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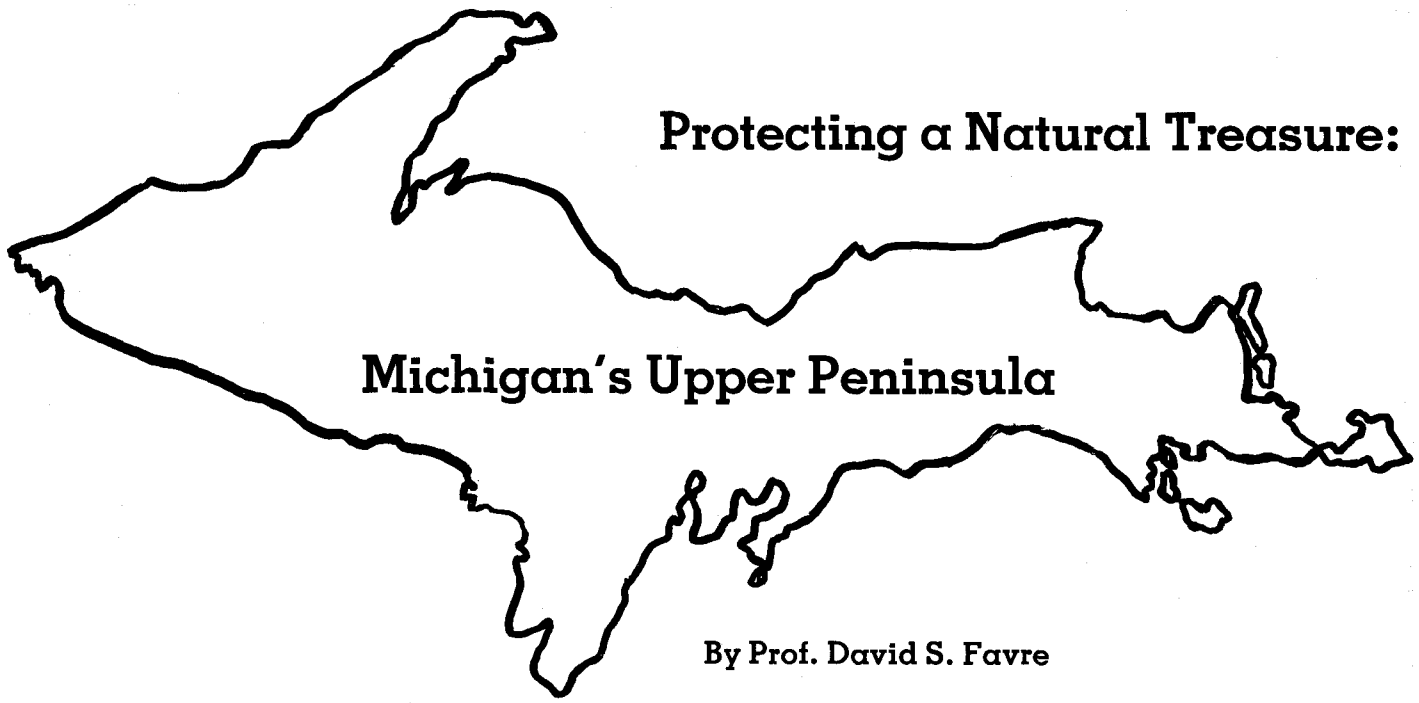
Protecting a Natural Treasure: Michigan's Upper Peninsula

David S. Favre
Michigan State University College of Law, favre@law.msu.edu



Protecting a Natural Treasure:

Michigan's Upper Peninsula

By Prof. David S. Favre

As most readers of this Journal are aware, many through personal experience, the Upper Peninsula holds a great wealth of natural resources. These resources are of two kinds: Those which are commercially valuable, such as mineral deposits, and those of intangible value, like Pictured Rocks Park along Lake Superior's shoreline, which is of such striking beauty.

Some resources, such as sand dunes and peat bogs, for example, are important to different and competing interests. In certain locations they have potential value as a raw material or a commercial product, and are also important to the continued viability of natural ecosystems. These two uses of the same resource are incompatible. To retain them in their natural state foregoes their value as a commercial resource; to commercially utilize them destroys their value as natural ecosystems.

Given the pressures of economic forces and the finality of destruction, our society has in certain situations decided to intervene in the decision-making process of the private landowner. Most often the conflict arises when the owner wishes to consume a natural resource which society has decided should be retained in a natural state. The mechanism for this intervention has, of course, been passage and administration of various laws.

From the point of view of society, some of the potential uses of Upper Michigan resources include:

1. Economic exploitation by consumption.

2. Economic exploitation by in situ use — tourism, etc.

3. Preservation for the potential information and knowledge to be realized through scientific investigation.

4. Preservation in order to maximize the options available to future generations.

5. Preservation in order to protect the viability of existing ecosystems.

How society has sought through its Legislature to balance these interests can be determined in large measure by examining the laws which deal with natural resources. Federal laws will not be examined because, while important, they are not as controlling in unpopulated areas as they are in built-up urban areas.

Two major legal concepts are the basis for this discussion. First, in accordance with common-law principles of land ownership, individual property owners may do as they wish with their land and all located thereon or there under. Second in accordance with the concept of state police power, society may limit or redefine the rights of the individual when it is deemed to be in society's interest. While articulation of the scope or extent of police power is usually left to the Legislature, on the subject of natural resources there is a clear statement in the Michigan Constitution of the policy to which the police power must conform:

> **Sec. 52. 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.[1]**

Note the tension in the first sentence. Both are important, and neither conservation nor development is to be pursued without regard to the other.

The first sentence, suggesting a balance between two competing philosophies, does not suggest how that balance should be struck. The second sen-

tence sets parameters or how to balance the two approaches: Development of natural resources and other economic activities are to be fostered and promoted unless they will result in the pollution, impairment and destruction of a natural resource of the state.

Consider the harvesting of trees, one of the Upper Peninsula's most abundant resources. Section 52 in the Constitution would suggest that it is proper for the trees to be economically utilized. The limit of economic exploitation would be reached, however, if a proposed plan would impair or destroy the natural resource represented by the trees themselves, by precluding healthy regeneration, or if the cutting of the trees would impair or destroy another natural resource.

Perhaps one section of forest should not be harvested because it is the location of a nesting site for a bald eagle, or is part of a state or federal park, or is an important part of a city's water supply.

The provisions of the Constitution are not self-executing; rather, the Legislature must give shape and form to its mandate by the passage of legislation. The general approach dictated by our political process is to focus on a specific resource when the conflict between destruction and preservation becomes particularly heated. (This is the "management-by-crisis" approach to government. The one very important exception to this approach is the Michigan Environmental Policy Act, which will be discussed below.)

The problem with the single resource approach is that different standards and procedures are used with respect to different resources; there is no cumulative analysis of a given proposed project upon multiple resources. There is no state law requirement comparable to the federally-required environmental impact statement.

Most natural resources are related to real property, but wildlife is also a natural resource. In 1974 Michigan passed its version of the Endangered Species Act,[2] giving the Natural Resources Commission power to list "those species of fish, plants and wildlife" determined to be endangered or threatened within the state.[3] Once an animal or plant is listed, the Act prohibits its "taking" by any party.[4]

The Michigan Act does not provide for designation of critical habitat, as required under the federal law,[5] thus the state Act, though it provides nearly absolute protection for listed species, does not protect the habitats the species need in order to assure long-term survival.

There is no balancing of interest under this Act. If a species has reached the point of being endangered it is listed and protected without regard to economic consequences.

Unlike the Endangered Species Act, most state laws deal with the protection of natural resources by granting or denying permits for specific activities in specific locations. The benefits of the permit approach are several. The laws can be simpler, since not every possible fact variation needs to be set out. There is less likelihood that a permit denial will be considered an unconstitutional "taking." Most important, it allows for the balancing of individual and state interests in each particular fact situation.

Responsibility for performing this balancing decision in granting or denying a permit has been delegated by the Legislature to various administrators or boards, who must make their decision based upon the standards in the particular laws.

The Inland Lakes and Streams Act restricts the destruction and development of lakes and streams larger than five acres, not including the Great Lakes.[6] If you are a landowner within its provisions, you must obtain a permit to dredge or fill bottomland, to build a marina or other structure or an artificially constructed waterway.

The permit may not be granted if:

1. The project adversely affects the public trust or riparian rights, or

2. The project will unlawfully impair or destroy any of the waters or other natural resources of the state.[7]

This is a lawyer's paradise. What is a "riparian right?" When is it "adversely affected?" Does the statute contemplate trivial, substantial or measurable impacts?

"Unlawfully" is an unhelpful adjective, for unlawfully describes action after the decision is made, not a standard upon which to make the decision. Perhaps it means "unreasonable." Perhaps not.

There are no cases to clarify these problems. The standards in this Act are very broad, perhaps even uncertain. The effect is to leave great discretion in the hands of the administrators. While providing some protection for natural resources, the actual degree of protec- ▶

Prof. David S. Favre is a 1973 graduate of the College of William and Mary Law School, Williamsburg, VA. He has been a professor at the Detroit College of Law since 1976, focusing primarily on Property and Environmental Law.

tion is not predictable from the language of the law itself.

Sand dunes were given special attention in 1976, resulting in the Sand Dune Protection and Management Act.[8] Anyone wishing to mine sand dunes located within a Great Lakes sand dune area must obtain a permit. This law does require a formal environmental impact statement, but it is to be written by the applicant, not by the decision-making administrator.

In this case the balancing of various interests are to be found in a standard which states that the DNR shall deny a permit only if the operation would have an "irreparable harmful effect on the environment."[9] This standard suggests the same sort of policy as that found in the Michigan constitution; "irreparable harmful effect" is nearly equivalent to "impairment and destruction."

This appears well and good, but the exact dimensions of the standard are not clear. Does the term "environmental" include the sand dunes themselves, which must be consumed "irreparably" if they are to be mined? Also, the term "irreparable" implies a prediction of future consequences from a present action— prime ground for a battle of expert witnesses.

The Act is not really helpful in setting out who has what burden of proof in the administrative process. Again, the administrative decision-maker appears to be left with great discretion in determining how to balance the interest of the public and of the individual land owner.

In the Wetland Protections Act, passed in 1979, the Legislature went to great length to express legislative findings as to the importance to society of preserving wetlands. The applicant must provide an environmental assessment if requested by the DNR. In deciding whether or not to grant a permit, the DNR must determine if the issuance of a permit is "in the public interest."[11] Note how this differs from the previously discussed standards. Under this statute the decision-maker must make an affirmative determination. Under the others, the permit is to be granted unless a negative finding is made.

The law provides nine factors to be considered in determining what is in the public interest. A clearly stated burden of proof is placed upon the applicants who must show that (a) the activity is primarily dependent upon being located in the wetland, and (b) a feasible and prudent alternative does not exist.

The DNR is referred back to the general policy section and told that the decision "shall reflect the national and state concern for the protection of natural resources from pollution, impairment and destruction."[12]

The state has weighed the interest differently in the case of wetlands. Unlike the case of sand dunes, the administrator is directed to protect wetlands whenever possible, and a landowner has a heavy burden to meet before being allowed to destroy any wetland.

It is curious that the most recent legislation, the Michigan Surface and Underground Mine Reclamation Act, is also the most complex and detailed.[13] Part of this is undoubtedly due to the need to satisfy federal requirements so that the state may implement the federal program in Michigan. The complexity may also be the result of increased sophistication in the Legislature in dealing with a natural resource.

Under this law anyone who wants to conduct a surface coal mining operation must have a permit. Without calling it an environmental impact statement or environmental assessment, the Act requires an equivalent statement, perhaps even more than would be required in a federal impact statement (identification and effect of the proposed activity on watersheds, groundwater, surface soil, historical resources, farming and local zoning).

As with the Wetlands Act, the administrator must make affirmative findings before granting a permit.[14]

One new requirement is that these findings must be in writing.

The tenor of this Act is not to stop activity, as was the case with the wetlands, but to allow coal mining so long as stringent preconditions can be met. These primarily require the applicant to show the plans and ability to reclaim the site. (Article 4 deals with Environmental Performance Standards and Article 5 deals with Bonding.)

Removal of coal need not be an environmental disaster, but it often has been when society has not improved the costly requirements of reclamation upon the resource owner.

In this case society is trying to allow commercial exploitation but also seeks to protect the other natural resources of soil and water which might otherwise be harmed.

The Michigan Environmental Policy Act (MEPA) was passed back in 1972. It may be the most underutilized law on the books.[15] The basic reason is that it does not directly impose any standards or limits on government decision-makers. Nothing is required by this Act prior to the granting of a permit. Its provisions are not integrated into the administrative process, but must be asserted by the filing of a law suit. Also, it

is not resource-specific; it applies to all resources, and in being so general in scope is often simply forgotten when specific conflicts arise.

The MEPA allows any individual to file a civil action against any other individual, including governmental entities, to stop any action which "has or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein . . ."[16]

Thus we go the full circle, for this language is almost identical with the constitutional provision previously cited.

The language of the MEPA is very protectionist. While some balancing is provided by allowing the defendant an affirmative defense, little use has been made of this defense in the few cases which have been filed.[17]

As with other short, general statutes, a lot of issues remain unresolved, and the courts must determine the Legislature's intentions. The two primary issues are what constitutes a "natural resource" and what types of actions would be found to "pollute, impair or destroy" them?

A recent Court of Appeals opinion penned by Judge Mackenzie does an excellent job in considering these issues and suggesting a workable answer to several of these issues.[18] Notwithstanding the lack of specifics, it is clear that the general tenor of MEPA is to preserve the natural resources of the state of Michigan.

The success of our efforts to balance the desires of the individual landowners and the interests of society in general will not be known until some indeterminate point in the future. As time proceeds, I suspect that the laws will continue to become more sophisticated, more protective of natural resources, and give administrators less discretion in granting permits. The conflict of conservation versus commercial consumption is a fundamental one in our society, and neither side will ever win the struggle. While the Michigan Constitution sets a tone for balancing these interests, our Legislature will continue to grapple with the questions into the indefinite future.

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Footnotes

1. Michigan Constitution Art. 4, § 52.
2. Mich. Comp. Laws Anno. § 3299.221 et seq.
3. M.C.L.A. § 299.244. (1).
4. Taking is defined as attempting to harass, harm, pursue, hunt, shoot, kill, trap, capture, collect, or to attempt such conduct. M.C.L.A. § 299.222(j).
5. 16 U.S.C. § 1533(a).
6. M.C.L.A. §§ 281.951 et seq.
7. M.C.L.A. § 281.957.
8. M.C.L.A. §§ 281.651 et seq.
9. M.C.L.A. § 281.659.
10. M.C.L.A. §§ 281.701 et seq.
11. M.C.L.A. § 281.709.
12. Id.
13. M.C.L.A. §§ 425.1101 et seq.
14. M.C.L.A. § 425.1311.
15. M.C.L.A. §§ 691.1201 et seq.
16. M.C.L.A. § 691.1203(1).
17. M.C.L.A. § 691.1203(1). The defendant must show that there is no feasible and prudent alternative and that the conduct is consistent with the strong protectionist policy of the Act.
18. *Kimberly Hills Ass'n* v *Dion*, 114 Mich App 495 (1982).