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What is a Pond? Michigan Court of Appeals interprets "Waters of the State" Under Michigan Law

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These assessments were generally undertaken in a large group format, but were on occasion more effective when presented and discussed in smaller interest group sessions. The smaller sessions provided an opportunity for the groups to more frankly evaluate their options, contributions and the costs and benefits of going forward separately or together. Shuttle discussions coupled with the modeling provided the opportunity for each group to evaluate just what would ultimately constitute a good mediated settlement.

The primary features of this internal-to-the-group or self-mediated process were:

1. An easy to understand baseline of source documents.
2. Standardized data classified into objective, understandable groupings which related to the ROD.
3. Simplified decisions that minimized transactions costs.
4. Process steps to assure that each company had a full understanding of its documents.

With this baseline and an ability to see the effects of discount changes, frank negotiation yielded an agreement, i.e. an outcome with which all parties were equally unhappy, but which they nearly all considered acceptable. The group, with one defection, moved forward to resolve its liability with the EPA and implement a cleanup in less time and with lower transaction costs than would have been expected. That is real progress in Superfund terms.

What is a Pond? Michigan Court of Appeals Interprets "Waters of the State" Under Michigan Law

Nick Schroeck and Justin Sterk[1]

A waterbody in Michigan that fails to meet the designation of "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, may still meet the state's designation of "waters of the state" under Michigan's Natural Resources and Environmental Protection Act, MCL § 324.20101 *et seq.* As illustrated by a the recent unpublished opinion from the Michigan Court of Appeals case, *Charter Twp. of Plainfield v. Department of Natural Resources & Environment*,[2] point sources that are not subject to the federal National Pollutant Discharge Elimination System (NPDES) permit program could still be required to obtain a state permit.

Plainfield involved the Charter Township of Plainfield's (Township) sewer waste water treatment plant and its byproducts, including sewage sludge and backwash water. The receiving location of the Township's treated waste water is the Coit Avenue Gravel Pit (CAP), which also stores the byproducts from the treatment plant's operation. The CAP is an open area between thirty-five and thirty-eight acres and is closed off from other bodies of water. There is no natural surface outlet to the nearby Grand River or to any other stream.

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[2] Docket No. 316535 (Mar 10, 2015) is also available on the State Bar of Michigan website.

In Michigan "a person shall not discharge any waste or waste effluent into the waters of this state unless the person is in possession of a valid permit from the department."[3] The Township originally applied to the DNRE[4] for a permit to use the CAP to hold backwash water and water softening sludge in 1987, but was told that a NPDES permit was not required due to the DNRE's conclusion that the CAP was not a "water of the state" which, in Michigan, includes both groundwater and surface water.[5] The DNRE reasoned that the CAP met the exemption in the Michigan Administrative Code that "surface waters of the state" explicitly did not include "drainage ways and ponds used solely for wastewater conveyance, treatment, or control."[6] This decision from the DNRE gave Plainfield Township license to use the CAP as part of its wastewater treatment program without any permitting requirements.

However, in 2009, the DNRE informed the Township that it now considered the CAP to be "surface waters of the state" because it was hydrogeologically connected by groundwater to the Grand River. The Township filed its initial complaint in Kent County Circuit Court, asserting that: (1) the Township was entitled to a declaratory judgment that the waters of the CAP are not "waters of the state"; (2) equitable estoppel barred the DNRE from ruling that the CAP is "waters of the state"; (3) collateral estoppel barred the DNRE from ruling that the CAP is "waters of the state"; and (4) the DNRE's attempt to rule that the CAP is "waters of the state" constituted inverse condemnation. After the DNRE moved to dismiss counts two through four, the Township filed an amended complaint seeking only declaratory judgment that the waters of the CAP are not "waters of the state." The DNRE argued that the CAP was not a "pond" and was not used "solely" for wastewater conveyance, treatment, or control because it was hydrogeologically connected by groundwater to the adjacent Grand River. The Township contended that the CAP was not "waters of the state" subject to NPDES permitting because it was a "pond" that was "solely" used for wastewater conveyance, meeting the exemption. The Township also argued that the DNRE should be prevented from defending the case on estoppel grounds, given the years in which the DNRE had advised the Township that the CAP was exempt from permitting.

On January 17, 2013, the trial court granted summary disposition to the DNRE, ruling that the CAP constituted "waters of the state" because the waters in the CAP are drawn from and interchange with the groundwater system which includes the Grand River. The court held that the CAP was not a "drainage way or pond used solely for wastewater conveyance, treatment, or control."

The Township appealed. The Court of Appeals reversed and remanded to the trial court to (1) determine whether the DNRE is barred from asserting that the CAP is not a pond, (2) if

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[3] MCL § 324.3112(1)

[4] Pursuant to Executive Reorganization Order No. 2011-1, signed by Governor Snyder on Jan 4, 2011, to be effective Mar 13, 2011, the DNRE was split into the DNR and DEQ. MCL § 324.99921. For consistency, the agency is referred to as DNRE throughout this article.

[5] MCL § 324.3101(z).

[6] Michigan Admin. Code R. 323.1044(u).

necessary, determine whether the CAP is a pond, and (3) conduct any other proceedings not inconsistent with its opinion.

The central question for the Court of Appeals was whether, for purposes of Michigan Administrative Code Rule 323.1041, the CAP constituted "waters of the state" or instead was merely a "pond." The pertinent section of the statute provides as follows:

> "A person shall not directly or indirectly discharge into waters of the state a substance that is or may become injurious to (a) the public health, safety or welfare, (b) domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters, (c) the value or utility of riparian lands, (d) livestock, wild animals, birds, fish, aquatic life, or plants or their growth or propagation, or (e) the value of fish and game."[7]

Further, "a person shall not discharge any waste or waste effluent into waters of this state unless the person is in possession of a valid permit from the department,"[8] and "waters of the state means groundwaters, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the jurisdiction of this state."[9] The legislature delegated authority to DNRE to "protect and conserve water resources of the state" and to "have control of the pollution of surface or underground waters of the state and the Great Lakes, which are or may be affected by waste disposal of any person."[10] The legislature also delegated to DNRE the authority to "promulgate rules to carry out its duty to protect Michigan's water resources."[11] In carrying out this authority, the DNRE defined surface waters of the state to mean (1) the Great Lakes and their connecting waters, (2) all inland lakes, (3) rivers, (4) streams, (5) impoundments, (6) open drains, (7) wetlands, and (8) other surface bodies of water within the confines of the state, but explicitly exempting "drainage ways and ponds used solely for wastewater conveyance, treatment, or control."[12]

The Township argued that the CAP is used solely for wastewater conveyances, treatment, or control and is exempt from Part 4 of the Michigan Administrative Rules governing water resource protection and the DNRE's permitting authority. The Township's specific argument concerned the word "used" and that it was meant in the context of human use. The DNRE maintained that the CAP is not used *solely* for wastewater conveyances, treatment, or control because the CAP's naturally occurring interchange of water with the groundwater system was also sufficient to constitute a *use*.

The trial court agreed with the DNRE's interpretation, but the Court of Appeals reversed, calling the lower court's view of the regulation overbroad. The Court of Appeals reasoned that if the

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[7] MCL 324.3109.
[8] MCL 324.3112(1).
[9] MCL 324.3101(z).
[10] MCL 324.3101(1).
[11] MCL 324.3103(2).
[12] Michigan Admin. Code R 323.1044(u).

mere movement of groundwater through a pond constituted a use, then there was no pond that could qualify for the exemption unless it was artificially lined, which is not required within the text of the exemption. The Court further explained that statutes must be read in the context of their placement and their purpose in the scheme of administrative rules and that the purpose of this provision was to allow an exemption under certain defined circumstances. The Court of Appeals concluded that the only use of the CAP is wastewater conveyance, treatment, or control and that the use was consistent with exempting the CAP from designation as "surface waters of the state" under Rule 323.1044(u).

The issue of whether or not the CAP could be considered a "pond" under Rule 323.1044(u) is left to be decided by the trial court on remand. The Court of Appeals noted that the regulation failed to properly define "pond" and that the dictionary provides little assistance. Webster's dictionary defines pond as a body of water smaller than a lake, sometimes artificially formed, and defined lake as a body of fresh or salt water of considerable size, surrounded by land. The Court found that the vagueness of the definition did not lead to a conclusion that the CAP was or was not a pond as a matter of law.

Beyond the application of a number of Michigan's water protection statutes, this case serves as a reminder that potential dischargers must comply not only with federal water quality standards and permit programs, but regulation at the state level as well. The federal Clean Water Act generally prohibits discharges of pollutants from point sources into waters of the United States[13] and the United States Supreme Court has held that a waterbody is a "water of the United States" if it has a significant nexus to navigable waters of the United States.[14] The Clean Water Act also gave authority to the states to expand on the standards set by Congress.[15]

However, in Michigan, a second designation of "waters" must be met: waters of the state. Michigan's NPDES permits use a slightly more expansive definition of "waters" to determine applicability. As illustrated by *Plainfield,* even if a discharge is not into "waters of the United States," the discharge is not necessarily exempt from NPDES permitting requirements at the state level.

[13] 33 U.S.C. § 1251(a)(1).
[14] *Rapanos v. United States*, 547 U.S. 715 (2006)
[15] 33 U.S.C. § 1370.