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THE RISE AND FALL OF ARTICLE III STANDING REQUIREMENTS IN MICHIGAN: A LOOK AT THE MICHIGAN ENVIRONMENTAL POLICY ACT

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I. Introduction

Citizen suits under state and federal law are "a defining theme of the modern environmental era." Barton Thompson Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185, 185 (2000). At least in federal court, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) foreclosed Congress's ability to confer standing on citizens who cannot otherwise meet Article III's injury requirements. *See Lujan*, 504 U.S. at 573–74. In other words, there is a "limit to the power of Congress to confer rights of action," a limit based on "the case and controversy requirements found in Article III," that prevents federal courts from entertaining citizen suits based on "nonconcrete interests." *See id.* at 580–81 (Kennedy, J., concurring).

But what about states? According to the Court, "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Furthermore, state constitutions differ from the federal Constitution, and these differences alter the relations among a state's executive, legislative, and judicial branches. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1842–76 (2001). As a result, with respect to citizen suits, some state appellate courts have upheld broad state grants of statutory standing; others have not. *See* James Doggett, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 Colum. L. Rev. 839, 840–41 & n.9 (2008) (collecting authorities).

In this article, we review one such broad state grant of statutory standing in Michigan. The Michigan Environmental Protection Act (MEPA) on its face confers standing to "any person," but its wildly varying interpretations by Michigan appellate courts illustrate the impact of federal standing decisions on one state judiciary. First, we provide a brief background on the Michigan Constitution and MEPA. Then, we review the shifting historical treatment of MEPA. Finally, we review MEPA cases decided under an Article III-like standard to see what Michigan appellate courts have previously required when simply being "any person" was not enough.

II. Background

In 1963, the Michigan legislature amended the state constitution, granting explicit protection to Michigan's air, water, and other natural resources. Laura Rogers-Raleigh, *Michigan Climate Change Litigation: Can the Michigan Environmental Protection Act Save the Day?*, 57 Wayne L. Rev. 1411, 1413 (2011). The amendment's text is as follows:

> 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.

Mich. Const. art. IV, § 52.

In 1971, the Michigan legislature fulfilled "its constitutional duty to protect Michigan's natural resources" and enacted the Michigan Environmental Protection Act (MEPA)[ed:note name here]. Susan Mahoney, *Muddying the Waters: The Effects of the* Cleveland Cliffs *Decision and the Future of the MEPA Citizen Suit*, 83 U. Det. Mercy L. Rev. 229, 236 (2006). MEPA's text, in relevant part, is as follows:

> 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.

Mich. Comp. Laws § 324.1701 (2006) (emphasis added).

III. Standing in Michigan State Courts

As a general rule, a litigant has standing in a Michigan state court if either: (1) "the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large"; or (2) "the statutory scheme implies that the Legislature intended to confer standing on the litigant." *See Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 372 (2010). This second category, "statutory standing," has been "a highly politicized issue." *See* Rogers-Raleigh, *supra*, at 1423. One commentator cautions that "the approach adopted and applied by the [Michigan Supreme Court] at any given time may depend on its ever-changing political composition." *Id.*

This volatility around the category of statutory standing is particularly pronounced with respect to MEPA. In 2007, the Michigan Supreme Court held in *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*, 479 Mich. 280 (2007), that statutory standing was not available under MEPA; rather, litigants must satisfy the requirements for Article III standing. *Nestle*, 479 Mich. at 301–03. But in 2010, the court issued two opinions, which, taken together, can be read to reinstate statutory standing for "any person" under MEPA. First, in *Lansing School Education Association v. Lansing Board of Education*, 487 Mich. 349 (2010), the court reversed *Nestle* and other cases, returning statutory standing's general availability to Michigan state courts. *See Lansing*, 487 Mich. at 371 & n.17. Next, the court in *Anglers of the AuSable, Inc. v. Department of Environmental Quality*, 488 Mich. 69 (2010) (hereinafter *Anglers I*), reaffirmed statutory standing's specific availability under MEPA, although the court later vacated its decision on mootness grounds. *Anglers I*, 488 Mich. at 81–82, *vacated*, 489 Mich. 884, 884 (2011).

Accordingly, we proceed in two parts. First, we outline of the history of the Michigan statutory-standing controversy to suggest that statutory standing is, at present, specifically available under MEPA. Second, recognizing this state of flux on statutory standing's general availability, we discuss the facts of several MEPA-specific cases decided under Article III-like standing to illustrate what a MEPA litigant must prove if statutory standing were not available.

A. MEPA and Statutory Standing in Michigan State Courts

1. Statutory Standing's Specific Availability Under MEPA Until Nestle

MEPA's plain language is unqualified: "*any person* may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur." Mich. Comp. Laws § 324.1701 (2006) (emphasis added). From MEPA's inception until *Nestle*, many Michigan state courts recognized that the Michigan legislature did indeed grant standing to "any person." *See, e.g.*, *Eyde v. State*, 393 Mich. 453, 454 (1975); *Ray v. Mason County Drain Comm'r*, 393 Mich. 294, 305 (1975); *Trout Unlimited, Muskegon White River Chapter v. City of White Cloud*, 195 Mich. App. 343, 349 (1992); *cf. People ex rel. Atty. Gen. v. Clinton County Drain Comm'r*, 91 Mich. App. 630, 631–32 (1979).

Ray is the Michigan Supreme Court's first and seminal pronouncement that MEPA specifically provides for statutory standing to "any person." In *Ray*, the Mason County Soil Conservation District sought to build a flood-control project over area residents' strenuous objections. *Ray*, 393 Mich. at 299–300. Plaintiffs were "70% of the landowners in the Black Creek Watershed in Mason County"

and "an additional group of six persons who joined the suit solely with regard to the environmental issues." *Id.* at 299. The trial court dismissed all claims, and the appellate court affirmed. *Id.* at 300. The Michigan Supreme Court focused initially not on standing under MEPA, but rather "the kind of findings of fact required" of the trial judge "in deciding an action brought under [MEPA]." *Id.* The *Ray* court then examined MEPA because the "standards for acceptable findings of fact will vary somewhat with the nature of the action." *Id.* at 303. After this introduction, the court noted that MEPA "was the first legislation of its kind." *Id.* at 304–05. According to *Ray*, MEPA "*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." *Id.* at 305 (quotation marks omitted) (emphasis added). The court then remanded the case for the trial court to develop specific findings of fact on plaintiffs' MEPA claim. *Id.* at 306–07, 314.

Other earlier Michigan cases consistently upheld statutory standing's specific availability under MEPA. In *Eyde*, the Michigan Supreme Court allowed property owners, whose property was the subject of a state condemnation proceeding related to a sewer, to proceed under MEPA. *Eyde*, 393 Mich. at 453–54. According to the *Eyde* court, MEPA is "significant legislation" that "creates an independent cause of action" and "grant[s] standing to private individuals." *Id.* at 454. Similarly, in *Trout Unlimited*, a Michigan appellate court held that a private, nonprofit corporation dedicated to preserving and improving cold-water fishing reservoirs had statutory standing under MEPA to challenge a local dam project. *Trout Unlimited*, 195 Mich. App. at 345–50. In a related vein, one Michigan appellate court held that the Michigan attorney general, when proceeding on a MEPA claim to challenge a drainage project, did not need to exhaust administrative remedies before he had statutory standing under MEPA. *See Clinton County Drain Comm'r*, 91 Mich. App. at 630–32.

2. A Shift in Statutory Standing and Nestle

In 2001, there was a sea change on statutory standing's general availability in Michigan. In *Lee v. Macomb County Board of Commissioners*, 464 Mich. 726 (2001), the Michigan Supreme Court held that Michigan state courts should adopt the federal constitutional standing test from *Lujan* as the "irreducible constitutional minimum of standing." *Lee*, 464 Mich. at 740. According to the *Lee* court, the *Lujan* standing test would require that a plaintiff in Michigan state court meet the following requirements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lee, 464 Mich. at 739 (quoting *Lujan*, 504 U.S. at 560–61) (quotation marks omitted).

In 2004, the Michigan Supreme Court reaffirmed its support for *Lee* and, derivatively, *Lujan* in *National Wildlife Federation v. Cleveland Cliffs Iron Company*, 471 Mich. 608 (2004). *Cleveland Cliffs*, 471 Mich. at 612. Notably, *Cleveland Cliffs* involved a dispute about standing under MEPA. *Id.* However, the court declined to reach the question of statutory standing's specific availability under MEPA because plaintiffs sufficiently met the test for standing set forth in *Lee*. *Id.* at 630–32 ("Because we hold that plaintiffs have standing without regard to [MEPA], we find it unnecessary to reach the constitutionality of [MEPA].").

In 2007, the Michigan Supreme Court finally reached the specific question of statutory standing's remaining availability under MEPA after the

court's general adoption of Article III-like standing requirements in *Lee*. In *Nestle*, the court held that a MEPA litigant must meet the *Lujan* standing test. *Nestle*, 479 Mich. at 301–03. In other words, a MEPA litigant must satisfy federal constitutional standing requirements, even though, under MEPA's plain language, the Michigan legislature expressly created a cause of action and conferred standing on "any person." *See id.* According to *Nestle*, "the Legislature cannot compel this Court to exercise the 'judicial power' beyond constitutional limits any more than this Court can legitimately enlarge or diminish the Legislature's constitutionally prescribed 'legislative power.'" *Id.* at 302.

3. The Lansing Decision Until Today

Lee, *Cleveland Cliffs*, and *Nestle* did not last long. In 2010, the Michigan Supreme Court directly overruled *Lee* and *Cleveland Cliffs* in *Lansing*. *See Lansing*, 487 Mich. at 352–53. Moreover, the court overruled all of *Lee* and *Cleveland Cliffs*'s progeny, including *Nestle*, in a footnote. *Id.* at 371 & n.17. In *Lansing*, the court held that "the standing doctrine adopted in [*Lee* and *Cleveland Cliffs*] . . . lacks a basis in the Michigan Constitution and is inconsistent with Michigan's historical approach to standing." *Id.* Instead, "Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing." *Id.* at 372. Now, a plaintiff would have standing "if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id*.

After *Lansing*, the Michigan Supreme Court again revisited statutory standing's specific availability under MEPA. In *Anglers I*, plaintiffs, riparian owners and recreational users, challenged the Michigan Department of Environmental Quality's plan to allow defendant Merit Energy Company to discharge remediation waste into a creek. *Anglers I*, 488 Mich. at 73–74. The court first implied that plaintiffs would meet Article III standing requirements because, as riparian owners or users, they "have interests that differ from the citizenry at large." *See id.* at 74 n.2, 82. Even without Article III standing, though, the court held that "it is clear that under MEPA 'any person' has standing to maintain an action protecting Michigan's natural resources; indeed, the Attorney General admitted at oral argument that that was the state's position as well." *Id.* at 82.

In combination, *Lansing* and *Anglers I* might unambiguously signal *Nestle*'s death knell but for the fact that *Anglers I* was vacated a year later. *See Anglers of AuSable, Inc. v. Department of Environmental Quality* (*Anglers II*), 489 Mich. 884, 884 (2011). However, there are three reasons to believe that statutory standing remains specifically available under MEPA. First, *Anglers I* was vacated on mootness grounds. *Id.* Second, language in the *Anglers II* opinion suggests that *Anglers I* was vacated because of the *Anglers I* court's treatment of Michigan water law, not standing law. *See id.* at 889 (Zahra, J., concurring). Third, a recent Michigan appellate court decision confirmed the continuing viability of *Lansing* and, implicitly, statutory standing's general availability in Michigan state courts. *Duncan v. Michigan*, 300 Mich. App. 176, 191–92 (2013), *appeal dismissed*, 494 Mich. 879 (2013).

B. Past MEPA-Specific Standing Cases Decided Under Article III Standing Requirements

Alternatively, if a Michigan state court concludes that plaintiffs must establish "Article III-like" standing to bring a MEPA claim, we outline below the facts of MEPA-specific standing cases applying Article III standing requirements to illustrate what a MEPA litigant must prove if statutory standing were not available. We divide the following discussion into two categories: (1) the factual contexts in which MEPA litigants were found to have Article III standing; and (2) the factual contexts in which MEPA litigants were found not to have Article III standing.

1. Factual Contexts in Which MEPA Litigants Had Standing

Several courts have found that currently owning the property potentially affected by the challenged

action gives rise to Article III standing. *See Niecko v. Emro Marketing Co.*, 769 F. Supp. 973, 991–92 (E.D. Mich. 1991) (noting that, because the current owner had no "practical obstacles" to assert its claim, the past owners' claim under MEPA should fail). For example, in *Eyde*, the Michigan Supreme Court found that plaintiffs had Article III standing, where plaintiffs were the property owners whose property was the subject of a state condemnation proceeding to install a sewer drain. *Eyde*, 393 Mich. at 453–54. In *Ray*, the Michigan Supreme Court found that plaintiffs had Article III standing, where plaintiffs included "70% of the landowners" in the affected watershed. *Ray*, 393 Mich. at 299, 305. In *Trout Unlimited*, a Michigan appellate court found that a certain plaintiff had Article III standing, where this plaintiff was a riparian landowner on the affected river. *Trout Unlimited*, 195 Mich. App. at 345, 348–50. In *Nestle*, the Michigan Supreme Court found that plaintiffs did have standing to challenge actions that affected their actual riparian interests; however, they did not have standing for actions that affected nearby property with only a hydrogeological or ecological connection to plaintiffs' property. *See Nestle*, 479 Mich. at 285–87, 296.

At least one court has found that recreational activities in or near the area affected by the challenged action give rise to Article III standing. In *Cleveland Cliffs*, plaintiffs "bird-watched, canoed, bicycled, hiked, skied, fished, and farmed in the area" potentially affected by a mine expansion. *Cleveland Cliffs*, 471 Mich. at 611, 630–31. The court found that these activities, as described in plaintiffs' affidavits, sufficiently met the test for Article III standing. *Id.* at 630.

2. Factual Contexts in Which MEPA Litigants Did Not Have Standing

At least one court has found that formerly owning the property actually affected by the challenged action does not give rise to standing. In *Niecko v. Emro Marketing Company*, 769 F. Supp. 973 (E.D. Mich. 1991), plaintiffs purchased property, which later turned out to be contaminated, from a petroleum company. *Niecko*, 769 F. Supp. at 975. Before plaintiffs sold the property to McDonald's, they incurred significant expenditures to remove the contaminated soil. *Id.* at 975–76. After the sale, plaintiffs sued the petroleum company on several theories, including MEPA. *Id.* at 976. The court noted that "Article III of the United States Constitution restricts this Court's jurisdiction to actual cases and controversies between persons with an actual stake in the outcome." *Id.* at 991. Accordingly, because there were no "practical obstacles" for McDonald's to assert its own claims, the court dismissed plaintiffs' MEPA claim. *Id.* at 992.

At least one court has found that foreign governments, even with actual property interests that may be physically affected by the challenged action, do not have Article III standing. Although vacated, in *Detroit Audubon Society v. City of Detroit*, 696 F. Supp. 249 (E.D. Mich. 1988), the Canadian province of Ontario, the attorney general for Ontario, and the minister of the environment for Ontario sued the city of Detroit under MEPA to challenge the construction of a municipal solid waste combustion facility. *Detroit Audubon*, 696 F. Supp. at 250–52, *vacated sub nom. Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989). According to the court, although Ontario shares both air and water with Michigan, MEPA is limited to protecting threats to Michigan's natural resources. *Id.* at 253. Ontario, a foreign government, had no recoverable interest or claim under MEPA, and the court dismissed Ontario because it lacked standing. *Id.*

At least one court has found that owning nearby property with hydrogeologic or ecologic connections to the actual property affected by the challenged action does not give rise to Article III standing. Although overruled, in *Nestle*, certain plaintiffs were riparian owners on two water bodies out of the six total water bodies at issue in the litigation. *Nestle*, 479 Mich. at 285–87. These certain plaintiffs shared the "hydrological effects" and the "ecological impacts" of defendant's pumping activities on the other four water bodies.

Id. at 288. With respect to the other four water bodies, the court found that plaintiffs could not demonstrate that they "used or had access to these areas or that they enjoyed a recreational, aesthetic, or economic interest in them." *Id.* at 297. Therefore, "[t]he absence of a concrete, particularized injury in fact is fatal to plaintiffs' standing to bring a MEPA claim with respect to" the other four water bodies. *Id.*

IV. Conclusion

At least in Michigan, judicial experimentation with Article III standing may continue for some time. Indeed, as a normative matter, experimentation should continue so long as the U.S. Supreme Court affirms the principle that "state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *ASARCO*, 490 U.S. at 617; *see also* Doggett, *supra* note 7, at 881. As it stands, the Michigan Supreme Court's decisions in *Lansing* and *Anglers I* counsel that statutory standing is broadly available under MEPA to "any person," as the statute provides on its face. However, as a practical matter, plaintiffs proceeding on statutory standing-based claims, and defendants responding to such claims, must regularly apprise themselves about the current availability of statutory standing in Michigan state courts.

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