn precedent. In determining whether a special or compelling justification exists, a number of evaluative criteria may be relevant, but overturning precedent requires more than a mere belief that a case was wrongly decided.
>
> . . .
>
> To begin with, a case may be given less deference when it was an abrupt departure from long-standing precedent and lacks a constitutional basis. In such cases, by refusing to follow the erroneous precedent, then, we do not depart from the fabric of the law; we restore it. [*Id.* at 366-69 (internal citations and quotations omitted).]

In *Lansing Schools*, this Court identified certain evaluative criteria that are relevant when determining whether a special or compelling justification exists to overturn precedent:

> (1) whether the rule has proven to be intolerable because it defies practical workability; (2) whether reliance on the rule is such that overruling it would cause

> a special hardship and inequity; (3) whether upholding the rule is likely to result in serious detriment prejudicial to public interests; and (4) whether the prior decision was an abrupt and largely unexplained departure from precedent. [*Id.* at 369 (internal citations and quotations omitted).][12]

As this Court has explained: "Not all of these factors will be applicable in every case. Nor is there a magic number of factors that must favor overruling a case in order to establish the requisite compelling justification." *Peterson*, 481 Mich at 320. Rather, "the conclusion about whether these factors support finding a compelling justification should be reached on a case-by-case basis." *Id.*

Based on the foregoing principles, this Court would be justified in overruling *Preserve the Dunes* for a second time. For starters, the *Preserve the Dunes* decision should be given less deference given the fact that it was an abrupt departure from this Court's precedent over the quarter-century that preceded it—as was previously acknowledged by this Court in *Anglers I*. Thus, by refusing to follow the erroneous precedent in *Preserve the Dunes*, the Court would not be departing from the fabric of the law, but rather, restoring it.

Furthermore, given the doubt cast upon *Preserve the Dunes* by this Court in *Anglers I*, the durability of the decision has been unclear for more than a decade. As a result, reliance upon the rule set forth in *Preserve the Dunes* has been minimal and overruling it would not cause a special hardship or inequity on the administrative agencies because those agencies should presumably be carrying out their duties in accordance with the standards of MEPA regardless of whether they might be subject to any action under MCL 324.1701(1).

[12] This Court has also considered other factors in examining this question, including: (a) "whether related principles of law have so far developed since the rule was pronounced that no more than a remnant of the rule has survived," (b) "whether facts and circumstances have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," and (c) "whether other jurisdictions have decided similar issues in a different manner." *Peterson v Magna Corp*, 484 Mich 300, 320; 773 NW2d 564 (2009) (opinion by KELLY, C.J.). These factors do not seem pertinent to the Court's decision in this case.

Likewise, upholding the rule in *Preserve the Dunes* is likely to result in serious detriment prejudicial to public interests because administrative permitting decisions would be beyond the reach of MEPA even if those decisions lead, or are likely to lead, to impairment, pollution, or destruction of the air, water, or other natural resources or the public trust therein.

For these reasons, there is a compelling reason for this Court to overturn its decision in *Preserve the Dunes* for a second time. That case was wrongly decided, and this Court should restore precedent and breathe new life into the safeguards set forth in MEPA.

CONCLUSION

The Court of Appeals erred in interpreting *Preserve the Dunes* to mean that administrative review and approval of a permit can never support of cause of action under MCL 324.1701(1). Alternatively, if the Court of Appeals correctly interpreted *Preserve the Dunes* as supporting that proposition, then this Court should overrule *Preserve the Dunes* because it departed from this Court's precedent, defied the legislative intent in enacting MEPA, and frustrated the constitutionally-declared imperative to protect the natural resources of this state.

Respectfully submitted,

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