



# MICHIGAN WATERFRONT ALLIANCE

## NEWSLETTER

### JANUARY 2019

[www.mwai.org](http://www.mwai.org)

**MWA Mission Statement “This corporation is formed to protect, preserve and promote the wise use of inland waters – lakes, streams, rivers, creeks and the waters and bottomlands of the state of Michigan.**

### Presidents’ Corner

By Bob Frye

Dear MWA Lake Association Members, Individual Members and Friends,

I am glad to report that The MWA / DNR Aquatic Invasive Species Task Force meeting that was held on Oct 23 has yielded some positive results. including the following consensus items:

DRAFT points of consensus

We agree that:

- 1) Michigan needs to strengthen statutory legislation and enhance resources for managing and preventing the introduction and spread of aquatic invasive species.
- 2) If there are considerations of new public access sites by DNR, part of the process of due diligence will include evaluation and implementation of best management practices for the prevention of AIS.
- 3) Not only the state but public and private access point managers and marinas need to work together to reduce the introduction and spread of invasive species and implementing best management practices at all launch sites.
- 4) A method should be developed to share the costs associated with managing AIS on inland lakes to maintain recreational and environmental sustainability.
- 5) Form a public/private coalition with the Michigan Waterfront Alliance and other interested organizations to provide guidance to the DNR in facilitating the steps noted above.
- 6) An initial document outlining definable steps and objectives toward the above consensus items will be drafted by April 15, 2019 and include a 2019 action plan and timeline.

I am also glad to include (below) in this communication a memorandum analysis regarding the Michigan Environmental Protection act and the Public Trust Doctrine of potential Legal recourse against the state of Michigan and its agencies for failing to protect Michigan waterways from harm by aquatic invasive species.

The purpose of the memorandum is to make Lake associations and Riparian’s aware of possible legal actions that may be taken to hasten action by the state to do more to prevent and remediate the growing Aquatic Invasive Species disaster. If you thought Eurasian Milfoil was a serious problem, wait until you find Starry Stonewort in your Lake!

Please take the time to read the Memorandum, I think you will find it very informative.

Sincerely,

Bob Frye, Michigan Waterfront Alliance President

[roberttfrye@gmail.com](mailto:roberttfrye@gmail.com)

## MEMORANDUM

**TO:** Michigan Waterfront Alliance, Michigan Lake and Stream Associations, and Other Interested Parties

**FROM:** Dane Carey, Dingeman & Dancer, PLC William Carey, Carey & Jaskowski, PLC

**DATE:** October 10, 2018

**RE:** Michigan Environmental Protection Act and Public Trust Doctrine: Analysis of Potential Legal Recourse Against the State of Michigan and its Agencies to Protect Michigan Waterways from Harm by Aquatic Invasive Species

This memorandum is intended to provide an overview of the legal remedies that can be used to compel an appropriate governmental response to the rapid spread of aquatic invasive species (“AIS”) throughout Michigan waterways. The discussion below focuses on the viability of bringing a legal action against the State of Michigan and its various departments for (1) facilitating the introduction of AIS and (2) failing to take appropriate action to prevent the resulting environmental impairment.

### Brief Answer

Under Michigan law, a viable cause of action can be maintained against the State for failing to uphold its duties under the Michigan Constitution and Michigan Environmental Protection Act (“MEPA”). MEPA provides universal standing for private individuals and other legal entities to maintain actions in the circuit courts for declaratory and other equitable relief against anyone, including the State and its departments, for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction.

### Legal Analysis

The questions considered stem from the State’s aggressive policy of expanding public access to waterways by adding new boat launch sites through the purchase and development of waterfront property or opening up never-used access points at streets dedicated to the public under old plats with limited dedications. Boat launch sites are considered to be one of the primary causes of AIS introduction in inland lakes. The State acknowledges this reality but nevertheless continues to emphasize the development of public access sites. Furthermore, the State has thus far failed to commit basic resources or implement adequate policies to address the negative consequences of opening new launch sites and the resulting increased opportunity for AIS introduction.

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The State has continued to engage in a practice of expanding the number of launch sites despite a critical mass of growing concerns about AIS. The purpose of this letter is to evaluate the possible legal mechanisms that can be used to either persuade the State to voluntarily change its policy priorities or obtain a court order to preclude the State from contributing to further proliferation of AIS and compel implementation of appropriate strategies and policies to address the serious environmental effects of AIS.

Based on an extensive review of relevant Michigan law, the most effective way to accomplish this objective would be to bring a lawsuit under the Michigan Environmental Protection Act (“MEPA”), which authorizes courts to prevent conduct that harms the environment based on evidence presented in litigation.<sup>1</sup>

The purpose of MEPA is to “protect . . . the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.” MEPA imposes a duty on both public and

private actors “to prevent or minimize degradation of the environment.”<sup>2</sup> MEPA implements the Michigan Constitution’s command to the legislature to protect the state’s natural resources. Const 1963, art 4, §52 declares:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

“This constitutional provision imposes a duty on the Legislature to protect the water and other natural resources from pollution, impairment, and destruction.”<sup>3</sup> In *Ray v Mason County Drain Commissioner*,<sup>4</sup> the Michigan Supreme Court explained the significant rights and duties provided under MEPA:

Michigan’s Environmental Protection Act marks the Legislature’s response to our constitutional commitment to the conservation and development of the natural resources of the state....

The Act provides private individuals and other legal entities with standing to maintain actions in the Circuit Courts for declaratory and other equitable relief against anyone for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

The Act also empowers the Circuit Courts to grant equitable relief, or . . . impose conditions on the defendant that are required to protect the air, water and natural resources.<sup>2</sup>

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As noted above, MEPA grants universal standing to any person to bring an action against any other person for the protection of the environment.<sup>5</sup> Specifically, MCL 323.1701(1) states as follows:

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

“To prevail on a MEPA claim, the plaintiff must make a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources.”<sup>6</sup> The critical factor in whether such a claim is able to survive is whether the lawsuit alleges sufficient likelihood of environmental harm supported by sound scientific evidence and expert opinion on causation.<sup>7</sup>

To bring an action against the State in this case, a plaintiff would need to show that the State’s activities are leading to impairment of the water and other natural resources by the introduction and spread of AIS. The most compelling argument to establish standing seems to be that the State is actively contributing to the AIS problem by opening up new access points without providing resources to protect against the increased opportunity for environmental degradation from AIS.

To properly present such an argument, a potential plaintiff would need to secure a well-regarded expert to prepare a report and provide testimony to establish the key conclusion: that more access sites leads to more AIS. This expert analysis should be based on actual evidence from examples in Michigan waterways, as opposed to abstract research and theories of AIS in other contexts.

A plaintiff need not show certain harm to make a prima facie case.<sup>8</sup> The standard in MEPA actions is “probable rather than guaranteed harm.”<sup>9</sup> Conduct that is “likely to pollute, impair, or destroy” the environment includes “probable” damage to the environment.<sup>10</sup>

The word “impair” in MEPA means to “affect in an injurious manner.”<sup>11</sup> As an example, fogging of the air and icing of roads have been held to not be an impairment of any natural resource.<sup>12</sup> This memorandum does not provide an opinion as to whether aquatic invasive species have an injurious affect on the environment, but the anecdotal evidence seems to conclude that it does. Though that opinion may seem obvious, this issue should not be overlooked and would need to be analyzed and explained through scientific evidence and expert witness opinion. Statutes such as the Inland Lakes and Streams Act (Part 301) and the Wetland Protection Act (Part 303) can serve as aids to a trial court in establishing a common-law impairment standard.<sup>13</sup>

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In the event that a plaintiff is able to establish the requisite evidentiary showing, MEPA not only authorizes declaratory and equitable relief, but also allows the court to direct the adoption of corrective standards, impose conditions on a defendant to protect the environment, and prohibit certain conduct from polluting, impairing, or destroying the environment.<sup>14</sup> MEPA does not impose specific standards, but authorizes courts to determine adverse environmental effects and issue appropriate relief.<sup>15</sup> MEPA allows “courts to fashion standards in the context of actual problems as they arise in individual cases.”<sup>16</sup> MEPA is a legislative recognition of the court’s power to recognize anticipated harm and fashion suitable remedies.<sup>17</sup>

MEPA also allows a court to undo environmental harm that has been done as well as to prevent harm to the environment before the harm has occurred. Restoration of the environment is an appropriate remedy under MEPA.<sup>18</sup> Restoration will not be ordered, however, where the effectiveness of the restoration is questionable.<sup>19</sup> Notably, MEPA does not provide for an award of money damages. Instead, MEPA plaintiffs typically seek injunctive and declaratory relief to prevent further harm to the environment through the activity at issue.

### **Strategic Recommendations**

As noted above, the first step in the process of persuading or litigating a change in behavior with the State of Michigan is to retain a highly regarded environmental expert. Once that expert has been retained, he or she will need to prepare an exhaustive study that reaches a near inescapable conclusion that the State, through negligence and nonfeasance, is creating an environmental nuisance or impairment. This process may take up to six months after the expert is retained. However, to move forward without an expert and supporting report would be futile.

Once a report is obtain supporting the anecdotal consensus that AIS is being introduced through the activities of the State at public boat launches, the State or its departments should be engaged in a professional but demanding dialogue. The essence of the dialogue is to demand, utilizing the support of the expert’s report, that the State undertake immediate action to correct its negligence and nonfeasance. The State should be given a reasonably sufficient period of time to make a binding commitment relative to any demands of remediation and correction. A 90-day period of time for that purpose would not be out of the ordinary.

If the period of dialogue does not result in a committed action plan being advanced by the State, then litigation should be considered. If this matter is litigated, we recommend that several project sites be identified as “test” cases in controversy. Some consideration should be given to finding a judicial venue that might be expected to offer a sympathetic view of the position being advanced.<sup>4</sup>

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### **Timeline and Costs**

Assuming for the sake of discussion that litigation is necessary to compel performance by the State, one might anticipate two years of litigation in the circuit court. Certainly, matters can be resolved on a more prompt basis, but the State does not have a great track record of mediating settlements on a pre-trial basis.

MWA should anticipate expert costs to range from \$25,000 to \$30,000. MWA should expect to invest litigation costs of \$50,000 to \$60,000. Both of the figures provided above are estimates that will need to be refined in the event an expert is retained and litigation is the only alternative to a solution.

Respectfully submitted,

Dane Carey  
Dingeman & Dancer, PLC

William Carey  
Carey & Jaskowski, PLC



### **MWA Legislative Update – January 2019**

As of this writing (December 18), the current lame-duck session of the Michigan Legislature is turning out to be one of the busiest lame-duck sessions in recent memory, in large part due to the upcoming transition in January from complete Republican control of state government to a split between Gov.-Elect Gretchen Whitmer (D-East Lansing) and continued Republican control of both chambers of the Legislature (58-52 in the House and 22-16 in the Senate). A number of legislative initiatives are currently in play that represent efforts to tip the balance of political power between the Legislative and Executive Branches of government before January 1, and lame duck session is often the time when bills too politically sensitive to move prior to Election Day in November see new life.

MWA is monitoring a number of bills including the following:

- Senate Bill 1072, sponsored by Sen. Mike Kowall (R-Oakland County) which would do the following:
  - Update and enact restrictions on the sale of non-native aquatic species,
  - Prohibit transport of watercraft over land without removing drain plugs, require draining water from live wells and bilge, and ensure watercraft, trailers, and any transporting device are free of aquatic organisms,
  - Prohibit people from releasing baitfish into Michigan waters, other than in waters where they were caught,
  - New DNR posting requirements of regulations and prohibitions,

- Registration of individuals importing or selling live aquatic species, and
- Allow law enforcement officers to require owners or operators to comply with the aforementioned requirements,

MWA is supportive of SB 1072, which passed the Senate 38-0 and passed the House 106-3. The bill is now awaiting concurrence in the Senate before heading to Governor Snyder for his signature.

- Senate Bill 1136, sponsored by Sen. Dave Robertson (R-Genesee County) would create a grant program for the control and eradication of aquatic invasive plant species within Michigan inland lakes. Eligible applicants would need to be legally constituted lake associations, property owners associations, home owners associations, lake boards, nonprofit organizations, or special assessment districts.
- Eligible projects would need to meet the following requirements:
  - Public access must be available on the inland lake,
  - Vegetation management goals must be in place,
  - Survey, control, eradication, and documentation activities must be completed by a qualified scientist, technician, licensed commercial aquatic applicator, or university representative,
  - Best practices must be utilized for control or eradication, and
  - Products utilized must be authorized by both EPA and DEQ.
- The bill creates a fund and guidelines for grants to applicants but does not yet specifically create a dedicated fund source.

MWA supports the bill as a long-overdue first step in creating a framework for state government to assist riparians who currently bear the burden of all costs associated with treatment of invasive species in inland lakes. While the bill is not perfect, we look forward to building on these important first steps next year and seeking state funding to assist riparians with control and treatment. SB 1136 passed the Senate 36-1, and is awaiting action on the House floor.

In addition to monitoring these and other bills important to inland lakes in Michigan, MWA successfully lobbied earlier this year to save the Cooperative Lakes Management Program in the DEQ budget and is continuing to work in cooperative fashion with the DNR Invasive Species Task Force to foster more cooperation between state government and riparians.

All in all, 2018 was a great year for MWA, and our success due to the efforts of riparians like YOU who have taken time to support our efforts either financially or by taking time to contact your legislators to share your views on these and other important issues. Next year brings a number of new dynamics into play as Governor-Elect Whitmer prepares to take office, and we look forward to continuing our momentum into the new legislative session.

The Michigan Waterfront Alliance made great strides in 2017 to promote further cooperation between riparians and the Michigan Department of Natural Resources. First and foremost, in early 2018 we will be meeting with the DNR to establish a Joint Task Force to address numerous issues directly affecting riparians with a focus on management of aquatic invasive species and state policies governing boating access sites on inland lakes. We plan to meet regularly doing forward to promote more cooperation and communication between the DNR and riparians as well as action on issues directly affecting not only our quality of life, but just as importantly the quality and preservation of our treasured inland lake ecosystems.

The establishment and development of the Joint Task Force is in large part due to your overwhelming response to MWA's request for a letter writing campaign in 2017 informing the DNR of a need to reform inland lake management in Michigan. Thank you for your continued efforts, as your letters have made a difference and will continue to do so well into the future!

We also plan to step up our activities before the Michigan Legislature in 2018 educating not only current but future legislators of the need to increase state focus on (and funding for) management of aquatic

invasive species, given the financial burden of such management continues to unfairly be borne solely by riparians.

2018 is shaping up to be quite a wild election year. MWA encourages you to reach out to your local candidates for local and state offices to share your concerns with management of inland lakes. The candidates knocking on your doors and filling up your email inboxes and/or social media threads may soon be voting on policies that directly affect your property rights and the management of inland lakes and streams in Michigan. If you need advice on how to contact legislators, MWA is ready and willing to provide you with talking points on the issues affecting you before state government and the most efficient ways to convey your concerns to your legislators. 2017 was a productive year for MWA, and look forward building upon our work thought the last year to continue advocating for riparians in 2018.

Matt Kurta

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(For review of other watershed legislative matters, see our web site - <http://www.mwai.org/> )

**YOUR MEMBERSHIP IS DUE NOW!**



**Membership Application**  
(Dues for 2019 are due January 2019)

**The annual dues for individual membership In Michigan Waterfront Alliance are \$50. Lake Association Membership is \$100. Commercial, Individual & Legal Donations Are Appreciated.**

Please Print:

|                |            |   |                                    |
|----------------|------------|---|------------------------------------|
| Last Name      | First Name | ( ) _____ - _____<br>Day Phone            | ( ) _____ - _____<br>Evening Phone |
| Street Address | City       | State                                     | Zip Code      Email Address        |
| County         | Township   | Lake or Stream Association if established |                                    |

List your top concern and return to MWA

Make Checks payable to: **Michigan Waterfront Alliance**  
Mail to: **MWA, P.O. Box 369**  
**Fenton, MI 48430**

|                       |                 |
|-----------------------|-----------------|
| Individual (\$50)     | _____           |
| Lake Assoc. (\$100)   | _____           |
| Corp. (\$200)         | _____           |
| Legal Assist. Fund    | _____           |
| <b>Total Enclosed</b> | <b>\$ _____</b> |

Jan 19

**SUMMARY MWA MEETING(S)**



**MICHIGAN WATERFRONT ALLIANCE, INC. BOARD MEETING**

**September 11, 2018 –11:49 am –**

**Karoub, Lansing**

Minutes (unapproved)

1. Meeting called to order. Present were Frye, Beckwith, R. Brown, S. Brown, Cornell, Nordeen, Mahoney. Excused were W. Carey & Highfield. Also

- present were M. Kurta of Karoub Association.
2. Minutes of 5/24/18 were approved.
  3. Treasurer's Report was presented for review and accepted.
  4. R. Frye updated the group regarding conversations with Ron Olson (DNR) about the Task Force and other related items. Bob believes that getting cooperation from Waterways is very good. After discussion, Dane Carey was asked to build a framework for a memorandum expressing our concerns and potential actions to ensure execution of the public trust responsibility. It was noted that Ron Olson poke at MLSA Annual meeting in April of this year and is committed to Task Force. It was noted that follow up on MWA Facebook sight will be pursued.
  5. M. Kurta reported that the governor is supporting SB 943 increasing solid waste landfill fees. MWA supported this SB 943
  6. Membership status was reviewed by Dick Brown. Brown also discussed the upcoming annual mailing.
  7. S. Brown reviewed the upcoming Inland Lakes convention
  8. C. Cornell reported the progress of the swimmer itch partnership.
  9. Future meeting will be set in mid - November at 10:00am at Karoub Associates.
  10. Meeting adjourned at 2:00 pm

**Fill out the enclosed Green Envelope & Take a copy of the MWA membership form on page # 7 and share with your friends and neighbors.**

**MICHIGAN WATERFRONT  
ALLIANCE,  
ONLY THROUGH  
YOUR ACTIVE INVOLVEMENT,  
IS YOUR LAKE PROTECTED.  
Your Support Does  
Make a difference!  
It's an investment that pays off!**

Lobbyists are NOT FREE, but individual membership in MWA is VERY CHEAP; it costs just \$50 a year, your lake Association is only \$100. Think of it as an insurance policy against the erosion of the value of your riparian rights of your valuable property.

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