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# THE MICHIGAN RIPARIAN

**RIPARIAN** (r-'per-EE-n) adj. Relating to or living or located on the bank of a natural watercourse, such as a river, or of a lake or a tidewater.



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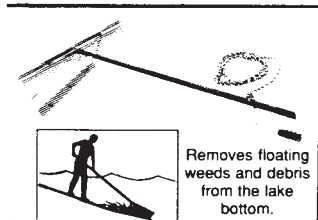
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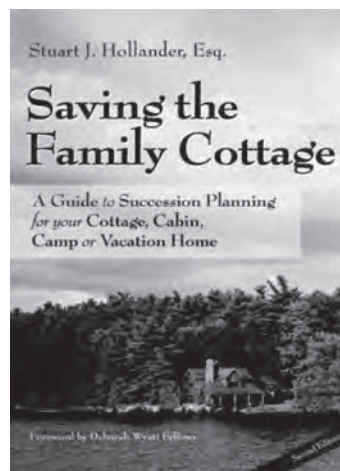
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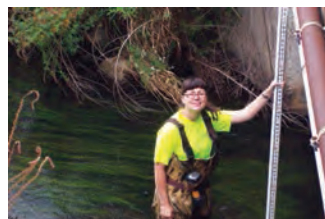


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# Important, Recent Riparian Appellate Cases

by Clifford H. Bloom/Law Weathers

Two recent Michigan Court of Appeals decisions should be of interest to riparian property owners in Michigan. The first case decision is *City of Novi v Evers*, unpublished Michigan Court of Appeals decision, initially issued March 30, 2010, and reissued on May 6, 2010 (Docket No. 290079). An easement was created for backlot property owners on Walled Lake across platted Lot 12 of the Bentley Subdivision, a lakefront lot. The language creating the easement stated in relevant part:

*... is to be used for pedestrians' right of way to the lake for all purchasers of lots on Poplar Street and Pine Street, each purchaser to pay his proportion for dock improvements and taxes ... If not paid in one year, this easement ceases.*

There was evidence at the trial court level that a dock had been periodically installed along the easement at the water and that Lot 12 was used for swimming, sunbathing, and similar beach activities. There was no evidence indicating what the historical use was as of when the easement was created, although an affidavit was introduced indicat-

ing that over 20 different docks had been utilized at the easement over the years.

Both the trial court and the Michigan Court of Appeals in *City of Novi v Evers* held that the easement or right-of-way granted only a pedestrian (walking or access) right-of-way easement and nothing more. The courts disallowed dockage and permanent or overnight boat moorage at the easement. Both courts held that the language regarding paying for dock improvement and taxes did not change the limited scope of usage rights for the easement. The Court of Appeals did remand the case back to the trial court for a determination of whether or not some or all of the backlot property owners gained a prescriptive easement (i.e., use for 15 years or more, plus proof of all of the other elements of a prescriptive easement) for dockage and permanent boat moorage.

In *Keiser v Feiser*, unpublished Michigan Court of Appeals decision issued March 2, 2010 (Docket No. 282531), the Court of Appeals grappled with the issue of whether numerous backlot property owners gained a prescriptive easement to maintain dock-

age and permanent boat moorage at a lakefront access property. Significantly, the Michigan Court of Appeals held that each individual backlot property owner had to establish their own prescriptive easement right for dockage and permanent boat moorage, which included meeting the burden of proof for each of the elements of establishing prescriptive easement rights (15 years' usage or more, hostile use, under color of right, etc.). The Court discussed the ability of particular backlot property owners to "tack"; that is, if a particular backlot property owner did not have 15 years or more of continuous usage of dock and permanent boat moorage, they could potentially add their years of usage to that of their predecessor in title, so long as there was a written or oral transfer of that right at the time the property was purchased. Very significantly, however, the Court held that each individual backlot property owner had to prove all of the elements for a prescriptive easement for himself/herself, and could not "piggyback" on the usage or prescriptive easement rights of any other backlot property owner. Michigan law has not authorized "collective tacking."

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**THE MICHIGAN RIPARIAN  
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304 East Main Street  
Stanton, MI 48888

**PUBLISHER • FRANZ MOGDIS**  
PHONE 989-831-5100  
E-MAIL fmogdis@mi-riparian.org

**PUBLISHER EMERITUS • DON WINNE**  
PHONE 989-831-5100  
E-MAIL dwinne@mi-riparian.org

**EDITOR • JENNIFER CHURCHILL**  
PHONE 989-831-5100  
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## FROM THE PUBLISHER

# Good-Bye To An Old Friend



**DON WINNE: 1917–2010.** Extremely sad news for all of us who are interested in the protection of Michigan's water and natural resources was just received before this edition of The Michigan Riparian went to press. A true friend passed away on August 3, 2010 – Don Winne (pictured above and below in photos taken at the Michigan Riparian office in Three Rivers, Michigan, by editor Jennifer Churchill in 2005).

Don, after a 30-year career of teaching, began a second career in the early 1970s as an environmental advocate of riparian rights in Michigan. It became his passion. He served as editor and publisher of this magazine – The Michigan Riparian – from 1974 to 2008. He also served as Executive Director of the Michigan Lake & Stream Associations, Inc. (MLSA) during that same period.

Both organizations saw tremendous growth and success under his leadership. Through his efforts, Don raised the state's overall awareness of water-quality issues and the need for improved protection of the state's natural resources.

The Autumn issue of The Michigan Riparian will feature a special article highlighting Don's numerous contributions over the last 40 years to the protection of Michigan's natural resources. Needless to say, we have lost a giant in the field. His knowledge, insight, and passion will be sadly missed.

– Publisher, Franz Mogdis      – Editor, Jennifer Churchill





# Proposed Michigan Legislation Regarding the Public Trust Doctrine (House Bill 5319)

By Clifford H. Bloom/Law Weathers

Michigan has a limited common law water-related tradition sometimes referred to as the “public trust doctrine.” Although the phrase “public trust” is used in the context of water rights and navigability, the Michigan courts have also used the phrase in many other areas of the law totally unrelated to bodies of water. In addition, the Michigan courts have also shown a lack of precision when discussing the “public trust,” even as to bodies of water. In the past, the courts have vaguely asserted that certain waters and aquatic uses are held “in trust” for the benefit of the public. Thus, private riparian rights in some situations are subject to certain usage rights by the general public. However, the actual reach of the public trust doctrine regarding waters and navigability is somewhat uncertain.

Where a river or lake is “navigable,” the courts have indicated that the water (and potentially the lake or river bed) is impressed with or subject to the public trust doctrine. The public trust doctrine seems to stand for the proposition that waters located within the Great Lakes, as well as navigable rivers and even navigable inland lakes, are owned (or co owned) by the state which “holds” those waters in trust for the public and certain public uses. The public trust doctrine preserves public rights to waters separate from a riparian landowner’s title. Although various groups have urged the Michigan appellate courts to extend the public trust doctrine to nonnavigable inland lakes, streams, creeks, and even groundwater, the Michigan appellate courts have refused to do so. For some of the Michigan cases that discuss the public trust doctrine, please review *Bott v Comm’n of Natural Resources*, 415 Mich 45 (1982); *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25 (2005), and *Glass v Goeckel*, 473 Mich 667 (2005).

Another Michigan common law doctrine is that of “riparian rights,” which is also sometimes referred to as the “reasonable use doctrine.” Any riparian property owner in Michigan has such rights, whether the riparian owns land with frontage on one of the Great Lakes, an inland lake, or

a river, stream, or creek. The reasonable use doctrine allows a riparian to utilize the riparian property (and related water) for a variety of different uses. However, the public trust doctrine, which preserves public rights to waters, operates as somewhat of a restriction on private riparian rights with regard to any body of water subject to the public trust doctrine.

A number of thoughtful riparians and groups throughout Michigan are concerned about the diversion of water from the state, whether it be pursuant to municipal water systems outside the relevant watersheds, bottled water extractions, or other diversions. Many believe that the existing state laws, federal laws, and multi-jurisdictional compacts are not sufficient to protect Michigan’s water resources from unreasonable exploitation. Hence, some believe that the public trust doctrine should be expressly extended to all waters within Michigan, both on the earth’s surface and underground.

Last September, seven Democratic members of the Michigan House of Representatives introduced House Bill No. 5319, which would legislatively extend the public trust doctrine to all waters within Michigan, including nonnavigable lakes and streams and even groundwater. The proposed legislation states as follows:

## HOUSE BILL No. 5319

September 9, 2009, Introduced by Reps. Scripps, Roberts, Valentine, Geiss, Warren, Smith and Bledsoe and referred to the Committee on Great Lakes and Environment.

A bill to amend 1994 PA 451, entitled “Natural resources and environmental protection act,” (MCL 324.101 to 324.90106) by adding part 4.

The People of the State of Michigan Enact:

### Part 4. Public Trust Resources

Sec. 401. (1) The conservation and development of the natural resources of the state are of paramount public concern in the interest of the health, safety, and general welfare of the people, and the air, water, and other natural resources of the state shall be protected from pollution, impairment, and destruction.

(2) The waters of the state, including groundwater, are held in trust by the state. The state shall protect these waters and other natural resources that are subject to the public trust for the benefit of present and future generations.

(3) The attorney general, on behalf of the state,

or any other person may maintain an action in the circuit court having jurisdiction to enforce the public trust in the state’s natural resources, either alone or in conjunction with other provisions of this act or other legal remedies that are appropriate. The circuit court may apportion costs, including attorney fees, if the interests of justice require.

At the time that this article was authored, passage of House Bill No. 5319 was uncertain. The proponents of the legislation argue that it is necessary to protect Michigan’s water resources from unreasonable exploitation and diversion. They believe that current common law and legislative protections are not sufficient. Finally, they assert that the passage of the bill will not detract from riparian ownership rights.

Some of the opponents of House Bill No. 5319 view it as a “power grab” by the government. They fear that it will constitute a “taking” of private property rights, including riparian rights. They claim that riparians will not be able to exercise their riparian rights without extensive government regulation and interference.

Although anyone who knows this author is aware that I have very definite opinions regarding riparian issues, I have not yet been able to decide for myself whether this proposed piece of legislation is meritorious or not. If anything, passage of the legislation would lead riparian law into uncharted waters (sorry, I could not resist!). House Bill No. 5319 would achieve what the Michigan appellate courts have refused to do – extend the public trust doctrine to nonnavigable bodies of water such as certain inland lakes, streams, ponds, wetlands, and creeks, as well as groundwater. It is also not clear how the Michigan courts would interpret House Bill No. 5319 if enacted. It is also uncertain how the proposed legislation would “mesh” with existing riparian rights case law. The enactment of House Bill No. 5319 (or a similar bill) would be an open invitation to the Michigan courts to create new case law with very little legislative or prior common law guidance. It is unclear whether the proposed legislation would be responsibly interpreted by the courts to prevent unreasonable water diversions or turn it into an opened Pandora’s Box that decimates private property rights.



# 2010 Certified Natural Shoreline Professional Training Course A Success

By Jane Herbert

District Water Quality Educator  
Michigan State University Extension Land &  
Water Unit, Kellogg Biological Station

Looking for a shoreline contractor that understands natural shoreline landscaping and erosion control? The Michigan Natural Shoreline Partnership (MNSP) is proud to introduce its inaugural class of Certified Natural Shoreline Professionals. Some are landscape contractors, some are marine contractors – but all have successfully completed a new training course: *Certified Natural Shoreline Professional* (CNSP).

The course was developed by MNSP and is targeted toward contractors working on inland lakes. The partnership is made up of Michigan Department of Natural Resources and Environment (DNRE) staff, Michigan State University Extension staff, industry representatives, trade associations, academic institutions and non-profit organizations (including Michigan Lake & Stream Associations). The partnership certifies that contractors have successfully completed the four-day training course (three days in the classroom, one day in the field) and have passed the certification exam.

A total of 56 participants, mostly from southern Michigan, attended the classroom component at one of the two locations offered this year – Kalamazoo and Pontiac. Taught by MNSP experts, the course was a detailed training packed with information on green landscaping and erosion control methods, shoreline environments, lake health and shoreline permits. It included a training manual, lectures and small group activities in which participants learned to design natural shorelines. The field day involved hands-on construction of a bio-engineered natural shoreline project on a lakeshore.

Scott Brown, Executive Director of MLSA, took the Pontiac course out of a personal interest in natural shorelines. “The Certified Natural Shoreline Professional training course was outstanding,” he said. “While I did not get an opportunity to speak to every member of the class, those I spoke to seemed really en-

*The Michigan Riparian*



MI DNRE PHOTO BY DAVE KENYON • Scott Brown (foreground) gains hands-on experience working with contractors to install a natural shoreline on Ford Lake.

thused about the class and the untapped potential for serving the needs of riparians looking to give back to their lakes.”

The Pontiac group recently completed the course in a final construction day on Ford Lake at the Ypsilanti Township Park in Washtenaw County. The project was sponsored by the township, JF New, Eastern Michigan University, and Huron River Watershed Council. Participants also completed their certification exams that day. The Kalamazoo group finished in early June, taking their exam and participating in a construction day on Gull Lake sponsored by Wildtype Nursery, Gull Lake Quality Organization and the Kalamazoo Community Foundation. The construction day provides participants with experience installing a natural shoreline including native plants, erosion control blankets and coir fiber logs – biodegradable logs made from coconut husk fiber that protect plantings from wave and ice action until they can get established.

Ed Schmitt, a marine contractor who owns Trident Dock & Dredge, Inc., in Watervliet, is a member of MNSP and sees bioengineering as a viable alternative to rock riprap and vertical sea walls on low-to-moderate energy shorelines. Both Ed and his son, Matt, attended the Kalamazoo course and found it provided a balanced and technically sound approach

to bioengineered shoreline erosion control. He regards this new technology as a way to expand his business and respond to the new green economy in Michigan by offering ‘soft’ shoreline erosion control techniques to his customers.

Riparians may be interested to know that MNSP has assisted the DNRE in developing a new Bioengineering Minor Permit for low energy sites on inland lakes. The DNRE plans to issue the new permit category in the next few months and it will enable property owners to obtain permits more quickly for soft shoreline projects. MNSP is also working on homeowner education materials and providing leadership to natural shoreline research and demonstration in Michigan.

The partnership is already making plans to offer CNSP in 2011. Shoreline property owners looking for more information, can visit [www.michiganlakes.msue.msu.edu/LakeManagement/ShorelineDevelopment.aspx](http://www.michiganlakes.msue.msu.edu/LakeManagement/ShorelineDevelopment.aspx). Those looking to hire a Certified Natural Shoreline Professional should watch for the list on this same site. (Please Note: Contractors from across the state participated.)

For more information about the MNSP, contact Jane Herbert at [jherbert@msu.edu](mailto:jherbert@msu.edu) or John Skubinna at [skubinnaj@michigan.gov](mailto:skubinnaj@michigan.gov).



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## NEWSLETTER EDITOR

Sharon Wagner  
304 E. Main St., Stanton, MI 48888  
PHONE 989-831-5100 E-MAIL [swagner@mlswa.org](mailto:swagner@mlswa.org)

## EDITORIAL:

### MICHIGAN LAKE AND STREAM ASSOCIATIONS' 49th ANNUAL CONFERENCE

An enthusiastic crowd of nearly 300 people from around the Great Lakes state crowded the 2nd Floor conference area of the Radisson Hotel Lansing as the Michigan Lake and Stream Associations' 49th Annual Conference opened Friday morning on April 30, 2010.

Conference attendees were warmly welcomed by a large group of lake management, riparian services and non-profit organization exhibitors. Distinguished speakers graciously volunteered their valuable time and effort in contributing to the 49th Annual Conference in a wide array of lake- and stream-related presentations and seminars.

The conference opened with a lively and well-attended legislative forum moderated by Cliff Bloom, riparian and water law attorney from Law Weathers, PLLC, in Grand Rapids. Michigan State Senator Patty Birkholz of Saugatuck (Michigan Senate District 24) and Michigan House Representative Rebekah Warren of Ann Arbor (Michigan House District 53) gave opening presentations and entertained a variety of good questions from a well-informed and interested audience. Michigan Lake and Stream Associations extends a warm thank you to Senator Birkholz and Representative Warren for taking time out of their busy schedules to address conference attendees about the importance of protecting and managing Michigan's most valuable natural resources — our treasure of lakes and streams.

On Friday afternoon, conference attendees were given the option of attending a three-hour comprehensive Natural Shoreline Forum presented by the Michigan Natural Shoreline Partnership, attending presentations entitled "Assessment and Classification of Michigan's Inland Lakes" by Kevin Wehrly of the Michigan Department of Natural Resources or attending "Restoring the Public Trust Doctrine to Michigan Waters" by Terry Swier, President of the Michigan Citizens for Water Conservation (MCWC).

The Friday night annual banquet was anchored by keynote speaker Pat Lindemann, Ingham County Drain Commissioner, entitled "The New Paradigm in Storm Water Management: Source Control." Pat provided an entertaining and enlightening discussion of the social, economic, scientific, technological, political and historic elements of modern watershed management. Michigan Lake and Stream Associations also took a few moments to remember and pay tribute of Mr. Del Sipes, our long-time newsletter editor who passed away in January. Our banquet ceremony culminated with a presentation to the **Crystal Lake and Watershed Association** as the MLSA 2010 Inland Lake Steward of the Year Award recipient. Dr. Stacy Daniels received the award on behalf of the Crystal Lake and Watershed Association of Beulah, Michigan.

Cliff Bloom followed the banquet with a well-attended question-and-answer session regarding the implications of the 2000 Baum Family Trust case now awaiting a decision from the Michigan Supreme Court.

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# MICHIGAN LAKE & STREAM ASSOCIATIONS, INC.

## MLSA NEWSLETTER



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On Saturday morning, outstanding presentations included "Critical Water Quality Parameters for Michigan Inland Lakes" by Jennifer L. Jermalowicz-Jones; "Suction Harvesting – Myth vs. Methodology"; by Jerry Davis, President of AquaCleaners, Inc. of Lancaster, New York; and a review of the past year's riparian law cases by attorney Cliff Bloom.

On Saturday afternoon the conference culminated with offerings by MSU/MLSA Inland Lake and Stream Outreach and Management Specialist, Dr. Jo Latimore, regarding the Michigan Inland Lakes Partnership. Jason Broekstra, Vice-President of Operations of Professional Lake Management of Caledonia, Michigan presented "A Review of Aquatic Plant Management Options and Technical Advancements" and Earl Gilhouse, President of ANG Water Tech of Manitou Beach, Michigan presented "Mechanical Aquatic Plant Harvesting: History, Technology and Methodology." Carol Swinehart of Michigan Sea Grant and Dr. Jo Latimore of the MSU Department of Fisheries and Wildlife presented a program regarding the Michigan Sea Grant, "Clean Boats, Clean Waters." All of the conference presentations and events were well attended by folks who followed up with very good questions and comments.

As part of our on-going commitment to the Michigan Clean Water Corps Cooperative Lakes Monitoring Program, MLSA's annual conference again provided a classroom venue for volunteer water-quality monitors who received "basic training" in inland lake ecology and water

quality monitoring processes and procedures from MiCorps staff. This year, approximately 80 volunteer water-quality monitors attended the outstanding training offered by MiCorps Cooperative Lakes Monitoring Program scientists and management staff. Volunteers leave the training prepared to collect accurate and reliable data regarding the overall health and condition of their respective inland lakes.

Michigan Lake and Stream Associations would like to thank everyone who participated in our 49th Annual Conference. We recognize that without the support of our membership, our conference co-sponsors – Law Weathers of Grand Rapids and the Michigan Chapter, North American Lake Management Society, our commercial and non-profit exhibitors, a great Radisson Hotel management and staff and a host of highly professional presenters and speakers, our 49th Annual Conference would not have been a success.

We offer special thanks to Dr. Jo Latimore of the MSU Department of Fisheries and Wildlife for her tireless efforts in supporting our conference and the MiCorps Cooperative Lakes Monitoring Program volunteer training sessions as well as to Mr. Cliff Bloom for his unwavering support and commitment to our conference and to our organization. Michigan Lake and Stream Associations is grateful for your unique contributions!

*We hope you enjoy the photographs from the conference that appear on pages 12 and 13 of this newsletter.*

### **VISIT OUR WEB SITE**

As a resource for riparian, lake, water resources and Michigan water

law issues, it is difficult to beat the Michigan Lake & Stream Associations, Inc.'s web site at [www.mlsa.org](http://www.mlsa.org). The web site not only chronicles the current and future events and undertakings of MLSA and its related affiliates, but also has countless articles and resources about riparian legal issues, lake association matters, environmental issues, and local government.

Furthermore, the web site is constantly updated. If you have not done so recently, please visit the web site at [www.mlsa.org](http://www.mlsa.org). For suggestions or improvements to the web site, as well as questions about MLSA, please contact Sharon Wagner at 989-831-5100 or e-mail at [swagner@mlsa.org](mailto:swagner@mlsa.org).

### **CRYSTAL LAKE AND WATERSHED ASSOCIATION RECEIVES MLSA INLAND LAKE STEWARD OF THE YEAR AWARD**

Michigan Lake and Stream Associations has awarded the Michigan Inland Lake Steward of the Year for 2010 to the Crystal Lake and Watershed Association of Beulah, Michigan "in recognition of outstanding leadership, teamwork and dedication in preserving and protecting Michigan's freshwater heritage for future generations."

MLSA launched the special recognition program in 2007 as a means to highlight the substantive activities, programs and achievements of Michigan lake and stream associations whose hard work and dedication have created a model for other associations to follow.

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# MICHIGAN LAKE & STREAM ASSOCIATIONS, INC. MLSA NEWSLETTER



*continued from page 11*

The Crystal Lake and Watershed Association, an “organization of concerned local citizens and environmental professionals committed to protecting the integrity of Crystal Lake, Benzie County, Michigan. It was established for the enjoyment of future generations and has achieved a high level of success through citizen involvement, education, science-based planning and lake management. They have been working with local governments in creating and implementing an integrated watershed management approach to land use planning and zoning within Crystal Lake’s parent watershed area.

This year’s award was presented at the Michigan Lake and Stream Associations 49th Annual Conference banquet on Friday, April 30, at the Radisson Hotel in Lansing. The award was presented to Dr. Stacy Daniels, who accepted on behalf of the Crystal Lake and Watershed Association.

Michigan Lake and Stream Associations applauds the on-going efforts of the Crystal Lake and Watershed Association. We highly encourage other lake and stream associations to seek inspiration and guidance from our learned friends in Crystal Lake.

To learn more about the Crystal Lake and Watershed Association, visit their organizational web site at [www.clwa.us](http://www.clwa.us).



*Michigan Natural Shoreline Partnership training team at the 49th Annual Conference.*

*Pictured left to right, Jane Herbert, MSU District Water Quality Educator, Kevin Cronk, MDNRE Inland Lakes Management Specialist, and John Skubinna, MDNRE Michigan Natural Shoreline Partnership facilitator.*



*Kevin Wehrly, PhD, MDNRE Fisheries Research Biologist, discusses inland lake assessment and classification at the MLSA 49th Annual Conference.*

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# MICHIGAN LAKE & STREAM ASSOCIATIONS, INC. MLSA NEWSLETTER



*continued from page 12*



## MLSA 49th Annual Conference

Ralph Bednarz, MDNRE MiCorps Program Manager, assists Cooperative Lakes Monitoring Program volunteers at the annual CLMP training event.



Jason Broekstra of Professional Lake Management, talks about aquatic plant management options.



Dr. Jo Latimore of the MSU Department of Fisheries and Wildlife gives a presentation regarding the Michigan Inland Lakes Partnership.



Patrick E. Lindemann, Ingham County Drain Commissioner, gives keynote address.



## Are Artificial Lakes in Michigan Real?

By Clifford H. Bloom, Esq.

Law, Weathers, P.C.  
800 Bridgewater Pl • 333 Bridge St NW  
Grand Rapids, Michigan 49504-5320



On March 23, 2010, the Michigan Court of Appeals issued an opinion that should be troubling for every lake-front property owner on any artificial lake in Michigan. The opinion was issued in the case of *Persell v Wertz*, \_\_\_ Mich App \_\_\_ (2010). Given that the decision is “published,” it is binding precedent throughout Michigan. Accordingly, it will represent the likely permanent rule in Michigan regarding this matter unless it is reversed by the Michigan Supreme Court.

Although *Persell* involved a pond less than five acres in size, the Court of Appeals used broad *obiter dictum* to indicate that properties that front on any artificial lake in the state of Michigan cannot be riparian. Or, put another way, the Court stated that lakes that are artificially created (presumably, by dam, excavation, or otherwise) are not subject to the normal riparian rights analysis. In the *Persell* case, that meant that each of the two owners of the non-riparian pond at issue could only use the surface of the pond over their respective properties. Accordingly, since neither party had riparian rights to use the entire surface of the pond, it was within the legal right of one of the property owners to stretch a fence along the common boundary line across the waters of the pond and to keep the other property owner off of the surface of the pond lying above the lands of the objecting property owner.

It is one thing for the Court of Appeals to blanketly state that lakes that have been artificially created in Michigan do not have riparian rights. It is another to ascertain specifically what that means for those lakes and how it will work in practice. The decision by the Court of Appeals leaves a vacuum with regard to lake-front property owner rights on artificial lakes. If the rights they have as waterfront property owners are not riparian, what rights do they have? For example, does *Persell v Wertz* mean that

anyone on an artificial lake can cordon off their “portion” of the lake with fencing or walls out in the water? Does a lake-front landowner on an artificial lake still own to the center of the lake (similar to a riparian property owner), or is that well-established case law now defunct as to artificial lakes? A riparian property owner has the right to utilize the lake involved for dockage, swimming, boating, fishing, ice fishing, and drawing water out for the riparian’s lawn. Does a landowner with frontage on an artificial lake have some, any, or none of those rights pursuant to *Persell v Wertz*? Once again, this may be an example of an appellate court making broad pronouncements without carefully thinking through the consequences of the court’s decision for many property owners throughout the state. The law of unintended consequences will likely loom large with regard to this case.

And, of course, as is all too typical with appellate court decisions that make sweeping pronouncements which will affect large numbers of people, the Michigan Court of Appeals did not define what it meant by an “artificial lake.” Is an artificial lake one that did not exist at all prior to dredging or mining (such as a lake created by a sand and gravel extraction process) or before a dam was installed (for example, a small wetland, creek, or other wet area was increased dramatically in size by the installation of a dam)? What if a small natural lake existed initially which was enhanced by dredging, a dam, or an augmentation well – is the enhanced or enlarged lake still considered an “artificial lake” for purposes of the Court of Appeals’ pronouncements that riparian rights do not attach?

If one or both parties in *Persell v Wertz* petition the Michigan Supreme Court to hear a further appeal of the case and the Court agrees to take the case, it is possible that the Supreme Court could reverse the portion of the Court of Appeals’ decision that

blanketly states that artificial lakes cannot have riparian rights. As of the date of this column, neither party has appealed the decision to the Michigan Supreme Court. Now, any appeal would be difficult to pursue because it would involve requesting approval of a delayed application for leave to appeal from the Michigan Supreme Court. If such a delayed application is filed, and the Michigan Supreme Court agrees to hear the case, one or more parties could submit amicus curiae briefs in support of the proposition that artificial lakes (as opposed to small ponds) do have riparian rights.

It is possible that future Michigan appellate courts could find that a given artificial lake has “morphed” into a natural lake for purposes of riparian rights based upon the passing of the 15-year general Michigan real estate statute of limitations. That is, if the property owners around an artificial lake have treated the lake akin to a natural lake with riparian rights for 15 years or more, a court could potentially deem the lake to be “natural” for purposes of riparian status, such that the property owners with lake frontage would be deemed to be riparians. However, that is simply an educated legal guess.

Some scholars may assert that the broad language in the Court of Appeals’ decision in *Persell* indicating that artificial lakes cannot have riparian rights is mere dicta and is not binding precedent, as the body of water in *Persell v Wertz* was clearly a small pond. However, that would likely be of little comfort to the tens of thousands of property owners in Michigan who own lakefront lots on large artificial lakes – that language by the Michigan Court of Appeals could effectively give such property owners limited lake usage rights.

\*\*\*

### RANDOM MUSINGS

No, I did not age prematurely since the last issue. Many people have indicated

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that I really should replace my high school picture on the header to these columns with a current photograph. Now that I have replaced the photograph, that should suffice for the next two decades!

\*\*\*

The annual Michigan Lake & Stream Associations, Inc., convention held during the last week in April was a great success. The 2011 convention will be in Bay City. These annual events are very worthwhile and enjoyable gatherings. Every riparian (or at least several members of each lake association) should plan to attend the next convention in late April 2011.

Clifford H. Bloom, Esq., is an attorney with Law, Weathers, P.C., in Grand Rapids, Michigan.

## A Viable Solution for Controlling Invasive Zebra and Quagga Mussels: Common Bacteria-Based Product Effective in Testing

By Scott Brown, MLSA Executive Director

After years of intensive research, a group of New York State Museum scientists has discovered that a strain of the bacteria known as *Pseudomonas fluorescens* selectively kills zebra and quagga mussels without harming other aquatic organisms. The naturally occurring and environmentally safe bacteria is commonly utilized by the agricultural community to help prevent delicate fruit crops from freezing.

Invasive mussels first appeared in Michigan waters in the late 1980s and have since caused hundreds of millions of dollars in damage to water-related infrastructure and have negatively impacted aquatic eco-systems throughout the state.

The New York State Museum has part-

nered with Marrone Bio Innovations, Inc., of Davis, California, to develop and test the product utilizing the bio-engineered technology.

SePro Corporation of Carmel, Indiana, will market the product worldwide under the trademark name Zequanox.

According to the company's website, the product should be available for sale in mid-2010 following U.S. Environmental Protection Agency and Environment Canada approval.

For more information regarding the product, visit the company's product-dedicated web page at:

<http://marronebioinnovations.com/products/zequanox/>.



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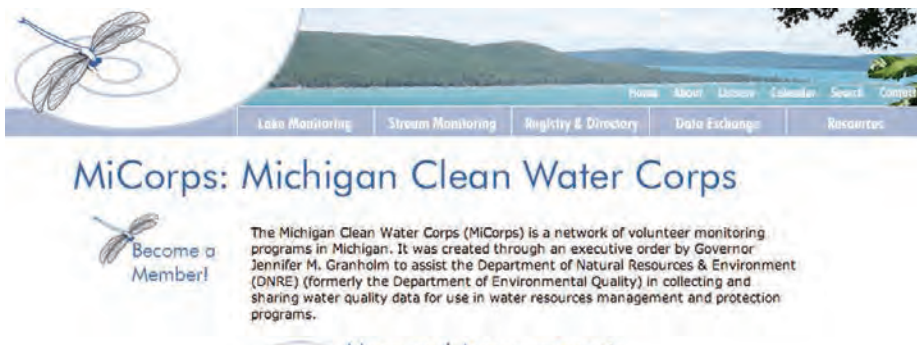
This web site is as much a celebration of planet earth's splendid inland lakes as it is a great online resource for those interested in learning more about these unique freshwater gems. Replete with outstanding photographs and timely articles focused on the science and management of inland lakes, this colorful web site was created by way of a collaboration between Kent State University and Miami (Ohio) University.

[www.lakescientist.com](http://www.lakescientist.com)

## STAY CURRENT ON AQUATIC INVASIVE SPECIES

For relevant and timely information regarding the constantly growing list of aquatic invasive species in the U.S. territorial waters, the U.S. Geological Survey has created an online resource called the Non-Indigenous Aquatic Species site. It was "established as a central repository for spatially referenced biogeographic accounts of introduced aquatic species. The program provides scientific reports, online/real-time queries, spatial data sets, regional contact lists" and more.

<http://nas.er.usgs.gov>



*Pictured above is a screen-capture image of the MiCorps web site.*

**COOPERATIVE LAKES MONITORING PROGRAM**  
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[www.micorps.net](http://www.micorps.net)

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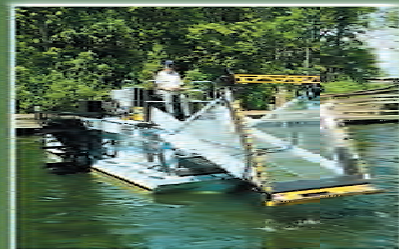
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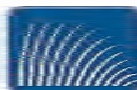
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# Cases: You Win Some, You Lose Some

by Clifford H. Bloom/Law Weathers

In general, the Michigan appellate courts have been relatively kind to lake-front property owners regarding riparian rights. However, on occasion, the Michigan courts issue opinions that are adverse to riparians, sometimes squarely grounded in the law, and other times, an opinion is an aberration.

In the recent unpublished decision by the Michigan Court of Appeals in *John Guidobono II Revocable Trust v Jones*, issued June 24, 2010 (Docket No. 290589), the riparian property owners both won and lost!

The case involved a fairly standard lake access easement. The Court of Appeals held as a matter of law that the lake access easement did not grant riparian

rights, and did not allow dockage, boat moorage, lounging, parking vehicles, and similar uses and activities. It cited *Dyball v Lennox*, 260 Mich App 698; 680 NW2d 522 (2003).

Unfortunately, the riparian property owners eventually lost the case. The Court of Appeals also held that certain backlot property owners had permanent rights to dockage, boat moorage, and similar activities at the easement at the lake based on both prescriptive easement and acquiescence principles. The backlot property owners (and their predecessors in title) had engaged in the uses at issue (dockage, permanent boat moorage, etc.) for well in excess of the 15-year statutory time requirement.

Accordingly, while the Court of Appeals held that the original easement did not

encompass rights to dockage, boat moorage, and similar otherwise riparian uses, it also found that the backlot property owners had permanently established those rights via prescriptive easement and acquiescence.

One of the lessons from this case is that riparian property owners whose lands are bound by or abut a lake access easement, road end, or other commonly-used lake access device should not "let sleeping dogs lie."

If the riparian property owners do nothing for a significant period of time, they will eventually lose the right to have a court order the backlot property owners to cease unlawful uses and activities.

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**Tom Prychitko PhD Laboratory Director**



## Introductory Land & Water Learning Module

The purpose of the Introductory Land & Water Learning Module (ILM) is to enhance understanding of environmental data integration and analysis through a self-paced approach that utilizes hyperlinked text. The ILM is an online module developed by the Institute of Water Research at Michigan State University with funding from MSU's All-University Outreach Grant and the U.S. Geological Survey. It's a module that anyone can access and learn from merely by going to this web site address: <http://iwr.msu.edu/edmodule/ilmfrm1.htm>.

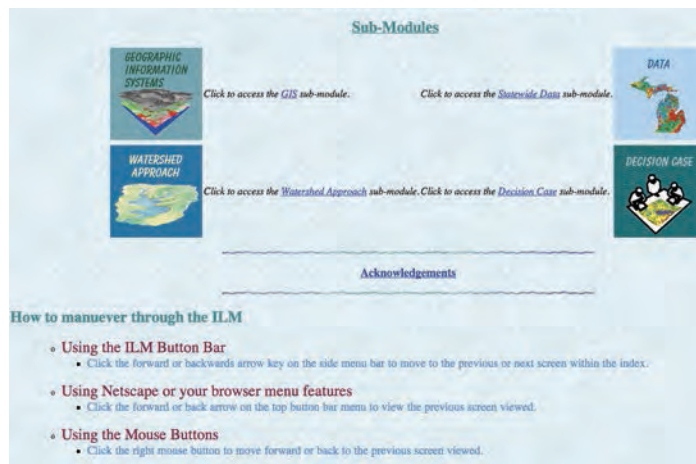
The ILM is divided into four sub-modules.

The first sub-module provides instruction on the use of *Geographic Information System (GIS)* tools for data manipulation, integration and analysis. The combination of graphics and text, along with examples, assists the user in understanding how these tools can be used in real-world situations. The quality that distinguishes a GIS from graphic, design, and data base systems is its ability to analyze and model data in a spatial context. The ability of a GIS to manipulate data from specific geographic locations offers the opportunity to create a realistic perspective of the world and a chance to see the effects of future actions. This unique ability is providing scientists, regional planners, and resource managers the opportunity to distill and combine large sets of spatial data into useful information, offering new perspectives and fresh approaches to problem solving.

*Statewide Data*, the second sub-module, is presented in map format. These maps of Michigan include land cover/land use, surface elevation, glacial drift thickness, natural drainage, Lower Peninsula aquifer vulnerability, annual precipitation, annual temperature and soils.

Sub-module three - *Watershed Approach: Land Use Effects on Water Quality and Quantity* - provides information on water and land use, including the interaction of these two systems, water quality and quantity issues, and land management practices that minimize water quality impacts. Land use and water resources are unequivocally linked. The type of land and the intensity of its use will have a strong influence on the receiving water resource. Whether the source is natural or comes from a human activity, the impact of any land use practice on either the quantity or quality of water can be substantial.

The ILM's fourth sub-module - *Decision Case* - presents a decision-case scenario as a means for illustrating the use of the tools, data, concepts, and techniques presented throughout all the other sub-modules. In order to understand the issues and dilemmas presented in the case, consideration should be given by the learner to the following



basic questions: What are the key issues? What are the objectives of the decision-maker in resolving the problem? What are the options of the decision-maker? What are the trade-offs among these options? How should the issues be addressed?

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# Taking Charge: Lake and Shoreline Management at the Local Level Conference on October 1

The Michigan Chapter of the North American Lake Management Society's Annual Conference is scheduled for Friday, Oct. 1, 2010, at the RAM Center in Roscommon.

This conference will feature an agenda that includes an introduction by Ted Batterson, President of Michigan NALMS; a New Outreach/Training Plan by Howard Wandell, Executive Director of Michigan NALMS; Current Legal Issues by Robert Reichel, State of Michigan Attorney General Natural Resources Division in Lansing; The Effects of Woody Debris Removal on Fish Populations by Brian Roth, Department of Fisheries and Wildlife, Michigan State University; and a MCNALMS Presentation by Howard Wandell.

There will also be concurrent sessions to choose from throughout the afternoon. The choices are categorized under two headings: Session A: Native Shorelines - A First Step in Lake Management with moderator Lois Wolfson and Session B: Becoming A Lake Manager with moderator Mike Solomon.

These two concurrent sessions will include the following topics: Why Native Shorelines?, Effects of Lake Shoreline Development on Painted and Northern Map Turtle Populations, Low Impact Development and Ordinances for Lake Shorelines, Designing/Restoring A Native Shorelines, Lake Management Options, Professional Assistance You May Need, Communicating and Promoting Your Work, and Leadership Skills.

There will be an opportunity after the concurrent sessions for Reflections and Insights on the MCNALMS Lake Manager's Manual with Dave Foley, as well as evaluation and feedback with Howard Wandell. The day will end with a MCNALMS Society Business Meeting.

This one-day conference is endorsed by the Michigan Inland Lakes Partnership and co-sponsored by the Michigan Lake and Stream Associations, Inc., MSU Extension, and the Institute of Water Research, Michigan State University.

For more information or to register, visit [www.mcnalms.org](http://www.mcnalms.org).

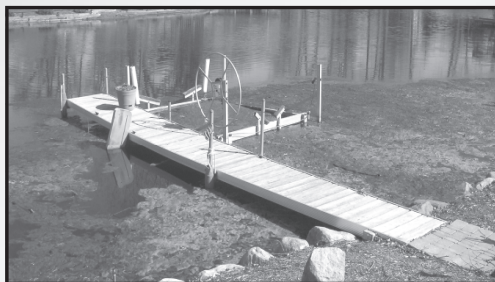


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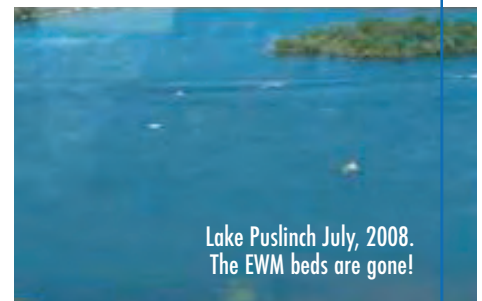
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- Chemicals are short-term, expensive, must be applied annually, and can damage native plants and fisheries. In most cases, water restrictions are imposed for 1-21 days post-treatment.
- Harvesting or hand cutting produces numerous fragments, causing EWM to spread more quickly to uninfested areas.
- Suction harvesting requires special equipment and personnel, is extremely expensive, and restricted to shallow areas.
- Drawdown may provide short-term relief but often worsens the problem because bare sediment allows for colonization by fast growing invasive species like milfoil.
- Bottom barriers are restricted to a small area and can disrupt growth of native plants.

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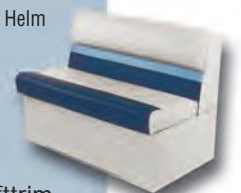
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