Winter
2020

Vol. 55 No. 1

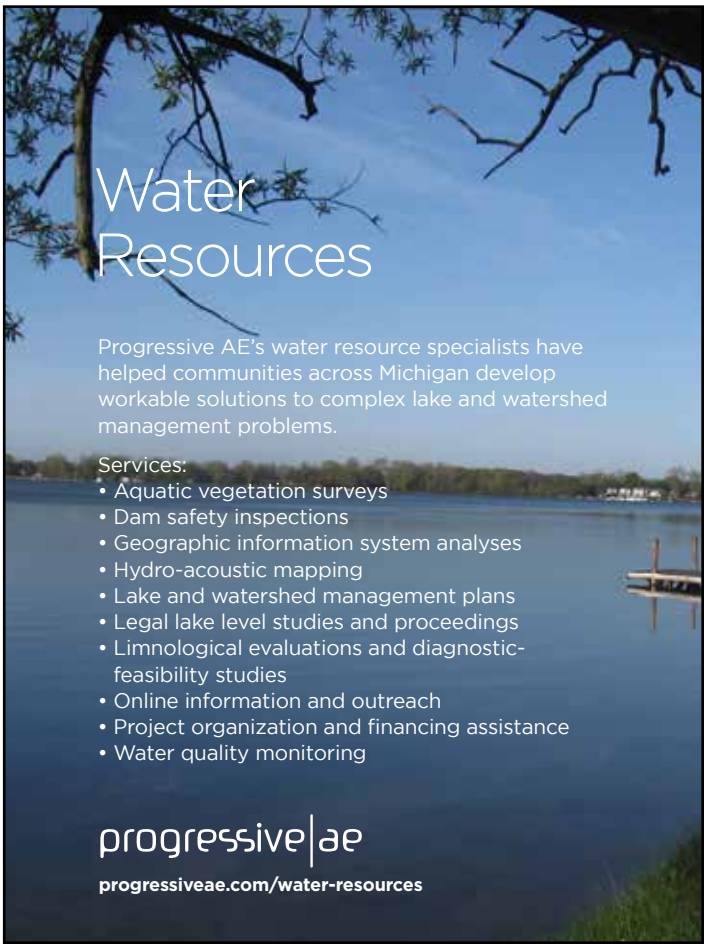
Designed and published for stream and lakefront property owners and enthusiasts.

THE MICHIGAN RIPARIAN

www.mi-riparian.org

DEVOTED TO THE MANAGEMENT AND WISE USE OF MICHIGAN'S LAKES AND STREAMS Published Quarterly

BEAVER LAKE



THE MICHIGAN RIPARIAN
www.mi-riparian.org

The Michigan Riparian (ISSN 0279-2524) is published quarterly for $6.25 per issue by the Michigan Lakes & Streams Association, Inc. a Michigan non-profit corporation. Non-profit postage is paid at Lansing, Michigan and additional mailing offices.

Postmaster:
Send address changes to:
The Michigan Riparian
300 N. State St., Suite A, Stanton, MI 48888

The Michigan Riparian is the only magazine devoted exclusively to the protection, preservation and improvement of Michigan waters and to the rights of riparian owners to enjoy their water-front property.

The Michigan Riparian magazine is published quarterly and is mailed to subscribers in the Spring, Summer, Fall and Winter each year.

The Michigan Riparian
PUBLISHING OFFICE
300 N. State St., Suite A
Stanton, MI 48888
PUBLISHER: Sharon Wagner
Phone: 989-831-5100
E-mail: swagner@mlswa.org
SUBSCRIPTION RATES (4 issues/year)
Individual annual subscription: $25
Lake association quantity subscriptions: $14
ADVERTISING RATES
Advertising rates sent upon request or available on website.
Deadlines: February 15 for Spring issue
May 15 for Summer issue
August 15 for Fall issue
November 15 for Winter issue
Printed by Spartan Printing, Lansing, Michigan

From The Publisher

What's New in 2020

There are many exciting things to celebrate in 2020. MLSA welcomes a new executive director, Melissa DeSimone. Melissa has been the MLSA Membership Coordinator. She is a graduate of Illinois State University with BS in Elementary Education and Governor's State University with an MA in Educational Administration. Melissa, her husband and son live part-time on Gravel Lake in Van Buren County. Melissa has been an MLSA member for 10 years and she and her husband, Craig, are the driving forces behind the very active Region 3 gatherings in their area.

MLSA also has a new president, Dave Maturen. Dave has lived on Indian Lake in Vicksburg for 40 years. He graduated from Western Michigan University with a BBA and MPA. From 2105 to 2018, he represented the 63rd District in the House of Representatives and served as Vice Chair of the House Tax Policy Committee and was a member of the Energy Policy, Local Government, Financial Liability Reform, Natural Resources and Transportation and Infrastructure committees. Dave was very instrumental in helping MLSA to secure funding for the Cooperative Lakes Monitoring Program for the current year. His past experience with MLSA includes time spent on *The Michigan Riparian* Board. Dave has served his community at the township, county, and state level. He currently operates Maturen and Associates, a real estate appraisal company in Portage and still maintains his interest in public policy.

Did you know the MDEQ has a new name? It's now called EGLE. Find out what EGLE stands for in the Ask the Experts feature. Remember to mark your 2020 calendar for the Annual MLSA Conference on May 1st & 2nd. Go to www.mymlsa.org website for complete registration information.

Cliff Bloom's article "Hazard of Navigability" was so popular that Cliff has a follow-up article in this issue. The topic has generated a lot of questions. Cliff also provides more insight into Prescriptive Easements. Continuing the series on PFAS, Lois Wolfson shares a perspective of PFAS on households.

Be sure to share your stories and pictures of the winter activities taking place on your lake. Send your photos of skiing, skating, polar plunges and ice fishing and other fun happenings this winter.

Hope 2020 is filled with Love, Peace and Prosperity! Happy New Year.

Editor, Carol McVicker
cbmcvic@gmail.com
(989) 831-5100

Publisher, Sharon Wagner
Send your information to:
300 N. State St., Ste A, Stanton, MI 48888
(989) 831-5100
swagner@mlswa.org

Contents

5 Attorney Writes:
Prescription Means Without Consent

8 Lake Happenings:
Free Fishing Weekend

9 PFAS Chemicals:
A Concern to Human Health and the Environment

12 Ask The Experts:
What is EGLE and How is it Related to the MDEQ?

16 Cover Story:
Beaver Lake

23 Swim Rafts

26 Love My Lake:
What Happened to the Milky Way?

30 Cliff Bloom:
Beach Walkers Case 15 Years Later

www.mymlsa.org

THE MICHIGAN RIPARIAN

www.mi-riparian.org

Prescription Means Without Consent

By Clifford H. Bloom, Esq.
Bloom Sluggett, PC
Grand Rapids, Michigan
www.BloomSluggett.com

Most riparians in Michigan have heard of "squatters rights". The correct legal phrase is "adverse possession". In Michigan, if a landowner uses a portion of the adjoining parcel extensively, without permission and consistently for over 15 years, the encroaching landowner can often obtain title to the land involved via a county circuit court action based on adverse possession. However, the possessing landowner's use of the adjoining property must be exclusive; that is, the land in dispute cannot also be used during the 15-year time period by the actual owner of the property or anyone else. That is called the "exclusivity" requirement for adverse possession.

Obtaining a permanent "prescriptive easement" or "easement by prescription" in Michigan is similar to adverse possession. The difference is, however, for a prescriptive easement, the beneficiary's use of the property at issue need not be exclusive and the land involved is often jointly used with the true landowner (and potentially others). To prevail on a claim of prescriptive easement in Michigan, a landowner must show that he or she has used the adjoining property for over 15 years without the permission of the true landowner. Again, a prescriptive easement cannot be obtained without a successful circuit court lawsuit.

Adverse possession almost always involves the active use and possession of a property, rather than mere travel or access. A prescriptive easement almost always involves obtaining access via travel to a landlocked property, a lake or stream or other property.

Surprisingly, the prevailing party on an adverse possession or prescriptive easement claim need not pay the losing landowner any money for the acquired property interest.

I have authored several prior articles for *The Michigan Riparian* magazine regarding adverse possession and prescriptive easements. However, a recent unpublished Michigan Court of Appeals case nicely summarizes many of the issues relating to prescriptive easements. In *Lamkin v Hartmeier*, decided on September 17, 2019, Case No. 326986 (2019 WL 4455094), landowners had long accessed their properties through a private road in an adjoining plat. Normally, the landlocked property owners would not have the right to use the private road because it was located in a different plat and was limited to use by the property owners within that plat. Nevertheless, since the landlocked landowners had used the private road (or private easement) for many decades, they were awarded a permanent prescriptive easement. With regard to prescriptive easements in general, the Court of Appeals noted:

> "A prescriptive easement is generally limited in scope by the manner in which it was acquired and the previous enjoyment." *Heydon v. MediaOne*, 275 Mich. App. 267, 271; 739 N.W.2d 373 (2007) (quotation omitted). The holder of a prescriptive easement is not altogether precluded from increasing the burden on a servient tenement where "necessary to make effective the enjoyment of the easement." *Mumrow v. Riddle*, 67 Mich. App. 693, 699; 242 N.W.2d 489 (1976). Thus, the owner of an easement may perform incidental repairs or improvements, subject to a balancing between the necessity of those repairs or improvements and the reasonableness of any increased burden upon the servient tenement. Id. at 699-700. Ultimately, "the scope of the privilege is determined largely by what is reasonable under the circumstances." Heydon, 275 Mich. App. at 271. "The owner of an easement cannot materially increase the burden of the easement or impose a new and additional burden on the servient estate." Id. at 275.
>
> A prescriptive easement is essentially indistinguishable from adverse possession, other than the requirement of exclusivity. *Matthews v. Dep't. of Natural Resources*, 288 Mich. App. 23, 37; 792 N.W.2d 40 (2010). "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc. v. Prose,* 242 Mich. App. 676, 679; 619 N.W.2d 725 (2000). Adverse, or hostile, use does not require ill will, but rather a claim to a nonexistent right or a nonpermissive use that would give rise to an action for trespass. Id. at 681. Use can be "continuous" without being literally uninterrupted so long as that use is "in keeping with the nature and character of the right claimed." *Dyer v. Thurston*, 32 Mich. App. 341, 344; 188 N.W.2d 633 (1971). As discussed, the fifteen-year period need not be satisfied by a single owner, and successive owners who are in privity with each other may "tack" their periods of

(Continued on page 6)

Prescription Means Without Consent

(Continued from page 5)

adverse use together. *Siegel v. Renkiwicz Estate*, 373 Mich. 421, 425; 129 N.W.2d 876 (1964). The party claiming a prescriptive easement must prove entitlement by clear and cogent evidence. Matthews, 288 Mich. App. at 37. The "clear and cogent evidence" standard calls for "more than a preponderance of evidence, approaching the level of proof beyond a reasonable doubt." *McQueen v. Black,* 168 Mich. App. 641, 645 n. 2; 425 N.W.2d 203 (1988). Slip opinion at pp. 5-6.

In order to obtain title to property via adverse possession or an easement via prescription, the property of another must be used consistently for 15 years or longer. If someone claiming adverse possession or an easement by prescription has not owned the land benefited for at least 15 consecutive years, they can sometimes add or "tack" the number of years of use by the prior possessing landowner to total 15 years or longer. For example, if the current owner of Parcel A uses a driveway across Parcel B for seven years and there is no recorded access easement, the use of Parcel B for access to Parcel A by the prior owner of Parcel A for eight years can often be added on to the seven years of the current owner of Parcel A, for a total of 15 years.

Sometimes, even if the current property owner has not accrued 15 years of use of an adjoining property, the actions of a prior owner of the benefited parcel can be used without tacking. All that is required is a 15-year block of time for consistent usage at some past point in time. So, assume that the prior owner of Parcel 1 used a driveway across Parcel 2 without the benefit of an easement and did so during the years from 1950 to 1970. That was over 15 consecutive years. Also assume that every subsequent owner of Parcel 1 since 1970 has only owned the parcel for five years or less. Although those subsequent owners could "tack" or add their usage to total more than 15 years, they need not do so. The prescriptive easement actually came into effect in 1965 for the benefit of Parcel 1 when the owner of Parcel 1 accrued at least 15 years of usage (1950-1965). Any later owner of Parcel 1 after 1965 could go to court at any time and obtain or "verify" a prescriptive easement due to the 15-year increment from 1950 through 1965. The Lamkin Court recognized that as follows:

Our Supreme Court held that, in order to establish a valid claim to a prescriptive easement, a claimant need not demonstrate privity of estate with a predecessor in interest if the claimant can demonstrate that a predecessor had perfected a prescriptive easement over the course of the fifteen-year statutory period. Marlette, 501 Mich. at 203-204. Specifically, "[w]hen a prescriptive easement vests with the claimant's predecessors in interest, the easement is appurtenant and transfers to subsequent owners in the property's chain of title without the need for the subsequent owner to establish privity of estate." Id. Thus, once a prescriptive easement vests, it runs with the land with no further action necessary. The predecessor in interest need not have taken legal action to assert a claim over the prescriptive easement in order for the easement to vest. Id. at 209. Accordingly, although not stated in so many words, Marlette held that a prescriptive easement vested and subsequently ran with the land following B & J Investment's open, notorious, uninterrupted, and hostile use of the parking lot for at least fifteen years.

On remand, defendants misconstrue Marlette as obviating the need for privity altogether. Marlette held nothing of the sort. Rather, Marlette explained that privity is no longer required for an easement to run with the land after the easement has vested. It so happened that in Marlette, the requisite fifteen-year period for adverse possession was satisfied by a single party. However, Marlette expressly acknowledged that "[i]f 'no single period' of adverse use amounts to the fifteen-year statutory period, a party claiming a prescriptive interest may tack the possessory periods of their predecessors in interest 'to aggregate the 15-year period of prescription' if the claimant can show privity of estate." Marlette, 501 Mich. at 203. The unambiguous significance of Marlette is that a prescriptive easement vests immediately and automatically upon satisfaction of the statutory requirements by either a single property owner, or a succession of property owners in privity with each other. Then, and only then, is any need for privity obviated. This is not a novel holding: a prescriptive easement that has

"A prescriptive easement cannot be obtained without a successful circuit court lawsuit."

(Continued on page 7)

(Continued from page 6)

already vested has always been deemed to run with the land, even where parcels are later subdivided. See von *Meding v. Strahl*, 319 Mich. 598, 611; 30 N.W.2d 363 (1948).

Therefore, we conclude that our Supreme Court's order for us to consider "whether each defendant established a prescriptive easement in light of Marlette" implicitly instructs that any individual defendant may satisfy the statutory requirements in one of three ways: (1) personally; (2) by tacking the defendant's own use to the use of a predecessor or predecessors in privity; or (3) by showing that any prior owner of their property, or any chain of owners in privity with each other, had satisfied the statutory requirements at any time in the past. Slip opinion at pp. 4-5.

The Michigan Supreme Court in *Marlette Auto Wash, LLC v VanDyke SC Properties, LLC,* 501 Mich 192 (2018), held that a prescriptive easement arises when a 15-year time period runs, even if a different and later owner of the benefitted parcel does not commence court action to "perfect" (i.e. prove) and confirm the prescriptive easement until years later. The *Marlette* Court noted:

The Court of Appeals' alternative rationale for rejecting plaintiff's claim is equally without merit. Quoting *Gorte v. Dep't of Transp.*, 202 Mich.App. 161, 507 N.W.2d 797 (1993), the Court of Appeals held that the person claiming a prescriptive easement must "act on the purported acquired right" because " 'the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession.' " Marlette, unpub. op. at 3, quoting Gorte, 202 Mich.App. at 168, 507 N.W.2d 797. In the Court of Appeals' view, plaintiff's claim failed because "[i]t is undisputed that no previous owner of the car wash asserted a claim of prescriptive easement with regard to defendant's property." Id. (emphasis added).

It is not clear why the Court of Appeals believes a prior property owner must have previously asserted a prescriptive easement claim in order for a prescriptive easement to vest, because, if a prior property owner had successfully asserted a prescriptive easement claim, marketable title of record as a result of the previous judicial decree would already exist for the property, and the current property owner would have no reason to file a lawsuit seeking to establish record title to the property by prescriptive easement. See *Escher v. Bender*, 338 Mich. 1, 8, 61 N.W.2d 143 (1953). Moreover, nothing in Gorte requires that a prior property owner assert a legal claim in order for a prescriptive easement to vest.

In Gorte, the defendant argued that the plaintiffs' title to the land did not vest upon the expiration of the period of limitations but, instead, plaintiffs' possession of the property simply gave the plaintiffs the ability "to raise the expiration of the period of limitation as a defense to defendant's assertion of title." Gorte, 202 Mich.App. at 168, 507 N.W.2d 797. The Gorte panel concluded:

Contrary to defendant's arguments, however, Michigan courts have followed the general rule that the expiration of the period of limitation terminates the title of those who slept on their rights and vests title in the party claiming adverse possession. Thus, assuming all other elements have been established, one gains title by adverse possession when the period of limitation expires, not when an action regarding the title to the property is brought. [Id. at 168-169, 507 N.W.2d 797 (citations omitted).]

Therefore, that portion of Gorte quoted by the Court of Appeals simply describes the general effect of an adverse-possession claim, assuming that all the other elements have been established. It does not stand for the proposition that a party must file a legal claim for title to vest by adverse possession. The final sentence of the quoted Gorte language specifically provides otherwise:

(Continued on page 13)

Lake Happenings

Free Fishing Weekend

Hey, all you hardy Michiganders who love to fish!! Did you know about free fishing on February 15-16, 2020? A fishing license is not required for Saturday, February 15 and Sunday, February 16. Grab your favorite gear and enjoy!

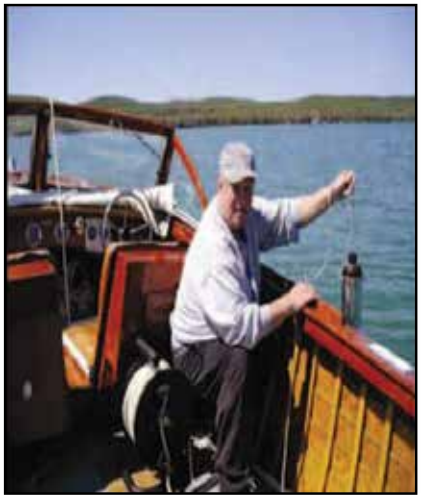
Send us your lake association newsletter or special announcements electronically. We love hearing from your lake. We will continue to use and spread the interesting and informative things happening on your lake in *The Michigan Riparian*.Please send your lake association newsletter to: swagner@mlswa.org.

Michigan Clean Water Corps

MiCorps
Monitoring Michigan's Water Quality

Michigan's Inland Lakes, Ours to Protect

Cooperative Lakes Monitoring Program



- *Providing baseline information and document trends in water quality for individual lakes.*
- *Educating lake residents, users and interested citizens in the collection of water quality data, lake ecology and lake management practices.*
- *Building a constituency of citizens to practice sound lake management at the local level and foster public support for lake quality protection.*
- *Providing a cost effective process for the EGLE (Department of Environment Great Lakes and Energy) to increase baseline data for lakes state-wide.*

For information regarding registration for the 2020 monitoring season contact Jean Roth, Program Administrator, at 989-257-3715 or jroth@mlswa.org

To enroll on-line, visit www.micorps.net/lake-monitoring/become-a-volunteer/

PFAS Chemicals:

A Concern to Human Health and the Environment

By Lois Wolfson, Department of Fisheries and Wildlife and Institute of Water Research, Michigan State University, East Lansing, MI
Erick Elgin, Michigan State University Extension, Fremont, MI

PFAS chemicals, also known as per- and poly-fluoroalkyl substances, have taken center stage as emerging chemical contaminants in Michigan. They are being detected in our surface water and groundwater, raising concern about effects on fish, wildlife, and human health. As discussed in the August 2019 Riparian, PFAS chemicals are a suite of synthetic organic compounds that have been used since the 1940s and currently number in the thousands. Some of the compounds are relatively new, while others, such as PFOS (perfluorooctane sulfonate) and PFOA (perfluorooctanoic acid), are older and no longer manufactured in the U.S.

WHAT DO WE KNOW ABOUT PFAS CHEMICALS?

PFOS, PFOA and several other PFAS chemicals are very effective at repelling water, grease and oil, preventing corrosion and acting as a surfactant. As a result, these chemicals were used in numerous industrial and manufacturing activities, including tanneries, metal plating factories, electronics, semi-conductors and as coatings in food packaging. On military bases and at airports, they were found in aqueous film forming foams (AFFF) that helped in putting out fuel-based fires. Household items such as non-stick cookware, stain-resistant fabrics, paints, some cosmetics, and polishes and waxes also were produced with PFAS chemicals (Table 1). Although several of these "older" PFAS chemicals were voluntarily phased out and taken off the market over the last 5 to 15 years, they are very persistent, meaning that they don't break down in nature, and thus are often referred to as the "Forever Chemicals." The very strong chemical bonds between the carbon and fluorine atoms also make them highly resistant to heat or chemical breakdown. Because of these persistent properties and ubiquitous use, they are now found in water, fish and wildlife, and humans around the world.

Table 1. A few PFAS compounds and their major uses

PFAS Compound Abbreviations	Product/Use
PFDA	Breakdown Product of Stain and Grease Proof Coatings
PFNS	Surfactants in Coating Products
PFNA	Surfactant; Production of Plastic
PFOS	Fabric Protection; Firefighting Foam
PFOA	Nonstick Surfaces; Surfactant
PFHpS	Firefighting Foams; Carpet Treatment
PFHxS	Firefighting Foam
PFPeA	Stain and Grease Proof Coatings on Food Packaging, Carpets
PFBS	Stain repellent; Replacement for PFOS
GenX	Replacement for PFOA

From: Dery et al., 2019

PFAS chemicals are soluble in water and can readily move in both surface water and groundwater. They have been detected in sediment, soil, and organisms (Mussabek et al. 2019). They also can be carried with dust particles through the air. They have been found around the world including areas that did not manufacture PFAS chemicals such as the Arctic and the open ocean. One study noted polar bears had PFAS in their blood. Of all PFAS chemicals, PFOS and PFOA are the most common types found in the environment. Not only have they been around longer than most other PFAS chemicals and used more extensively, they also can move from polluted sites, such as landfills, to water bodies. There are other chemical forms known as precursors that can be changed by soil and microbes into per-fluoroalkyl compounds. Some of the current research indicates that all PFAS chemicals and their precursors will eventually transform into a per-fluoroalkyl acid and never degrade naturally in the environment.

However, newer PFAS compounds, known as replacement chemicals, such as GenX and PFBS, have replaced these phased out chemicals. These newer PFAS compounds typically have shorter chains of carbon attached to fluorine atoms, purportedly making them less persistent, less bioaccumulative, and not as toxic. For example, in humans, shorter chain PFAS can have half-lives measured in days and months compared to years for the longer chain PFOS and PFOA. Recent scientific studies have raised concerns about these compounds, including having a greater ability to leach into groundwater, being resistant to water treatment

(Continued on page 10)

PFAS Chemicals

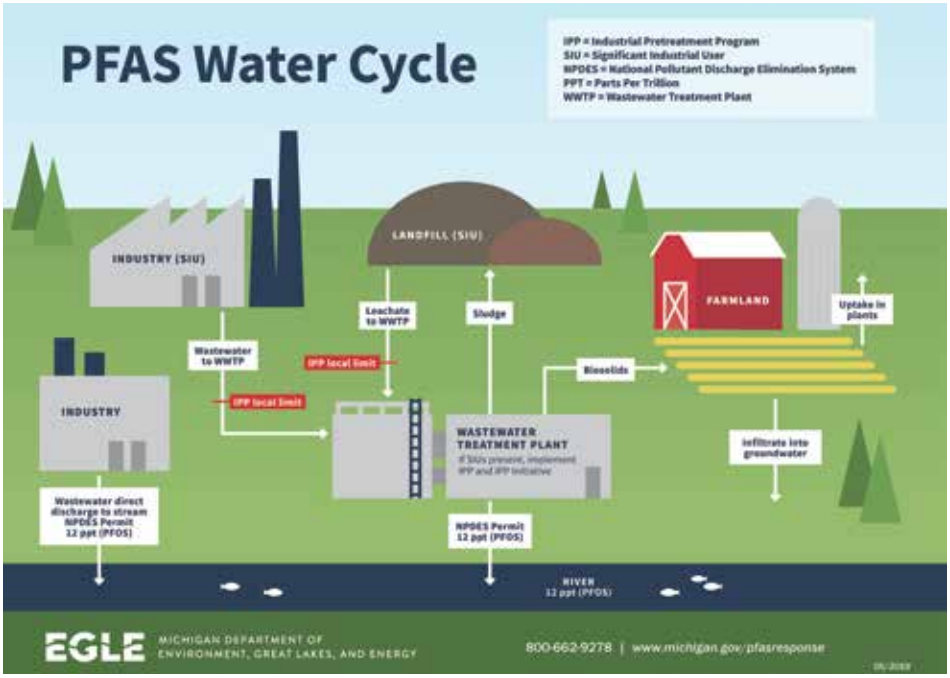
(Continued from page 9)

processes and bioaccumulating in plants. Other studies indicate that these newer chemicals are just as or more persistent and mobile in aquatic ecosystems (Appleman et al., 2014; Li et al. 2020; Scher et al., 2018).

HOW ARE PEOPLE EXPOSED TO PFAS?

In humans, the most likely ways that PFAS chemicals get into the body are through drinking contaminated water or eating contaminated fish or wildlife, particularly in localized areas where PFAS was readily used or disposed of, including manufacturing, landfills, wastewater treatment plants or airport and military facilities using AFFF, a foam used for fighting fires. The use of AFFF is considered a large source of PFAS into the environment since the chemical is mixed with water to form the foam, which then can easily be transported through groundwater and surface water (State of Washington 2019).

Other less important pathways include consumption of food that came in contact with packaging containing PFAS; being exposed to commercial products; or working in industries that utilize PFAS chemicals. Although infants and young children may be exposed through drinking breastmilk, the American Academy of Pediatrics has stated that "even though a number of environmental pollutants readily pass to the infant through human milk, the advantages of breastfeeding continue to greatly outweigh the potential risks in nearly every circumstance" (Etzel 2012). Most studies have reported that only a small amount of PFAS can get into your body through the skin. Therefore, touching products with PFAS in them or showering and bathing in water containing PFAS should not be a high risk for exposure.



Unlike other organic chemicals like PCBs and dioxins that bind to lipids and fats, PFAS tend to bind to proteins in the blood serum albumin and liver. Higher concentrations have also been found in bone and kidneys depending on the PFAS chemical being tested. This binding may interfere with normal protein functions such as endocrine and immunological functions (Liu et al. 2019). However, from 1999 to 2014, studies by the Centers for Disease Control and Prevention found decreasing levels of four PFAS compounds in the blood of humans, with PFOA and PFOS levels declining by more than 60% and 80%, respectively (CDC 2017).

HEALTH CONCERNS

More studies have been done with animals, particularly mice and rats than with humans with respect to PFAS exposure. While some correlations can be made, PFAS metabolism and bioaccumulation in humans is different than that in rats. However, there have been several studies on large populations of people in the US and other countries. One of the larger studies done as the result of a settlement brought against one of the manufacturers of PFOA occurred with communities within the mid-Ohio Valley. Between 2005 and 2013, a science panel, called the C8 panel, studied over 69,000 people exposed to PFOA. Probable links were found between PFOA and high cholesterol, thyroid disease, testicular and kidney cancer, ulcerative colitis, and pregnancy-induced hypertension. No probable links were observed between

(Continued on page 11)

(Continued from page 10)

PFOA and heart, kidney, or liver disease, osteoarthritis, neurodevelopment disorders in children, lung disease, stroke, or birth defects (C8 Science Panel 2012).

Other studies, including those done on people who worked in industries that used PFAS chemicals, indicate that exposure to certain PFAS may lower a woman's chance of getting pregnant, affect the immune system and increase the risk of cancer. Scientists are still learning about the health effects of exposures to mixtures of PFAS, and more research is needed to more fully understand how PFAS affects human health.

RESPONSES IN MICHIGAN

In 2019, Michigan Governor Gretchen Whitmer reestablished the Michigan PFAS Action Response Team (MPART) under Executive Order 2019-3 as a permanent body within the MDEQ, now EGLE. MPART, which includes multiple state agencies, has been testing numerous surface water and groundwater sites around the state since it was established in November 2017. Many tests have also been done on deer and fish. Based on tests, "do not eat" fish consumption advisories have been developed in areas where high PFOS concentrations have been found in surface water, groundwater, and/or in fish. The MPART website at https://www.michigan.gov/pfasresponse (then go to tab Fish and Wildlife) provides a list of lakes and rivers where advisories have been posted. These guidelines are set to be protective for all populations as well as for those with existing health problems.

MPART has also been addressing PFAS-laden foams found along the shoreline of lakes and rivers. These white, sticky foams are different than the naturally forming foams often seen along a lake's shoreline. Often times they have been found near military bases where AFFF, had been used. Although PFOS laden AFFF were replaced with other PFAS compounds, some of these chemicals contain compounds that can break down into PFOA and other PFAS chemicals. If these chemicals get into surface water or seep to groundwater and then move to surface water, foams may appear. In areas where foams tested positive for PFAS, health advisories have been issued by the local or state health department. If lake residents suspect that the foam contains PFAS, they should not try to remove it from the water. Removal is not only difficult, but it requires specific equipment. MPART suggests calling the Pollution Emergency Alert hotline at 800-292-4706 to report the foam.

DRINKING WATER HEALTH ADVISORIES

Although the US Environmental Protection Agency has set drinking water lifetime health advisory levels for PFOA and PFOS at 70 parts per trillion (ppt), several states, including Michigan, are in the process of lowering those levels and

(Continued on page 14)

ASK THE EXPERTS

If you have a question about water related issues, riparian rights, and/or lakes and streams, etc., let us know by email or snail mail.

Email: swagner@mlswa.org
Mail: The Michigan Riparian
300 N. State St., Suite A,
Stanton, MI 48888

Question: What is EGLE and how is it related to the MDEQ?

Answer: Many are familiar with the MDEQ or the Michigan Department of Environmental Quality. You may have applied for a permit or had to report an environmental concern to the department. You may even remember a time when there was the DNRE (Department of Natural Resources and Environment) when DNR and DEQ were together in one department. Effective April 22, 2019 we now have EGLE--the Michigan Department of Environment, Great Lakes, and Energy. Their mission is "to protect Michigan's environment and public health by managing air, water, land, and energy resources".

The acronym EGLE stands for the functions of the department. The "E" for Environment includes everything the department has historically done as the DEQ. You can apply for a permit and check out projects that have been permitted around you via MiWaters. You can find information on regulations and agency contacts regarding lakes, streams, and all other environmental concerns like air quality, land, waste and sustainability.

The "GL" for Great Lakes encompasses the Office of Great Lakes, now part of EGLE that came from the Michigan Department of Natural Resources. As a set of two peninsulas, Michigan is surrounded by the Great Lakes, and these important bodies of water consist of one fifth of the freshwater on the surface of the Earth. EGLE works to protect and restore our water. That department provides information and resources regarding water levels, the shipping industry and much more.

The last "E" represents Energy--new to this department as the Office of Climate and Energy. Much of what this office does was previously done by the Michigan Agency for Energy. The latest news about energy in our state as well as information for residents and businesses can be found on the EGLE website.

To see all that EGLE has to offer, visit their website: https://www.michigan.gov/egle/

You can also check out their YouTube channel for videos about Michigan environmental topics, subscribe to their email newsletters, and follow them on Twitter - @MichiganEGLE

By Melissa DeSimone
MLSA Executive Director

******

Our experts include our riparian attorney, a biologist, a limnologist, an engineer, a college professor and a state agency official. They look forward to responding to your question.

Prescription Means Without Consent

(Continued from page 7)

one gains title by adverse possession when the period of limitations expires, not when an action regarding the title to the property is brought. Furthermore, as this Court has explained, an adverse possessor acquires legal title to property when the statutory period ends, but that title is neither recorded nor marketable until the property interest is established by judicial decree:

This Court has long recognized the common law doctrine of adverse possession, which the Legislature has since codified. To establish adverse possession, the party claiming it must show "clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right." After the statutory period ends, the record owner's title is extinguished and the adverse possessor acquires "legal title" to the property. Acquisition of title in this manner includes "the right to defend the possession and to protect the property against the trespass of all others." However, the title acquired by adverse possession is neither record title nor marketable title until the adverse possessor files a lawsuit and obtains a judicial decree. Thus, until an adverse possessor obtains the necessary judicial decree, there is no record of the adverse possessor's ownership interest to verify whether the possessor actually satisfied the elements of adverse possession. [Beach, 489 Mich. at 106-107, 802 N.W.2d 1 (emphasis added; citations omitted).]

In urging the correctness of the Court of Appeals opinion, defendant argues that, if this Court does not require a prior property owner to take legal action to claim a prescriptive easement, the law would recognize the existence of "secret" easements not apparent to the purchaser of the servient estate. Defendant, having enjoyed the beneficial use of the parking lot access to the car wash, certainly has no legitimate argument that the claimed easement was in any way "secret." Moreover, in order for plaintiff to successfully establish a prescriptive easement, plaintiff must show clear and cogent proof of possession that is actual, continuous, open, notorious, hostile, and uninterrupted for the relevant statutory period. " 'The possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally, and with the purpose to assert a claim of title adversely to his, so that if the true owner remains in ignorance it is his own fault.' " *Ennis v. Stanley*, 346 Mich. 296, 301, 78 N.W.2d 114 (1956), quoting *McVannel v. Pure Oil Co.*, 262 Mich. 518, 525-526, 247 N.W. 735 (1933) (emphasis added). See also *Doctor v. Turner*, 251 Mich. 175, 186, 231 N.W. 115 (1930). 501 Mich 192, 208-211 (footnote omitted).

Prescriptive easements can be used not only to establish permanent access via private roads and pedestrian access easements, but also with regard to easements to lakes and other bodies of water, drainage easements, utility easements, septic tank easements, fence easements and even parking easements. It is also possible that the limitations contained in certain express easements can sometimes be expanded by prescriptive acts.

One of the confusing aspects of adverse possession and easements by prescription is the requirement that any use during the 15-year time period involved must be without the permission or consent of the true landowner. If the encroaching property owner was given permission or consent to use the land by the true landowner (whether in writing or orally), an

(Continued on page 15)

PFAS Chemicals

(Continued from page 11)

developing standards for other PFAS chemicals. A Michigan Science Advisory Workgroup identified health-based values for seven PFAS chemicals in drinking water. This included PFOA and PFOS at 8 ppt and 16 ppt, respectively and GenX and PFBS at 420 ppt and 370 ppt, respectively (Greenberg 2019). The Environmental Rules Review Committee met in November to consider draft PFAS rules. The final rule is expected to be completed by April 2020.

BEING PROACTIVE

PFAS is a worldwide concern with many issues yet to be fully understood. We do know that PFAS is easily transported by water in the environment and that ingestion of PFAS contaminated water is likely the primary vector of human exposure. Thus, it is also important to be proactive about keeping up-to-date with new research findings and regulations. Agencies such as the CDC, Agency for Toxic Substances and Disease Registry, and the US EPA are connecting and working with state agencies, drinking water utilities, and universities to investigate PFAS contamination and learn more about it. An engaged and informed public will only help to promote an effective response to this emerging crisis.

REFERENCES

Appleman, T.D., Higgins, C.P., Quinones, O., et al., 2014. Treatment of poly- and perfluoroalkyl substances in U.S. full-scale water treatment systems. Water Res. 51, 246-255.

C8 Science Panel. 2012. Accessed at: http://www.c8sciencepanel.org/prob_link.html

CDC (Centers for Disease Control and Prevention). 2017. Fourth Report on Human Exposure to Environmental Chemicals, Updated Tables, Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.

(Continued on page 22)

Prescription Means Without Consent

(Continued from page 13)

adverse possession or prescriptive easement claim will fail. Many lay people believe that this is exactly backwards; that is, someone should be able to obtain adverse possession or an easement by prescription only where they have consent but not if they lack permission. The "lack of permission" requirement for adverse possession and an easement by prescription is based on the fiction that the interloping landowner is acting as if they own the property in dispute and that after 15 years, the fiction should become reality.

Another interesting recent unpublished Michigan Court of Appeals case involving prescriptive easements was *Watch v. The Gregory S. Gilmore Trust*, decided on October 8, 2019; Case No. 344775; 2019 WL 5061222. The Court in that case noted the general requirements for a prescriptive easement as follows:

> "A prescriptive easement results from open, notorious, adverse, and continuous use of another's property for a period of 15 years." *Matthews*, 288 Mich App at 37. The continuity need not be strictly literal, but rather must only be consistent with "the nature and character of the right claimed" and "the nature of the use to which its enjoyment may be applied." *von Meding v Strahl*, 319 Mich 598, 613-614; 30 NW2d 363 (1948) (quotation omitted). If all of the elements are otherwise satisfied, a prescriptive easement is created and vests immediately upon crossing the fifteen-year threshold, not when an action regarding title is brought. Matthews, 288 Mich App at 36-37; *Marlette Auto Wash, LLC v. Van Dyke SC Properties, LLC*, 501 Mich 192, 196; 912 NW2d 161 (2018). Successive owners may "tack" their periods of adverse use for the purpose of satisfying the fifteen-year requirement, if those successive owners are in privity. Marlette, 501 Mich at 203. Once the easement is established, it runs with the land to subsequent owners, irrespective of their privity. *Id*. at 196, 206. Slip Opinion at pp. 3 – 4.

In addition, the *Watch* case stands for several other propositions regarding prescriptive easements:

A. A prescriptive easement is generally limited in scope, intensity and size by the manner in which it was acquired and the previous use. In other words, the beneficiary of a prescriptive easement cannot materially increase the burden of it upon the underlying property.

B. Casual or sporadic use of a property cannot ripen into a prescriptive easement.

C. Once a prescriptive easement is obtained, it is difficult to abandon. Mere non-use does not extinguish a prescriptive easement.

* * *

For more information regarding adverse possession and easements by prescription, please see the following earlier articles from this magazine:

1. *Adverse Possession and Prescriptive Easements (Spring, 2016)*
2. *Limits on Prescriptive Easements and Private Roads (Winter, 2014)*
3. *New Limitations on Prescriptive Easement Claims (Winter, 2013)*

REPRINTING *Articles from the Magazine*

Frequently, lake associations, the press, educational institutions and others request permission to reprint an article from *The Michigan Riparian* magazine in a newsletter, newspaper, or other publication. In general, *The Michigan Riparian* magazine is relatively liberal in granting permission for such reprints. However, no such reprint can be done without the express prior written permission of the magazine.

If you or your organization wishes to reprint an article from *The Michigan Riparian* magazine, please contact us at (989) 831-5100 or info@mi-riparian.org. If approved, we will notify you by email or letter. When permission is granted, the following language must appear just before or after the reprint:

> "Reprinted with permission of *The Michigan Riparian* magazine from the (indicate the season & year) issue, author's name: _____
> Copywritten by the Michigan Lakes & Streams Association, Inc."

BEAVER LAKE

By Kelsey Richards

If you ever catch yourself in Michigan's northern Lower Peninsula traveling on State Highway 65 N, you will come across a beautiful 665-acre spring-fed natural lake, known as Beaver Lake.

(Continued on page 18)

BEAVER LAKE

(Continued from page 17)

Beaver Lake is one of the deepest lakes in the state of Michigan with the deepest point approximately 77 feet deep. Beaver Lake resides in Alpena County where half of the lake is in Green Township and the other half is in Ossineke Township. There is a main inlet to the lake on the north shore called Rayburn Creek and an outlet along the south shore called Beaver Creek. The water quality of the lake is rather clear. Beaver Lake is a unique lake as the east shore is partially developed and the west shore is heavily wooded. The west shore belongs to a hunt club which consists of approximately 50 thousand undeveloped acres. Many wildlife animals have made the west shore their home including the eagles who made a huge nest a couple yards off the shore line. The eagles are often found scattered throughout the tree tops looking for their next prey. The loon family is often spotted together singing and diving for food. Occasionally deer are seen standing in the lake getting a drink of water and snapping turtles are coming up for air. There are many other wildlife animals spotted around the lake including a little geese family, a blue heron and many different breeds of ducks.

(Continued on page 19)

(Continued from page 18)

Along with the beauty of the animals, almost every night ends with the most vibrant sunsets. The winter months are rather cold and snowy, which sends the snow birds south for the winter. The lake freezes over in the winter, which allows many residents opportunities to ice fish.

On the weekends the lake becomes very lively with fishing, boating, swimming and water sports. However, fishing boats are always out early morning trying to catch one of the many fish living in the lake which includes Bluegill, Largemouth Bass, Northern Pike, Pumpkinseed, Rock Bass, Smallmouth Bass, Walleye and Yellow Perch. Many residents are not local to the area and spend the weekends and holidays at the lake. Beaver Lake has a campground and county park which opens for the season from May 15th through October 1st for people to camp and enjoy the lake. The residents of Beaver Lake are always willing to help each other out. There is a sense of community spread around the lake. Many women meet up at the local diner every Tuesday for lunch and a

(Continued on page 21)

BEAVER LAKE

(Continued from page 19)

game of cards. The lake has an association that was created 47 years ago in 1972. The Beaver Lake Association is a proud member of the Michigan Lakes and Streams Association and a member of the Michigan Waterfront Alliance. There are seven board of directors who oversee the welfare of the lake. The overall mission is to promote the education of riparian property owners and other users about water quality and water safety, to support issues which concern the welfare of the lake, and to support the measurement and evaluation of the hydrological data of the lake.

The Beaver Lake Association sponsors a fishing contest for members and their families during the summer months as well as arranging the Fourth of July boat parade. The Beaver Lake Association recently started creating a newsletter for their members. The newsletter is published monthly throughout the summer and every three months in the winter. It relays information to the members of the association to keep everyone updated on current news involving the lake, activities happening around the lake, and on the welfare of the lake. The members of the association are continuing to grow every year, and this is crucial to the welfare of the lake. Beaver Lake has been providing joyful memories to everyone around the lake, and we have to do our part for the lake to be around for many more years.

The Practical Guide to Lakefront Living:

Enjoying and Conserving Your Lake

Lake ecology, natural shorelines, swimmers itch, fishing with conservation in mind, e-coli bacteria, dock placement, riparian rights, algae blooms, Michigan boating law, watershed management, aquatic invasive species and Special Assessment Districts are just a few examples of the important topics that are covered in this unique guidebook that was written and published by MLSA with Michigan lakefront home owners in mind!

The new guide book may be purchased by visiting the Books and Publications purchase page on the MLSA website available at www.mymlsa.org, or by contacting MLSA Central Office Manager Sharon Wagner at swagner@mlswa.org.

Purchase it now for $20 shipping included

_____/_____/_____/_____

$_____

Exp. _____

Name (please print): _____

Address: _____

Street or P.O. Box Number _____

City _____

State _____ Zip Code _____

Email address: _____

Telephone number: _____

Mail Check or credit card order to:
MLSA
300 N. State St, Ste. A
Stanton, MI 48888

PFAS Chemicals

(Continued from page 14)

Dery, Jessica L., Daniel Gerrity, and Channah M. Rock. 2019. Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS): What consumers need to know. University of Arizona Cooperative Extension Service, Tuscon, AZ. 5pp.

Etzel, RA, ed. 2012. Pediatric Environmental Health, 3rd ed. Elk Grove Village IL: American Academy of Pediatrics, pp. 199)

Greenberg, Jill. 2019. Michigan moves forward on PFAS in drinking water rules. EGLE Press Release. Accessed at: https://www.michigan.gov/egle/0,9429,7-135-3308_3323-500772--,00.html

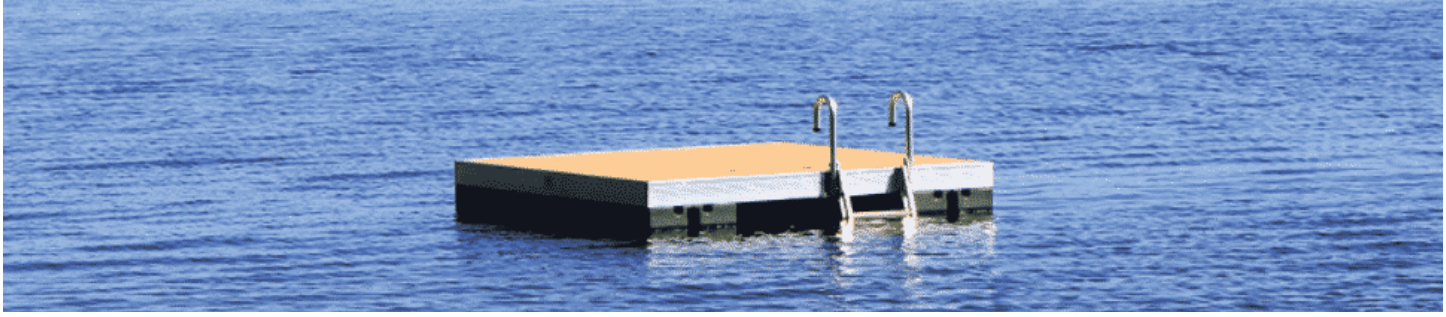
Li, Fan, Jun Duan, Tian Shuting, et. al., 2020. Short-chain per- and polyfluoroalkyl substances in aquatic systems: Occurrence, impacts and treatment. Chem. Eng. Journal 380:1-23, 122506.

Liu, Xiaotu, Mingling Fang, Fangping Xu and Da Chen. 2019. Characterization of the binding of per- and poly-fluorinated substances to proteins: A methodological review. TrAC Trends in Analytical Chemistry, Vol 116: 177-185

Mussabek, Dauren, Lutz Ahrens, Kenneth M. Persson, and Ronny Berndtsson. 2019. Temporal trends and sediment-water partitioning of per- and polyfluoroalkyl substances (PFAS) in lake sediment. Chemosphere 227: 624-629

Scher, Deanna P., James E. Kelly, et al. 2018. Occurrence of perfluoroalkyl substances (PFAS) in garden produce at homes with a history of PFAS-contaminated drinking water. Chemosphere. Vol. 196: 548-555. Accessed at: https://doi.org/10.1016/j.chemosphere.2017.12.179

State of Washington. 2019. Chemical Action Plan for Per- and Polyfluorinated Alkyl Substances – 2019 Updates. 2019. Washington State Departments of Ecology and Health, Governor's Office for Regulatory Innovation and Assistance, Washington.



Swim Rafts

By Clifford H. Bloom, Esq.
Bloom Sluggett, PC | Grand Rapids, Michigan
www.bloomsluggett.com

As a follow-up to my article in the Fall, 2019 issue of *The Michigan Riparian* magazine entitled "Hazards to Navigability", I thought it might be helpful to specifically address swim rafts, water trampolines, and other floating platforms (called "Swim Rafts" in this article).

Of course, Swim Rafts are subject to MCL 324.80163, which prohibits hazards to navigability and allows the Michigan Department of Natural Resources to require the removal or moving of hazards to navigation in inland lakes, including offending Swim Rafts. Seasonal Swim Rafts normally do not require a state permit. However, if a Swim Raft will remain permanently out in a lake or is accidentally left in the lake over the winter (which raft may or may not be frozen in the ice), a state permit is required pursuant to MCL 324.30103. Riparians should also be aware that specific bodies of water may have additional Swim Raft regulations via special watercraft rules under the Michigan Administrative Code.

Can a Swim Raft have night lights? There is no express Michigan statute prohibiting night lights (including solar powered lights) on a Swim Raft. However, such lights could be deemed a "hazard to navigation" under MCL 324.80163. Can Swim Rafts have reflectors? Likewise, there is no state statute prohibiting reflectors on Swim Rafts, and they may be useful as a safety measure.

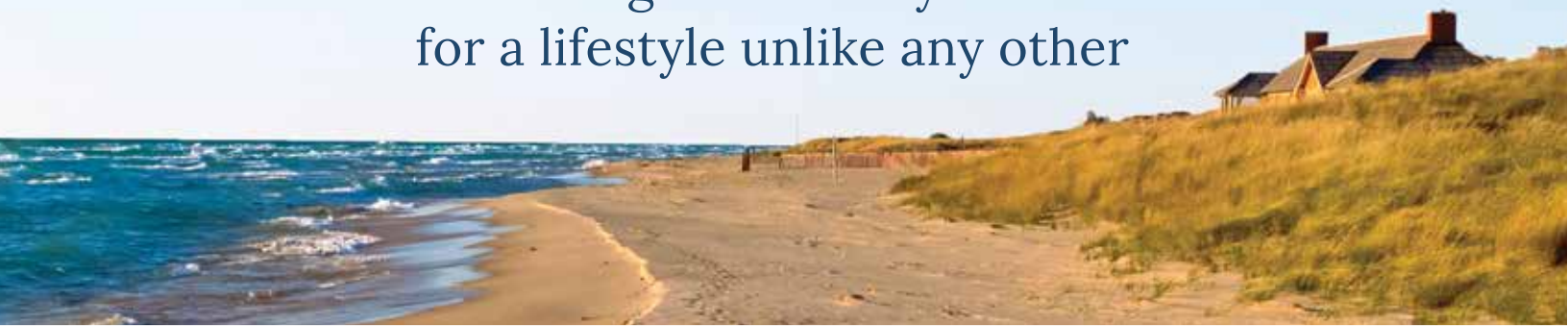
Can Swim Rafts have benches, flags, or similar items? That is not addressed by state law. However, local municipalities (including cities, villages and townships) can regulate (or even ban) Swim Rafts (and their accessories) by local ordinances. Those ordinances can also regulate the size and height of Swim Rafts, their distance from shore, attachments such as flags, benches and steps, and other matters. In addition, a local ordinance can also have "parallel" provisions to state law regarding impediments to navigability.

Riparians who have Swim Rafts should also consider the civil liability potential associated with those items. The riparian's insurance agent should be notified of the presence of a Swim Raft, to make sure that it is covered by the riparian's liability insurance policy. In addition, if a boater is injured or killed due to the negligent or reckless placement or design of a Swim Raft, the owner of the Swim Raft could also potentially face criminal charges.

Finally, a riparian should make sure that his or her Swim Raft is placed only on their own lake bottomlands. Swim Rafts should be placed, maintained, and used responsibly.

Lake ESTATE®

Coverage unlike any other for a lifestyle unlike any other



With borders on four of the great lakes and more than 11,000 inland lakes, Michigan is home to many lakefront properties. Farm Bureau Insurance recognizes the special needs of homes on the lake and their owners, so we developed the Lake Estate® policy. One of a kind protection for your lakefront home.

A Lake Estate® policy from Farm Bureau Insurance Company of Michigan offers protection for the structure of your lakefront home and its contents, and covers responsibility for damage to another person's property or for injuries to another person. Like all our products, this coverage for your lake home comes with our superior claim service.

Your Lake Estate® policy also gives you access to MyHomeWorks™, a free program that includes a home inventory tool along with many energy-saving tools and tips. Learn more about MyHomeWorks™ at myhomeworks.com.

Your property is valuable and we want to help keep it secure. Nolan Kamer Agency can help you decide what type of policy and coverage options are best for you and your home on the lake. There are several credits that are available with an insurance policy from Farm Bureau Insurance. We will let you know what credits you qualify for and the additional savings that may be available to you. Your lakefront home has unique needs. Call us to protect what's important to you.

Nolan Kamer Agency

FARM BUREAU INSURANCE®

(616) 396-4676

Nolan Kamer

Nolan.Kamer@fbinsmi.com

NolanKamerAgency.com

What Happened to the Milky Way?

By Dean W. Ginther

If you have lived in Northern Michigan for a while you may remember walking out on a lakefront dock or into the backyard on a moonless summer night, looking up into the night sky, and being amazed by the sight of the dense band of visible stars in our galaxy known as the Milky Way. These days, the Milky Way is still visible most nights in Northern Michigan but it does not appear to be nearly as bright as in the "old days". See the picture below, which was taken recently looking toward the south end of Elk Lake.

Looking toward the south end of Elk Lake at night -- photography by Dean Ginther.

Can you see the Milky Way rising from the horizon? It is barely visible just to the left of the massive vertical light plume. Note: a camera set on a tripod for long exposure, like this image, captures detail in the night sky which is normally not visible to the human eye.

Is some cosmic phenomenon gobbling up the stars and wiping out the night sky? That would be big astronomical news, if true, but it is not. The stars appear to be disappearing largely because human vision can no longer discern their presence due to the increasing levels of ambient light produced by man-made lighting. Essentially, while the overall brightness of the stars remains consistent (with considerable variation from star to star), the increasing ambient light levels overwhelms our visual capacity to detect the less bright stars. The brighter the ambient light, the fewer stars we can detect. In many areas of the United States, very few stars are visible at night.

In addition to an increasingly bright night sky, there are additional negative effects of being surrounded by artificial night lighting. Many people find it difficult to get to sleep at night, particularly as they age. Some suffer from sleep deprivation due to insomnia, which has many negative health effects. If you live next to or across from nighttime lighting, research shows that your sleep may be disrupted. The same is true for animals, whose diurnal patterns of activity can be adversely affected by nighttime lighting.

(Continued on page 27)

(Continued from page 26)

Artificial night lighting may have other serious health effects. In a study published by the Asian Pacific Journal of Cancer Prevention (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5454613/) the conclusion was:

> Artificial light at night is significantly correlated for all forms of cancer as well as lung, breast, colorectal, and prostate cancers individually. Immediate measures should be taken to limit artificial light at night in the main cities around the world and also inside houses.

Unnecessary night lighting also is very wasteful. The following quote is from the International Dark-Sky Association (IDA):

> Lighting that emits too much light or shines when and where it's not needed is wasteful. Wasting energy has huge economic and environmental consequences. In an average year in the U.S. alone, outdoor lighting uses about 120 terawatt-hours of energy. That's enough energy to meet New York City's total electricity needs for two years!
>
> The IDA estimates that at least 30 percent of all outdoor lighting in the U.S. alone is wasted, mostly by lights that aren't shielded. That adds up to $3.3 billion and the release of 21 million tons of carbon dioxide per year! To offset all that carbon dioxide, we'd have to plant 875 million trees annually.

So, is there a way to get better sleep at night, avoid potential conflicts with your neighbors, save money, and be able to appreciate the beautiful northern night sky? Of course – and it is largely under your control. Even better, it an easy act to perform.

IF YOU ARE NOT OUTSIDE AT NIGHT, THEN DON'T LEAVE YOUR OUTSIDE LIGHTS ON.

How easy is that? It requires just a flick of the light switch. If you do venture outside at night and turn on your outside lights for greater visibility, make sure that your lighting:

- is aimed down and illuminates only the smallest area needed for visibility and safety;
- uses a luminaire (i.e; a complete light unit) which is shrouded so no light is emitted horizontally;
- uses a luminaire which has wattage/power/brightness no greater than needed for immediate visibility and safety;
- uses a luminaire which has a color temperature and intensity which does not produce harsh glow;
- uses a luminaire which does not allow light to trespass into your neighbor's property.

DOCK LIGHTING

Private docks and piers should be lighted only when residents are present. It is particularly important that dock lighting be shielded, not produce reflections on the water or shine into the water, be of low wattage/power, and be of a color temperature, such as ambler or yellow, which reduces glare. For those concerned with dock–boat collisions at night, which are extremely rare, reflectors and flags are excellent alternatives to lighting. Michigan law requires boats when operating above no wake speeds to stay at least 100 feet away from docks. Boats approaching dockage at night should be equipped with hand held lighting to illuminate docks and hoists, as needed.

SOLAR LIGHTS

With the advent of LED lighting, solar lights have become widely and relatively cheaply available. Most solar lights have light sensors to turn the light on at dusk and turn it off at dawn. Unfortunately, most solar lights cannot be manually turned off during the night. For this reason, outdoor solar lights which cannot be turned off when residents are absent are not recommended. If solar lights are used, they should be shielded and of low power.

(Continued on page 28)

(Continued from page 27)

LIGHTING AND SECURITY

Many people believe that adding outdoor lights or increasing the intensity of existing lighting will deter the likelihood of trespass or beak-ins. In an article written by Paul Bogard for the Minneapolis Star Tribune in 2014 (http://www.startribune.com/the-tension-between-nighttime-lighting-and-public-safety/241561501/), he notes:

> When the goal is to improve our safety at night, installing brighter lights is rarely the answer. Because some light at night can undeniably improve our safety, we too often assume that ever-increasing amounts of light will make us ever more secure. Unfortunately, there is almost no research to support this belief. What research we do have on the relationship of light at night and crime is equivocal at best, and as often suggests that reducing lighting levels — rather than increasing them — improves safety most.

For example, a study done in West Sussex UK indicated that adding all-night lighting to a residential area helped residents feel safer but actually resulted in a 55% increase in crime compared to control areas and the country as a whole. Other studies also indicate that adding nighttime lighting does necessarily result in reduced crime (see http://cescos.fau.edu/observatory/lightpol-security.html). Marcus Felson, a professor at Texas State University and an expert in criminal justice, states that:

> The lights would only help robbers see their actions. If you're in a rural area, you're basically in a secluded area — you're better off turning off because the lights would help an intruder actually see.

A good way to reduce home burglaries, according to Felson, is to introduce yourself to your neighbors so they'll be familiar with who goes in and out of the house. You can also tell them if you're out on vacation so they can look out for you.

(Continued on page 29)

(Continued from page 28)

ORDNANCES AND LAWS TO PROTECT THE DARK SKIES

Sixteen States have laws related to the regulation of nighttime lighting and protection of the dark sky. Michigan does not, so it is up the Counties and Townships to address the diminishing dark skies. Emmet County has been a leader in dark skies advocacy and protection and it also is home to the only internationally designated Dark Sky Park (Headlands Dark Sky Park). To view the Emmet County Outdoor Lighting Ordinance see: https://www.emmetcounty.org/wp-content/uploads/2015/11/Outdoor-Lighting.pdf

Peninsula Township in Grand Traverse County also has a dark sky ordinance. See: Peninsula Township Zoning Regulations section 7.14 Exterior Lighting http://www.peninsulatownship.com/uploads/1/0/4/3/10438394/penizo15.ord.pdf

Further north in the U.P., Marquette Charter Township has enacted the Marquette Charter Township Outdoor Lighting Ordinance. See: https://marquettetownship.org/wp-content/uploads/2015/03/OUTDOOR-LIGHTING-ORDINANCE.pdf

IDA and the Illuminating Engineering Society of North America have developed a Model Lighting Ordinance to address the need for strong, consistent outdoor lighting regulation in North America. See: http://darksky.org/our-work/public-policy/mlo/

Milton Township has a lighting ordinance but residential properties are currently exempted.

Wouldn't you love to see your lake featured here? In word and picture, send us your story to swagner@mlswa.org. (Send pictures in jpeg or 300 dpi.)

The Beach Walker Case – Almost 15 Years Later

(OR, "THE HIGH WATER BLUES")

By Clifford H. Bloom, Esq.
Bloom Sluggett, PC | Grand Rapids, Michigan
www.bloomsluggett.com

On July 29, 2005, the Michigan Supreme Court adopted its famous decision regarding members of the public walking along the Michigan shorelines of the *Great Lakes in Glass v Goeckel,* 473 Mich 667 (2005). In that case, the Court held that members of the public can walk along the shorelines of the Great Lakes within Michigan between the water and the ordinary high water mark, even over the objection of the owner of the adjoining riparian property. Even though that decision is now almost 15 years old now, it is amazing how few problems it has caused for riparian property owners along the Michigan shores of the Great Lakes.

With the water level of the Great Lakes currently at record levels, the decision in *Glass v Goeckel* now has a bittersweet meaning. On virtually every Great Lakes shoreline within Michigan, the water level is at or above the Great Lakes' ordinary high water marks. Therefore, there is virtually no Great Lakes shoreline that constitutes dry land between the lake waters and the ordinary high water mark within which members of the public can walk without the permission of the owner of the adjoining riparian property. Accordingly, until the levels of the Great Lakes drop sufficiently to provide a walkable area on dry land between the lake waters and the ordinary high water mark, members of the public will likely not be able to walk on dry land along the shoreline of the Great Lakes in Michigan without the consent of the owner of the adjoining riparian property. Until the levels of the Great Lakes drop significantly on most shorelines, a walking member of the public can avoid trespass only by either walking in the water or obtaining the permission of the riparian property owner involved to walk on his or her shoreline landward of the ordinary high water mark (i.e. on the uplands).

* * *

2019's high water conditions for the Great Lakes raises another important issue. Many Michigan statutes, municipal zoning ordinances and other laws and regulations refer to the "ordinary high water mark" or "high water mark" of a lake. The definition of those phrases, as well as the numerical related water elevations involved, are very important for a variety of different purposes. For example, the "ordinary high water mark" or "high water mark" comes into play in the following circumstances:

1. Where members of the public can walk on the shorelines of the Great Lakes.
2. Zoning or other government setbacks for new buildings and structures from a body of water.
3. When state permits are required for activities lakeward of the ordinary high water mark or high water mark.

In addition, countless legal descriptions for property deeds and easements throughout Michigan rely on the phrases "ordinary high water mark" or "high water mark".

Given that Michigan has now experienced a so-called one hundred year cycle for the high water mark in many Michigan lakes and on the Great Lakes twice within only 33 years (1986 and 2019), will both science and the law have to "reset" what constitutes the "ordinary high water mark" and "high water mark" for every Michigan inland lake and each of the Great Lakes? If high water has become the norm, then the old bench marks for the "ordinary high water mark" or "high water mark" will become degraded or even meaningless. Should the new definitions now be based on a 50-year cycle? A 30-year cycle? Or some other benchmark?

Some might ask why does this matter? High water is a physical reality. However, if the legal benchmark for high water points is moved further inland due to extraordinarily high water in a given year or over a new cycle, that new benchmark will likely stay in the same place, even when the waters recede. Therefore, even if the waters recede significantly over the next few years, the changed benchmark line for the ordinary high water mark or high water mark would still be located further inland on a property.

(Continued on page 31)

(Continued from page 30)

Changing the definition of the benchmarks for these phrases will have significant real world impacts. If the ordinary high water mark and high water mark benchmarks for inland lakes and the Great Lakes are changed (presumably, the lines would be moved further inland), it would prompt the following:

a. New buildings and structures would have to be set back even further from a body of water.
b. Permits for altering the lakefront would become more frequent.
c. Waterfront property would effectively have less land area to be included in legal descriptions.
d. What is considered Great Lakes bottomlands could change.
e. It could alter where dredged lake spoils can be disposed.
f. The definition or location of "shoreline" for statutory and other purposes might change.
g. It could affect where oil and gas drilling can occur near lakes.
h. Sand dune permits could change.
i. Soil erosion and sedimentation permits could be required more often.
j. New wetlands may be created.

Whether the phrases "ordinary high water mark" and "high water mark" should be changed (and if so, to what) will likely be a contentious issue in the future, not only from a scientific and physical perspective, but also from a legal standpoint as well.

* * *

As of the date of printing of this article, experts on water levels for the Great Lakes believe that it is highly likely that the lake levels for Lake Michigan, Lake Huron and Lake Superior could be even higher in 2020 than they were in 2019. Should that occur, it could have disastrous effects throughout Michigan. Hopefully, state officials have begun planning and acting for that possibility, including setting aside additional emergency funds, further streamlining the State permitting process for seawalls, shore rocks and other wave barriers, seeking additional emergency funding from the federal government and other emergency measures. Waiting until next spring to act may very well be too late.

THE MICHIGAN RIPARIAN
www.mi-riparian.org

300 N. State Street, Suite A

Stanton, MI 48888

NON-PROFIT ORG.
U.S. POSTAGE
PAID
LANSING, MI
PERMIT #975

NOTE TO SUBSCRIBERS:
Please call The Michigan Riparian office at 989-831-5100 *or e-mail* swagner@mlswa.org *with any changes regarding your mailing address.*