STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ROSCOMMON

IN THE MATTER OF:
THE WATER LEVELS OF
HOUGHTON LAKE, HIGGINS LAKE, AND
LAKE ST. HELEN

Case No. 81-3003-CF
Hon. Robert W. Bennett

OUTSIDE LEGAL COUNSEL PLC
By: PHILIP LEE ELLISON (P74117)
Attorney for Petitioner
P.O. Box 107
Hemlock, MI 48616-0170
(989) 642-0055

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER, PC
By: MATTHEW J. ZALEWSKI (P72207)
Counsel for Respondent
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
mzalewski@rsjalaw.com

RESPONDENT'S MOTION TO STRIKE AFFIDAVIT OF ERIC OSTERGREN AND/OR TO SET ASIDE *EX PARTE* ORDER TO SHOW CAUSE

Respondent, ROSCOMMON COUNTY, by and through counsel, ROSATI SCHULTZ JOPPICH & AMTSBUECHLER, PC, move, pursuant to MCR 2.116(B), MCR 2.612(C)(1), MCR 2.119(A), and/or MCR 2.119(F), and with reference to MCR 3.606(A), to strike the Affidavit of Eric Ostergren attached as Exhibit M to Petitioners' Motion for Issuance of Show Cause Order (attached to this motion and brief as Ex. 1.), and/or to set aside or otherwise reconsider this Court's *Ex Parte* Order to County of Roscommon and/or its Delegated Authority to Show Cause entered May 28, 2019. (Ex. 2.). In support of this Motion, Respondent relies upon the accompanying Brief in Support.

Respectfully submitted,

ROSATI, SCHULTZ, JOPPICH, &
AMTSBUECHLER, P.C.

MATTHEW J. ZALEWSKI (P72207)
Attorney for Respondent Roscommon County
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
mzalewski@rsjalaw.com

Dated: June 3, 2019

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE AFFIDAVIT OF ERIC OSTERGREN AND/OR TO SET ASIDE *EX PARTE* ORDER TO SHOW CAUSE

Through their Motion, Petitioners perplexingly admit that Higgins Lake is presently in compliance with the 1982 Court Order at issue in this case, yet ask this Court to find that the County is in contempt of the 1982 Order, and to issue a contempt order to coerce the County to *actually* violate the 1982 Order. Indeed, Eric Ostergren, who has submitted the sole affidavit in this matter, admits that, as of May 20, 2019, Higgins Lake had exceeded its court-ordered normal level, and that the County then opened a dam to allow some water to flow from Higgins Lake to the Cut River. (Affidavit, Ex. 1, ¶5.) Thus, the County acted as would be expected under a court order to provide for and maintain for that normal level. Data from the U.S. Geological Survey ("USGS"), relied upon Petitioners for other purposes, confirms that Higgins Lake has reached its summer level. (Chart, Ex. 3.) Petitioners also admit that the County has been in compliance with winter levels. (Motion ¶9.) As the goal of the 1982 Order has been achieved, there is nothing to coerce the County to do, which is the only question properly before the Court on this Motion.

While the County is entitled to prevail on the merits of this matter, the Court should not even entertain the merits, and should instead set aside its Order to Show Cause. The Order is based on a defective affidavit offered by Mr. Ostergren, who has a history of animosity toward

the County Board, and solely offers personal opinions, hearsay, and lay testimony in lieu of personal factual knowledge of County misconduct. Combined, the affidavit and Motion do not provide sufficient factual assertions supporting Petitioners' standing, allegations, proposed remedies, or damages. While Petitioners suggest that periodic decreases in summer lake levels are intentional violations, Petitioners offer no facts to support this interpretation. A more reasonable inference is that these periodic decreases are the result of Mother Nature, which Mr. Ostergren admits constrains the Board's options. (Ostergren Statement, Ex. 15.) Either way, these larger questions are not properly considered on the instant contempt Motion.

Enforcing the Show Cause Order to require the County to answer to the Petitioners' allegations in the context of a contempt proceeding would be inequitable to the County. Civil contempt is only appropriate where there is a violation of a court order (which there is not), and where a contemnor has a path for immediately purging themselves of contempt. Immediate purging of contempt by a remedy suggested by Petitioners is not possible here given that Plaintiffs' proposed remedies are unlawful or require third-party actions. Further, the remedies Petitioners seek suggest that Petitioners are using the vehicle of contempt as a backdoor way obtain a court order to deviate from the lake level without proper procedure. While this Court is empowered to review its prior orders, authorize deviations, and even *decrease* the normal level where enforcement of the existing level is no longer equitable, a show cause hearing on contempt in a 38-year-old case is not the proper means for Petitioners to seek that relief.

As the defective affidavit of Eric Ostergren is the sole affidavit supporting Petitioners' *ex parte* motion, this alone should result in the Court setting aside its *Ex Parte* Order to Show Cause. Alternatively, the Order should be set aside since it would be inequitable to require the County to answer Petitioners' grievances in a contempt hearing. Or, this Court should otherwise deny Petitioners the relief they seek because they are not entitled to such relief.

FACTUAL BACKGROUND

The Inland Lake Levels Statute and 1982 Court Order

Michigan's Natural Resources and Environmental Protection Act (Act 451 of 1994) ("NREPA"), Part 307, Inland Lake Levels (MCL §324.30701 et. seq.) ("Lake Levels Statute," Ex. 4), sets procedures for establishing and maintaining a "normal level" of an inland lake. "Normal level" is defined as:

> The level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake. A normal level shall be measured and described as an elevation based on national geodetic vertical datum. MCL 324.30701(h).

It is common for property owners and/or the county in which an inland lake is located to have a court establish a normal level to protect property, prevent erosion, promote recreation, protect habitats, and mitigate ice damage. A lake level can be established for the entire year, or seasonally. The Court may exercise continuing jurisdiction to "provide for departure from the normal level as necessary to accomplish the purposes of" the statute. MCL 324.30707(5).

Higgins Lake is among the lakes for which a "normal level" has been established. Orders of the Roscommon County Circuit Court date back to 1926. The instant action relates to the Order of an order entered on February 24, 1982 ("1982 Order", Ex. 5), which provides, in relevant part:

> February 24, 1982: "IT IS HEREBY ORDERED AND ADJUDGED that the legal level of Higgins Lake, Roscommon County, Michigan, heretofore established at 1154.11 feet above mean sea level, be continued; provided, however that said level be lowered to a level not less than 1153.63 feet, commencing on or about November 1 of each year, and restored to its legal level, commencing on or about April 15, or ice-out, whichever shall first occur, in each year." (*In the Matter of the Water Level of Houghton Lake, Higgins Lake, and Lake St. Helen,* File No. 81-3003-CF.)

Maintaining Higgins Lake's Level: The Control Structure and Low-Flow Channel

Adjustment of Higgins Lake's level is achieved through the operation of a Lake Level Control Structure ("LLCS") – the Cut River Dam – positioned at the location where Higgins Lake

meets and flows into the Cut River. One member of the County Board of Commissioners oversees the dam for each the County's inland lakes. For Higgins Lake, that task has been assigned to Commissioner Ken Melvin since his election in 2008.

In 2007, significant improvements were made to the LLCS, including "the addition of two (2) 17-foot tilting weir gates and the creation of a 4.75-foot-wide low-flow channel in the center of the control structure." (Spicer Report, Ex. 6, p. 4). This low-flow channel is not capable of being closed. It is important to note that the low-flow channel was mandated by the Michigan DEQ in connection with the County's permit to upgrade the LLCS. The Lake Levels Statute authorizes the state to "require that a new dam that is proposed to be constructed be equipped with an underspill device for the release of cold bottom waters for the protection of downstream fish habitats." MCL 324.30719. The state issues permits for dams pursuant to Part 301 of Act 451 of 1994, "Inland Lakes and Streams," (Ex. 7.), which provides, in part,

> In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. MCL 324.30106.

A person who violates Part 301, or a permit issued under that part, is guilty of a misdemeanor punishable by a fine of up to $10,000 per day. MCL 324.30112(3)-(4).

Reviewing the County's proposed LLCS modifications in 2007, the DEQ required revisions to the plans to provide for a low-flow channel as a condition for issuing a dam permit:

> Move the function of the low flow outlet bay, now located towards the northeast end of the dam, to the five-foot stoop log bay located most northeast. This would allow some minimum flow to continue by design. The new low flow bay would have to be modified to permanently prevent boards from being inserted into the angle iron slots on either side. (1/12/07 Letter, Ex. 8.)

The County Board ultimately agreed to the DEQ's condition. (2/14/07 Letter, Ex. 9.) The DEQ subsequently issued Permit Number 06-72-0056-P on March 12, 2007. (Permit, Ex. 10.)

Public Debate and Studies of Lake Levels Since 2007

Debate over whether water levels are too high or too low has persisted since the 2007 dam modifications. In 2008, prior to Commissioner Melvin's election, the Higgins Lake Property Owners' Association (HLPOA) threatened litigation against the County, arguing that Higgins Lake was being maintained in excess of 1982 Order's maximum summer level, and was also too high in the winter. (6/20/08 Letter, Ex. 11.) The HLPOA argued that the high water was responsible for "significant shoreline destruction" being experienced by shoreline property owners. (Ex. 11.) In 2009, the HLPOA likewise urged that "the current legal summer lake level be adhered to and that at no time should this level be intentionally exceeded." (8/26/09 Letter, Ex. 12.)

The Michigan DNR echoed concerns about the water levels. In a 2010 letter to the County, the DNR expressed concerns with manipulating Higgins Lake's levels as follows:

> Artificial lake levels are one of the primary causes of shoreline erosion from wave energy during ice-free periods and ice scour during winter. Altering natural water fluctuations in lakes affects the establishment of wetland plant communities and nesting and rearing habitat for fish, mammals and water birds. Amphibian and reptiles are also affected by loss of habitat from erosion and construction of seawalls. Water control dams affect seasonal fish movements in the system and stream flows below the structure. We generally recommend against manipulation of lake levels and promote removal of control dams...(9/21/10 Letter, Ex. 13.)

The DNR offered that removing the dam would "significantly reduce shoreline erosion," and opined that "boat mooring and docking should not be affected with the exception that a wider beach area will be present." (Ex. 13.)

Yet, by 2010, there had also been discussion that lake levels were too low. To facilitate the process of sorting out the effect of the LLCS, the County Board commissioned a report from the Spicer Group in 2010 (the "Spicer Report"). The Spicer Report acknowledge that "the Board of Commissioners has received complaints of the lake level being too low. At other times, complaints have been received that the lake level is too high." (Ex. 6, p. 5.) The Spicer Report's findings were summarized, in part, as follows:

> Prior to 2007, the LCS on Higgins Lake did not have a center low-flow channel allowing constant flow to the Cut River and therefore water exited the lake by either evaporation, wave loss over the LCS, or operation of the LCS. By cutting a hole in the center of the structure, the amount of water leaving the LCS during summer months was calculated to increase by roughly 30 percent over the losses due to evaporation and wave action alone. This finding was corroborated through comparison of lake level trends before and after the lake level control structure was modified. Average lake levels in Higgins Lake have decreased by an average of about 0.20 feet in the past three years. (Ex. 6, p. 11.)

The Spicer Report made two key recommendations that are echoed in Petitioners' Motion. The first was that "additional water must be retained in the months of May and June . . . to maintain an average level near the summer legal level, approximately 0.2 feet of water above the legal lake level should be achieved in June." (Ex. 6, p. 15). This is commonly referred to as water "banking." Second, it recommended that a flow restriction device should be fabricated and installed to restrain the unobstructed flow through the low-flow channel. (Ex. 6, p. 15.)

The Spicer Report is not the only evaluation of the LLCS's effects. A comprehensive "Ecohydrologic Evaluation of Removing the Higgins Lake-Level Control Structure" was conducted in the mid-2010s through a collaboration of Michigan State University, the University of Michigan, the Muskegon River Water Shed Assembly, Huron Pines, the Higgins Lake Foundation, the HLPOA, and Fisheries Division. This Evaluation was summarized by the DNR in 2017. (3/8/17 DNR Notes, Ex. 14.) The Evaluation's conclusions included "that lake level management does not have significant effects on fishery habitat in Higgins Lake but does have significant effects on shoreline erosion. Lake-level manipulations have significant effects on fisheries habitat in the Cut River." (Ex. 14.) The study noted the inadequacy of the low-flow channel for the ecosystem, stating, "the low-flow opening is not large enough to consistently provide even a 33 cfs flow rate into the Cut River, as compared to the 50 cfs "target flow rate to protect Cut River fisheries," and the 100-150 cfs rate "necessary to provide optimal habitat for fish in the Cut River." (Ex. 14.)

The Evaluation also hinted at the abnormality of the "normal" lake level by addressing the sustainability of target lake levels under various conditions:

> The probability of achieving the established summer lake level (1154.11 feet) is 15% under current operation and 0% for unmanaged dam scenarios. The probability of achieving an established summer lake level 100% of the time under current operation would occur at 1153.28 feet, and at lower levels (1152.92) for the unmanaged dam scenarios. (Ex. 14, p. 2.)

In addition, the report acknowledged that climate warming, evaporation rates, and groundwater inputs are issues that need to be addressed. (Ex. 14, p. 2).

This public debate continues to this day, playing out in the press, at County Board meetings, and on social media. Mr. Ostergren, has been a vocal critic of the County through the years. His comments in public, and in the materials submitted with the instant Motion, reflect his belief that "the main problem with failing to maintain the legal levels is the Lake Level Control Structure or Dam that was modified back in 2007." (Motion Ex. I, Ex. 15 p. 1.) He believes the County Board should implement the Spicer Report's recommendation. (Ex. 15; Ex. 16.) He does not meaningfully address opposing viewpoints regarding how high water levels cause property damage, or how raising Higgins Lake affects the Cut River and aquatic species. In addition, Mr. Ostergren does not mask his animus toward Commissioner Melvin, as he has accused him of being a "low water" person, and invoked a Mark Twain quote not-so-subtly likening Melvin to a dirty diaper when endorsing his last election opponent. (Editorial, Ex. 16.)

The ongoing divide on this issue is apparent from the fact that the HLPOA recently considered three motions at its April 2019 meeting that would have supported recommendations that these Petitioners advocate, and would have provided financial support for this action. All three of those motions failed for lack of support. (HLPOA Minutes, Ex. 17.) Just as the Spicer Report observed in 2010, community opinion remains sharply divided.

Petitioners' Motion for Order to Show Cause

Having failed at achieving their agenda through the legislative or electoral processes, Petitioners now seek, through a single motion and hearing, to throw County officials in jail and obtain a monetary judgment for unspecified damages related to an unspecified recreational harm. Rather than file an original action (as occurred in 2009 when lake levels were reviewed under the Court's continuing jurisdiction), Petitioners have taken the extraordinary measure of filing an *ex parte* motion in a 38-year case to have the County immediately held in contempt. The Petitioners claim to be "interested persons" authorized to invoke this Court's jurisdiction under the Lake Level Statute, but, consistent with the overall tenor of the motion, the Motion contains a paucity of details to properly assess this claim, especially with respect to the skeletal non-profit organization organized, interestingly, on April Fools' Day. (CLLL Paperwork, Ex. 18.)

The Higgins Lake Level *Today*

Contempt is nothing to fool around with. As will be fully discussed in the argument section of the brief, if this Court holds the Show Cause hearing, the *only* question before this Court is whether it is necessary to enter a contempt order to coerce the County to comply with the 1982 Order, *today*. As we are at the start of the summer season, the question is whether the County has followed the 1982 Order's directive that Higgins Lake be brought up to its normal level. The one thing that the County and Petitioners appear to agree on is that Higgins Lake *has* been brought to the summer level. A chart retrieved from the HLPOA website derived from USGS data (the same source as other charts attached to Petitioners' brief) shows that the level steadily began rising in early April, and has achieved or even slightly exceeded the legal level. (Ex. 3.) Mr. Ostergren's affidavit *confirms* this, as he alleges that, as of May 20, Higgins Lake was above the legal level. (Ex. 1 ¶5.) Mr. Ostergren even alleges (correctly) that the County opened one gate to allow some flow into the Cut River so as to level Higgins Lake off to the legal level. (Ex. 1 ¶5.)

In other words, the County has done precisely what the 1982 Order requires. (Ex. 1 ¶5.) Petitioners also admit that the County complies with winter levels. (Motion ¶9.)

The Show Cause Order and the County's Motion

This Court entered its Order to County of Roscommon and/or its Delegated Authority to Show Cause on May 28, 2019. (Ex. 2.) The County now moves to strike Mr. Ostergren's affidavit and asks this Court to set aside its Order to Show Cause, as the affidavit is inadequate to initiate this proceeding and vest this Court with personal jurisdiction over the County, and contempt is otherwise neither warranted nor the proper vehicle for the relief Petitioners seek.

ARGUMENT[1]

I. This Court lacks jurisdiction over this matter, as the sole affidavit offered in support of the Motion and contempt hearing is deficient.

For a contempt allegedly committed outside of the Court's view, an order to show cause may only be issued "on a proper showing on ex parte motion supported by affidavits." MCR 3.606(A). **"If an inadequate affidavit is the predicate which underlies the contempt proceeding . . . the court lacks jurisdiction over the person of the alleged contemnor."** *Id,* at 159, citing *State ex. rel. Calahan v. Powers,* 97 Mich App 166, 168 (1980), emphasis added.

Affidavits must comply with MCR 2.119, be "made on personal knowledge," "state with specifically admissible facts establishing the grounds stated in the motion, and show affirmatively that the affiant, if sworn as a witness, can testify about the stated in the affidavit." *Id.*; MCR 2.119. For an affidavit to support a contempt proceeding, there must exist "a sufficient foundation

[1] Relevant standards for each of the County's arguments are integrated within each argument section. The County believes that the affidavit can be stricken and the Order to Show Cause set aside under MCR 2.116(B), MCR 2.612(C)(1), and MCR 3.606(A) based on the defective affidavit, and the inequity of requiring the County to respond to the Order to Show Cause under the circumstances described in this Motion and Brief. But, if this Court treats this motion as one for reconsideration of the Order to Show Cause, then the applicable standard allows for reconsideration upon a showing of palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error, though this should not be construed to restrict the Court's discretion where reconsideration would otherwise be warranted. MCR 2.119(F)(3).

of competent evidence, and legitimate inferences therefrom." *In re Contempt of Steingold,* 244 Mich App 153, 159 (2000). While a court may make "reasonable inferences drawn from the facts stated," (*Id.,* at 158), when inferences are too tenuous to be plausible, and "pleaded facts 'do not permit the court to infer more than the *mere possibility of* misconduct," a pleading fails to state a claim for relief. *State ex rel. Gurganus v. CVS Caremark Corp,* 496 Mich 45, 64 n. 41, citing *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009).

In this case, only Mr. Ostergren's affidavit is offered. Of its six paragraphs, only Paragraphs 2-5 attempt to allege a factual basis for the *ex parte* order and contempt hearing. Three of those paragraphs do not state "facts" for which Mr. Ostergren has personal knowledge, and even if the fourth does, it weighs in favor of finding that the County is abiding by the 1982 Order.

Paragraph 2 states that "it is commonly known and understood" that the County has failed to keep Higgins Lake at its "legally mandated minimal level." This is not a factual assertion, but an undocumented conclusory opinion of his interpretation of the community's belief. In addition, the assertion that the County has failed to keep Higgins Lake at its *minimal* level is directly contradicted by the Motion's concession that "the County of Roscommon has been generally compliant with lower winter levels for many years." (Motion, ¶9.) Per the 1982 Order, the *winter* level is expressed as a level "not less than" the prescribed amount, thus clearly making it the *minimum* level of Higgins Lake. (Ex. 5.)

Paragraph 3 refers to "data compiled by the United States Geological Survey and compiled by our attorney." In other words, it is data with respect to which Mr. Ostergren has no personal knowledge about how it was generated, stored, organized, or compiled. Paragraph 3 is hearsay.

Paragraph 4 merely makes observations about public comment. Presumably, Mr. Ostergren does have personal knowledge of the fact that he and others have publicly expressed their opinions about the County, but this does not transform their opinions into factual evidence

of contempt. A better reasonable inference from Mr. Ostergren's allegation that his arguments have been "ignored" by the Board is that he is wrong, and the Board knows it.

As discussed, *supra,* Paragraph 5 actually *supports* the County by acknowledging that the County raised Higgins Lake to its summer level and then opening a gate to level it off when that level was exceeded, from which the reasonable inference is that the County is complying with the 1982 Order and protecting riparians from unlawfully high water.

Based on this analysis, the affidavit is not based on Mr. Ostergren's personal knowledge, does not create a reasonable inference that the County has misbehaved, and is inadequate to establish this Court's jurisdiction over the County as an alleged contemnor. Accordingly, this Court should set aside its Order to Show Cause and dismiss this proceeding.

II. Ostergren is not an "Interested Person" under the NREPA Inland Lake Level provisions, and has no other claim to standing.

The Motion is similarly guilty of making a conclusory legal assertion that the Petitioners are "interested persons as that term is defined by [the Lake Level] statute," without providing any facts other than the movants' addresses and the nonprofit organization's alleged purpose. (Motion, ¶6.) Given that this Motion has been brought out of the blue under the cover of a 38-year-old lawsuit to which we cannot be certain any of these people were even originally parties, the County is prejudiced in not being able to interrogate each movant's standing through a normal litigation process. Having said that, as Mr. Ostergren is the only Petitioner to offer an affidavit, his standing is especially worthy of examination to the extent that it is possible.

To have standing, a plaintiff must demonstrate "a special injury or right, or substantial interest that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Schools Educ Ass'n v. Lansing Bd. of Educ,* 487 Mich 349, 372 (2010).

As defined by the Lake Level Statute, an "interested person" is:

> the department and a person who has a record interest in the title to, right of ingress to, or reversionary right to land that would be affected by a permanent change in the natural or normal level of an inland lake. MCL 324.30701(g).

With its emphasis on having a "record interest," the definition of "interested person" parallels that of a riparian. Riparian land is defined as "a parcel of land which includes therein a part of or is bounded by a natural water course." *Little v. Kin*, 249 Mich App 502, 508 (2002); see also *Thompson v. Enz*, 379 Mich. 667, 677, 154 N.W.2d 473 (1967). Persons who own riparian land "enjoy certain exclusive rights." *Thies v. Howland*, 423 Mich. at 288. A party is not a riparian owner if he or she does not own land adjacent to the body of water. *Little v. Kin*, 249 Mich App, at 508. A nonriparian lot owner does not hold the same rights as those who own the land around the water. *Id.* Furthermore, a landowner's riparian rights may not be transferred to another individual. *Thomas v. Enz*, 379 Mich, at 685.

Even if a person is an "interested person," that "interested person" must still demonstrate a "legally protected interested that is in jeopardy of being adversely affected." *Wortelboer v. Benzie County,* 212 Mich App 208, 214 (1995) (finding that riparians were "interested persons," but that this was not enough, as the "interested person" must show a sufficient personal stake/injury in the case.) Indeed, the person must have a substantial interest in the enforcement of a statute "that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced." *Lansing Schools, supra,* at 373.

Mr. Ostergren cannot even satisfy the "interested person" standard, let alone the personal stake requirement. Mr. Ostergren's stated property address, 2779 West Higgins Lake Drive, Roscommon, MI 48640 is *not even on Higgins Lake.* (Image, Ex. 19.) The County is not aware that he has a record interest in waterfront land or a dock. Thus, he is *not* a riparian. Yet, even if Mr. Ostergren were to persuade the Court that being a riparian is not a prerequisite for being an "interested person," he still cannot show a sufficient stake in the enforcement of the statute that

is different from the public at large. Mr. Ostergren states no facts explaining what his injury is. The only harm even hinted at in the Motion on behalf of all the movants is an unspecified recreational harm. Motion ¶¶ 10 and 12 are especially revealing on this point, noting that Petitioners' counsel compiled data for "that period from Memorial Day to Labor Day **when many residents recreationally use Higgins Lake,**" (Motion ¶10, emphasis added), and that the Lake is allegedly below legal levels "during the desirable and important recreation times of Michigan's summertime" (Motion, ¶12). Motion ¶10 effectively concedes that Petitioners are experiencing Higgins Lake in the same manner as the general citizenry, and have no unique substantial personal interest in this matter. Accordingly, neither Mr. Ostergren nor the other individual Petitioners have standing. By extension, the nonprofit that we know little about should also be found to lack standing. *Trout Unlimited Muskegon White River Chapter v. White Cloud,* 195 Mich App 343, 348 (1992). Accordingly, Mr. Ostergren's affidavit should be stricken, the Motion is not adequately supported, this Court lacks jurisdiction over the contempt proceeding, and the Order to Show Cause must be set aside.

III. A contempt order is not appropriate, as the County is in compliance, and cannot immediately perform any act sought by Petitioners.

Even if this Court were to determine that it has jurisdiction over this matter, a civil contempt order is not necessary or appropriate. "The purpose of civil contempt is to enforce compliance with an order, rather than to punish for disobedience. . . . to coerce [the contemnor] to do what he is able to do but refuses to do. . . in other words, the contemnor carries the keys to his prison in his own pocket." *In re Moroun,* 295 Mich App 312, 334 (2012), internal citations omitted. Accordingly, a civil contempt order must provide an opportunity to "***immediately*** avoid the sentence, or purge the contempt, by complying with the terms of the original order." *Id.,* at 335, emphasis added, internal citations omitted. An order must "identify the act or duty that must be performed" before the contempt order can be terminated. *Id.,* at 340. MCL 600.1715(2).

For example, where a contemnor had the present ability to commence construction of a project, but not the present ability to finish construction, a contempt order contingent on a condition of finishing construction could not stand. *Id.,* at 334-335. Likewise, where a court held a developer in contempt and ordered a financial sanction in lieu of imprisonment for failing to specifically perform construction of a mixed-used development, the contempt order was improper since the contemnor was dependent on banks to finance the development. *City of Dearborn v. Burton-Katzman Development Company, Inc.,* unpublished opinion *per curiam of the* Court of Appeals issued 12/18/14 (Docket No. 309758), at 5. (Ex. 20.)

A. No coercion is needed, as the County is in compliance.

The County is in compliance with the 1982 Order, as Higgins Lake has been brought up to its normal seasonal level. (Ex. 3.) Mr. Ostergren concedes that the normal level was exceeded by May 20. (Ex. 1 ¶5.) He even concedes that the County opened a dam gate upon the level being exceed, exactly as the County must do to comply with the 1982 Order. (Ex. 1 ¶5.)

To the extent that Petitioners seek contempt on any other basis, they overstate the scope of both the 1982 Order and the remedy of contempt. All the 1982 Order requires is that the County provide for and maintain the legal level. It does not require a specific means of maintaining that level. While Petitioners may fear that the lake level may drop later in the summer based on natural conditions beyond the County's control, contempt seeks to address present or still-occurring uncorrected past violations within the alleged contemnor's *immediate control,* not conditions brought upon by past years' droughts that are now moot, nor concerns about hypothetical future drought conditions. The Order to Show Cause should be set aside.

B. Ordering the County to be in contempt conditioned on installing a restrictor plate in the LLCLS is not a proper remedy.

Petitioners' effort to force the County to implement the Spicer Report's recommendation of restricting the low-flow channel in the LLCS appears to ask this Court to enter a contempt order

conditional on installing a restrictor plate in the LLCS. As explained above, MCL 324.30112 provides that any person who violates NREPA Part 301, or any permit issued thereunder, is guilty of a misdemeanor. As the 2007 permit for the LLCS is issued pursuant to Part 301 and requires the low-flow channel, Petitioners ask this Court to order the County to commit a misdemeanor.

Nor could Petitioners obtain an order conditioned on the County obtaining a permit for the restrictor plate because the County, alone, does not have the *present* ability to make that happen. Such an act would be dependent on the decisions of the DEQ, and then the contractors hired to construct the project. The 1982 Order is *not directed to State of Michigan.* Any contempt order conditioned on obtaining a dam modification permit would be outside the principled range of outcomes like the conditions invalidated in *In Re Moroun* and *Dearborn v. Burton-Katzman.*

C. "Banking" water would violate the 1982 Court Order

Petitioners allege that the County is not banking water in the spring to save in the event of a dry summer. (Motion, ¶20.) However, the Court order *solely* establishes a "normal level." In the absence of a Court-authorized deviation from that normal level, asking the County to bank water asks the County to intentionally violate the 1982 Order and expose itself to liability from those who are threatened by high water, just as the County was in 2008 and 2009 by the HPLOA. (Ex. 11, 12.) If Petitioners believe that some deviation from the normal level "is necessary to accomplish the purposes of this part" (MCL 324.30707), then Petitioners' remedy is to take the proper steps to invoke this court's jurisdiction for a review of the lake levels to support and establish such a deviation, *not* to ask for contempt. The Show Cause order should be set aside.

IV. Petitioners' request for non-monetary relief is in the nature of mandamus, and improperly asks the Court to order the County to take discretionary action.

Petitioner's desire to have the Court order the County to implement the Spicer Report's recommendations is not only improper under contempt standards, but also under the well-established principle "that circuit courts may not direct the manner in which an agency exercises

its discretion." *Vanzandt v. State Employees Retirement System,* 266 Mich App 579, 585 (2005). While MCL 324.30708(1) provides that a county "shall provide for and maintain [the court-ordered] normal level," the *means* of providing for and maintaining the level are within the County's *discretion*. For example, the portion of the statute relating to dams provides, in part,

> A county ***may*** acquire . . . an existing dam that may affect the normal level of the inland lake, sites for dames, or rights to land needed or convenient in order to implement this part. A county ***may*** enter into a contract . . . A county ***may*** construct and maintain a dam ***that is determined by the delegated authority to be necessary*** for the purpose of maintaining the normal level. MCL 324.30708(2), emphasis added.

Thus, the County's choice as to how to pursue its obligations is within the County's discretion, the exercise of which cannot be shaped by Court order. As the relief requested by Petitioners is not available through contempt, the Order to Show Cause should be set aside, or the proceeding otherwise dismissed.

V. Petitioners' request for monetary damages is in the nature of a private cause of action for a tort, which is not available under NREPA, and for which the County is immune from liability.

Petitioners seek costs and indemnification damages under MCL 600.1721, which provides that if the alleged contemptuous misconduct "has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him." It is immediately notable that, despite moving for a contempt order that includes damages, the motion is devoid of any factual support showing how any Petitioner has allegedly experienced "actual loss or injury" supporting a damages award. Thus, Petitioners' claim fails on the merits.

Even if Petitioners pled an actual injury, the Michigan Supreme Court has held that a request for non-contractual damages under MCL 600.1721 "seeks to impose 'tort liability," and "that **courts are prohibited from exercising their contempt powers by punishing a governmental agency's contemptuous conduct through an award of indemnification damages under MCL 600.1721**." *In re Bradley Estate,* 494 Mich 367, 393-394 (2013),

emphasis added. In this case, no contractual obligation is alleged or implicated. Rather, Petitioners allege an undefined harm to some recreational interest, and thus is in the nature of a tort claim. Even before getting to the immunity issue, Petitioners' claim fails because NREPA "does not create or protect individual rights regarding inland lake levels or create a civil cause of action for the benefit of individuals how are not satisfied with the county's exercise of authority." *Wortelboer v. Benzie County,* 212 Mich App 208, 214 (1995), citing *In re Van Ettan Lake,* 149 Mich App 517, 525-526 (1986). Beyond this,, Plaintiffs have not and cannot plead in avoidance of the County's immunity.[2] The Court is without authority to enter a contempt order awarding Petitioners indemnification damages, and the Order to Show Cause should be set aside.

VI. Holding the County in contempt and ordering action proposed by Plaintiffs would establish a new lake level without proper procedure.

While Petitioners have asked for this Court to "enforce" the existing lake level, their incorporation of the Spicer Report's recommendation of "banking" water in the spring suggests that they really want to establish a new higher lake level, or at least have this Court exercise its continuing jurisdiction to "provide for departure from the normal level as necessary to accomplish the purposes of this part." MCL 3245.30707.

A few cases illustrate the impropriety of Petitioners' method and requested relief. In *Anson et. al. v. Barry,* 210 Mich App 322 (1995) property owners invoked the statutorily provided continuing jurisdiction of the circuit court over a previously entered court order establishing a legal level for Pine Lake. The lawsuit was brought as a mandamus action asking the court to enforce the prior order and force the County to act to lower Pine Lake down to its legally established level. The County admitted that the lake level exceeded the level established by the

[2] It is Petitioners' burden to plead facts in avoidance of governmental immunity. The facts must "demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack v. City of Detroit,* 467 Mich 186, 204 (2002).

court, but argued that the order only pertained to levels resulting from the use of wells, and not any excess caused by the lake seeking its natural level. While the trial court dismissed the Complaint on the basis that the judgment was too old to be enforced, the Court of Appeals remanded the case to the trial court for factual findings. In essence, the Court of Appeals viewed the trial court's action as effectively establishing a new normal lake level without factual findings, and without statutory authority. Notably, however, while the property owners' action was an action asking not to deviate from the previously established order, the Court of Appeals left open the possibility that the lake level *could* be changed – even to the County's advantage – upon proper factfinding. Accordingly, the Court of Appeals determined that "a question of fact exists regarding whether the normal level of Pine Lake as established in the 1969 judgment remains beneficial to the public. To resolve that issue, we remand the matter to the trial court for a hearing to determine whether a departure from the established normal level is necessary." *Anson v. Barry County,* 210 Mich App at 326-327.

Another instructive case is *In re Waters East Lake,* unpublished opinion per curiam of the Court of Appeals issued 6/11/2013 (Docket No. 308021) (Ex. 21.) In that case, the Mackinac County Board of Commissioners initiated an action asking the court to rescind the prior-ordered level of West Lake on the basis that raising the lake to the court-ordered level would be cost prohibitive, and many property owners had voiced their opposition to maintaining the court-ordered level. The Court of Appeals noted, "a trial court can vacate a judgment if its prospective application is no longer equitable. MCR 2.612(C)(1)(e). Therefore, at issue is not whether there was sufficient evidence to set a normal lake level, but whether there was sufficient evidence for the trial court to conclude that the order entering the normal lake level was no longer equitable." *In re Waters East Lake,* at 4 (emphasis added).

Since a contempt order forcing the County to adhere to a deviation from the normal level would effectively establish a new level (or deviation from the normal level) in violation of proper procedure, and would otherwise deprive the County of its ability to challenge whether enforcement of the 1982 Order remains equitable today (which is plausible since the level has not been reviewed in light of the 2007 LLCS modifications, subsequent ecohydrological evaluations, and 37 years of climate change), such relief is not available to Petitioners through this Motion and contempt proceeding. Under these circumstances, requiring the County to submit to a show cause hearing for contempt is itself inequitable. The Show Cause Order should be set aside, and Petitioners should be denied the relief that they seek.

CONCLUSION

For these reasons, Respondent, ROSCOMMON COUNTY, respectfully requests that this Honorable Court strike the Affidavit of Eric Ostergren, set aside its Order to Show Cause, dismiss the contempt proceeding, and/or deny Petitioners' request for relief. Respondent further requests that this Court award Respondent costs and attorney fees so wrongfully incurred for having to defend against this motion, and grant any other relief deemed appropriate.

ROSATI, SCHULTZ, JOPPICH, &
AMTSBUECHLER, P.C.

MATTHEW J. ZALEWSKI (P72207)
Attorney for Respondent Roscommon County
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
mzalewski@rsjalaw.com

Dated: June 3, 2019

INDEX OF EXHIBITS

Ex. 1	Ostergren Affidavit
Ex. 2	Ex Parte Order
Ex. 3	May 2019 Level Chart
Ex. 4	NREPA Part 307
Ex. 5	1982 Order
Ex. 6	Spicer Report
Ex. 7	NREPA Part 301
Ex. 8	1-12-07 Letter
Ex. 9	2-14-07 Letter
Ex. 10	Permit
Ex. 11	6-20-08 Letter
Ex. 12	8-26-09 Letter
Ex. 13	9-21-10 Letter
Ex. 14	7-8-17 DNR Notes
Ex. 15	Ostegren Remarks
Ex. 16	Editorial
Ex. 17	HLPOA Minutes
Ex. 18	Nonprofit Docs
Ex. 19	Ostegren Property
Ex. 20	*Dearborn v. BK*
Ex. 21	*In re Waters East Lake*

Exhibit 1

M

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ROSCOMMON

IN THE MATTER OF:
THE WATER LEVELS OF
HOUGHTON LAKE, HIGGINS LAKE, AND
LAKE ST. HELEN
_____/

Case No.: 81-3003-CF

DECLARATION/AFFIDAVIT OF ERIC OSTERGREN

State of Michigan)
County of Midland) ss.

Eric Ostergren, being duly sworn, states:

1. My name is Eric Ostergren and I made this declaration/affidavit in support of the request for issuance of a show cause order against the County of Roscommon, together with its delegated authority, for failing to comply with this Court's February 24, 1982 order directing the minimum lake levels on Higgins Lake within Roscommon County.

2. It is commonly known and understood that the County of Roscommon, together with its delegated authority, have failed to keep the level of Higgins Lake at its legally mandated minimal level as dictated by this Court's February 24, 1982.

3. Attached to the motion is data compiled by the United States Geological Survey and compiled by our attorney which verifies that the County of Roscommon, together with its delegated authority, routinely fail to meet the minimum lake ~~lave~~ LEVEL as required by this Court's February 24, 1982 order.

4. County officials have been repeated told by members of the community, including myself, that it and/or its delegated authority has and have failed to comply with this Court's February 24, 1982 order directing minimum lake levels on Higgins Lake, and those statements are ignored.

5. On or about May 20, 2019, the County of Roscommon and/or its delegated authority dropped Gate #3 on the Cut River Lake Level Control Structure (LLCS) to allow further draining of water from Higgins Lake even though the lake level of Higgins Lake is only .36 inches over the legal level (just barely over a quarter inch).

6. This affidavit is not meant to be complete recitation of all known facts but to confirm those facts needed to support issuance of a show cause order.

If sworn, I could testify competently to the facts contained within this affidavit based upon my personal knowledge.

Eric Ostergren, Affiant

5-21-19
Date

Signed and sworn to before me, this 21 day of May, 2019 by Eric Ostergren.

Notary's Signature: Kyle Yordy

Notary's Name: KYLE YORDY

Notary public, MIDLAND County, State of Michigan

Acting in County of MIDLAND, Michigan

My commission expires: FEB 28 2023

KYLE YORDY
Notary Public - State of Michigan
County of Midland
My Commission Expires Feb 28, 2023
Acting in the County of MIDLAND

Exhibit 2

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ROSCOMMON

IN THE MATTER OF:
THE WATER LEVELS OF
HOUGHTON LAKE, HIGGINS LAKE, AND
LAKE ST. HELEN
_____/

Case No.: 81-3003-CF

AT A SESSION OF THE ABOVE-COURT
HELD IN THE COURTHOUSE OF THE ASSIGNED JURIST

PRESENT: Hon. Robert W. Bennett, Circuit Court Judge

***EX PARTE* ORDER TO COUNTY OF ROSCOMMON AND/OR ITS DELEGATED AUTHORITY TO SHOW CAUSE**

Upon the filing of the ex parte motion filed by counsel for and on behalf of certain property owners adjacent to and near to Higgins Lake for entry of an order to show cause pursuant to MCR 3.606(A)(1), said motion is hereby GRANTED.

TO: **COUNTY OF ROSCOMMON AND/OR ITS DELEGATED AUTHORITY PURSUANT TO PART 307**

Upon the filing of the *ex parte* motion filed for entry of an order to show cause pursuant to MCR 3.606(A)(1), you, COUNTY OF ROSCOMMON AND/OR ITS DELEGATED AUTHORITY, are hereby ordered and directed to appear at the above-referenced court whose address is:

500 Lake Street Roscommon, MI 48653
(address of court)

on 6-12-19 at 2:00 am/pm
(date) *(time)*

and show cause why the Court should not hold you in contempt of court, grant the relief requested with the above-referenced motion, and/or grant any other relief as the Court deems equitable and just.

This Order and the ex parte motion shall be served upon Clerk of the COUNTY OF ROSCOMMON at least 14 days before the above-listed hearing date. A proof of service shall be filed with the Court.

Date: 5/28/19

Hon.
Circuit Court Judge

PROOF OF SERVICE
THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT WAS SERVED UPON ALL ATTORNEYS AND PARTIES OF RECORD HEREIN VIA U.S. Mail & Email
ON May 28, 2019
C. Fowler

Hon. Robert W. Bennett P44262
1

Exhibit 3

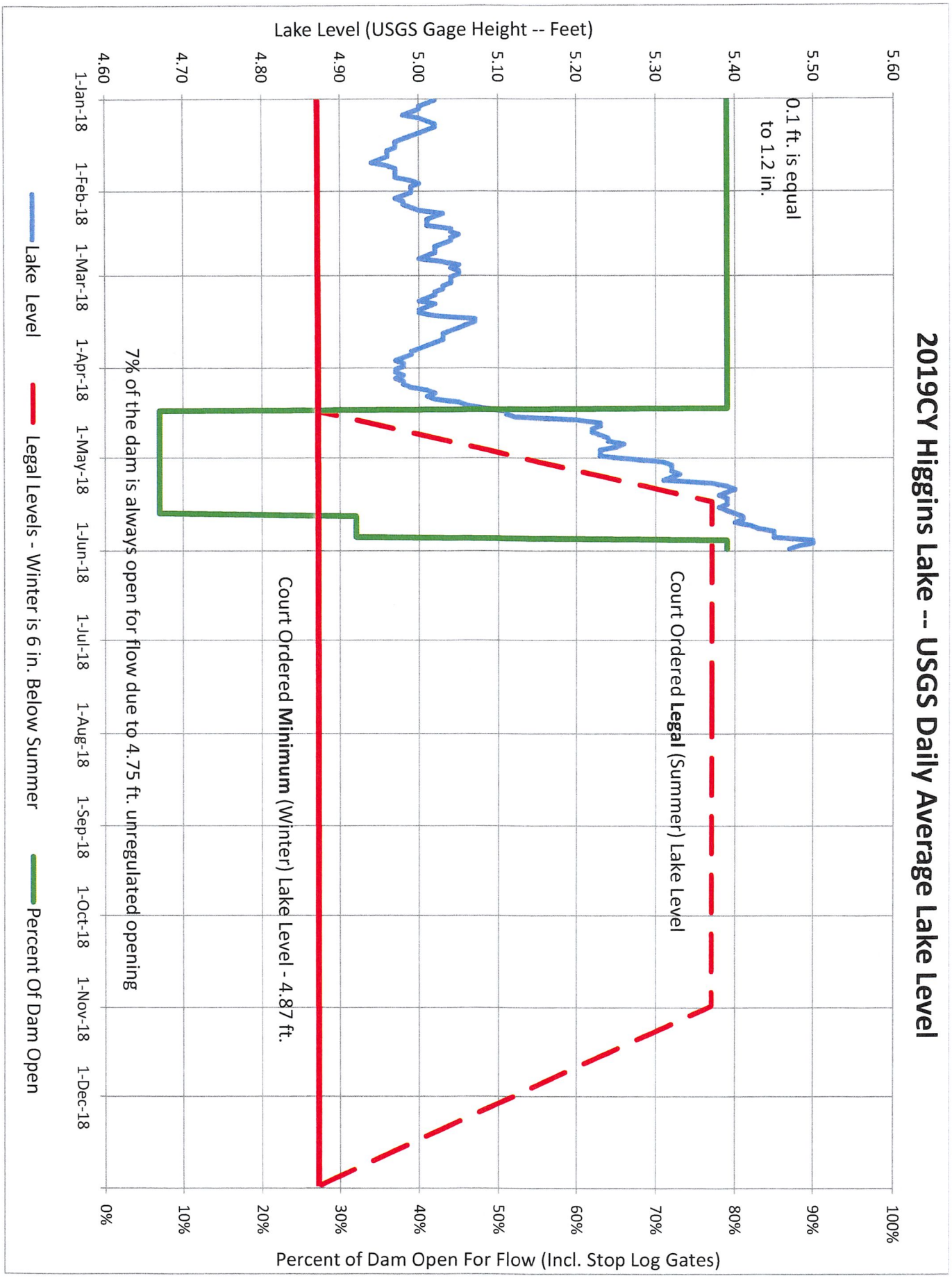

2019CY Higgins Lake -- USGS Daily Average Lake Level
Lake Level (USGS Gage Height -- Feet)
5.60
5.50
5.40
5.30
5.20
5.10
5.00
4.90
4.80
4.70
4.60
0.1 ft. is equal to 1.2 in.
Court Ordered Legal (Summer) Lake Level
Court Ordered Minimum (Winter) Lake Level - 4.87 ft.
7% of the dam is always open for flow due to 4.75 ft. unregulated opening
1-Jan-18
1-Feb-18
1-Mar-18
1-Apr-18
1-May-18
1-Jun-18
1-Jul-18
1-Aug-18
1-Sep-18
1-Oct-18
1-Nov-18
1-Dec-18
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Percent of Dam Open For Flow (Incl. Stop Log Gates)
Lake Level
Legal Levels - Winter is 6 in. Below Summer
Percent Of Dam Open

Exhibit 4

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT (EXCERPT)
Act 451 of 1994

PART 307
INLAND LAKE LEVELS

324.30701 Definitions.

Sec. 30701. As used in this part:

(a) "Commissioner" means the county drain commissioner or the county road commission in counties not having a drain commissioner, and, if more than 1 county is involved, each of the drain commissioners or drain commissioner and road commission in counties having no drain commissioner.

(b) "County board" means the county board of commissioners, and if more than 1 county is involved, the boards of commissioners of each of those counties.

(c) "Court" means a circuit court, and if more than 1 judicial circuit is involved, the circuit court designated by the county board or otherwise authorized by law to preside over an action.

(d) "Dam" means an artificial barrier, structure, or facility, and appurtenant works, used to regulate or maintain the level of an inland lake.

(e) "Delegated authority" means the county drain commissioner or any other person designated by the county board to perform duties required under this part.

(f) "Inland lake" means a natural or artificial lake, pond, impoundment, or a part of 1 of those bodies of water. Inland lake does not include the Great Lakes or Lake St. Clair.

(g) "Interested person" means the department and a person who has a record interest in the title to, right of ingress to, or reversionary right to land that would be affected by a permanent change in the natural or normal level of an inland lake.

(h) "Normal level" means the level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake. A normal level shall be measured and described as an elevation based on national geodetic vertical datum.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Compiler's note: For transfer of authority, powers, duties, functions, and responsibilities of the Land and Water Management Division, with the exception of the farmland and open space preservation program, natural rivers program, and Michigan information resource inventory system, to the Director of the Michigan Department of Environmental Quality, see E.R.O. No. 1995-16, compiled at MCL 324.99901 of the Michigan Compiled Laws.

Popular name: Act 451

Popular name: NREPA

324.30702 Determination of normal inland lake level; motion or petition to initiate action; delegation of powers and duties by county board; maintenance.

Sec. 30702. (1) The county board of a county in which an inland lake is located may upon the board's own motion, or shall within 45 days following receipt of a petition to the board of 2/3 of the owners of lands abutting the inland lake, initiate action to take the necessary steps to cause to be determined the normal level of the inland lake.

(2) Unless required to act by resolution as provided in this part, the county board may delegate powers and duties under this part to that county's commissioner, road commission, or other delegated authority.

(3) If a court-determined normal level is established pursuant to this part, the delegated authority of the county or counties in which the lake is located shall maintain that normal level.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Compiler's note: For transfer of authority, powers, duties, functions, and responsibilities of the Land and Water Management Division, with the exception of the farmland and open space preservation program, natural rivers program, and Michigan information resource inventory system, to the Director of the Michigan Department of Environmental Quality, see E.R.O. No. 1995-16, compiled at MCL 324.99901 of the Michigan Compiled Laws.

Popular name: Act 451

Popular name: NREPA

324.30703 Preliminary study; costs; contents of study.

Sec. 30703. (1) Before proceeding on a motion made or a petition filed under section 30702, the county board may require that a preliminary study be conducted by a licensed professional engineer. The county board, by resolution, may require a cash payment from the petitioners sufficient to cover the actual preliminary study costs or of $10,000.00, whichever is less.

(2) A preliminary study shall include all of the following:
(a) The feasibility of a project to establish and maintain a normal level of the inland lake.
(b) The expediency of the normal level project.
(c) Feasible and prudent alternative methods and designs for controlling the normal level.
(d) The estimated costs of construction and maintenance of the normal level project.
(e) A method of financing initial costs.
(f) The necessity of a special assessment district and the tentative boundaries if a district is necessary.
(g) Other information that the county board resolves is necessary.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30704 Initiating proceeding for determining normal inland lake level and establishing special assessment district; required finding; multicounty lake; joinder permitted.

Sec. 30704. (1) If the county board, based on the preliminary study, finds it expedient to have and resolves to have determined and established the normal level of an inland lake, the county board shall direct the prosecuting attorney or other legal counsel of the county to initiate a proceeding by proper petition in the court of that county for determination of the normal level for that inland lake and for establishing a special assessment district if the county board determines by resolution that one is necessary as provided in section 30711.

(2) If the waters of an inland lake are located in 2 or more counties, the normal level of the lake may be determined in the same manner if the county boards of all counties involved, by resolution, direct the prosecuting attorney or other legal counsel of 1 or more of the counties to institute proceedings. All counties may make a single preliminary study.

(3) The department may join a proceeding initiated under this section.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30705 Special assessment bonds; lake level orders; proceedings; issuance of notes; full faith and credit.

Sec. 30705. (1) The special assessment district may issue bonds or lake level orders in anticipation of special assessments. All proceedings relating to the making, levying, and collection of special assessments authorized by this part and the issuance of bonds or lake level orders in anticipation of the collection of bonds or orders shall conform as nearly as possible to the proceedings for levying special assessments and issuing special assessment bonds or lake level orders as set forth in the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630.

(2) The special assessment district may issue notes in anticipation of special assessments made against lands in the special assessment district or public corporation at large. The final maturity of the notes shall be not later than 10 years from their date. The notes are subject to the revised municipal finance act, 2001 PA 34, MCL 141.2101 to 141.2821.

(3) A county board by a vote of 2/3 of its members may pledge the full faith and credit of a county for payment of bonds or notes issued by a special assessment district.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 2002, Act 215, Imd. Eff. Apr. 29, 2002.

Popular name: Act 451

Popular name: NREPA

324.30706 Initiation of proceedings by director of department.

Sec. 30706. If the department finds it expedient to have the normal level of an inland lake determined, the department may initiate by civil action on behalf of the state, in the court of any county in which the lake is located, a proceeding for determination of the normal level.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30707 Hearing; notice; service; powers and duties of court.

Sec. 30707. (1) Upon filing of a civil action under this part, the court shall set a day for a hearing. The

prosecuting attorney or other legal counsel of the county or counties or the department shall give notice of the hearing by publication in 1 or more newspapers of general circulation in the county and, if the waters of the inland lake are situated in 2 or more counties, in 1 or more newspapers of general circulation in each of the counties in which the inland lake is located. The notice shall be published at least once each week for 3 successive weeks before the date set for the hearing.

(2) The commissioner shall serve a copy of the published notice of hearing by first-class mail at least 3 weeks prior to the date set for the hearing to each person whose name appears upon the latest city or township tax assessment roll as owning land within a tentative special assessment district at the address shown on the roll; to the governing body of each political subdivision of the state in which the lake is located; and to the governing body of each affected political subdivision of the state. If an address does not appear on the roll, then a notice need not be mailed to the person. The commissioner shall make an affidavit of mailing. The failure to receive a notice properly mailed shall not constitute a jurisdictional defect invalidating proceedings under this part.

(3) The prosecuting attorney or the legal counsel of the county shall serve notice on the department at least 21 days prior to the date of the hearing.

(4) In a determination of the normal level of an inland lake, the court shall consider all of the following:

(a) Past lake level records, including the ordinary high-water mark and seasonal fluctuations.

(b) The location of septic tanks, drain fields, sea walls, docks, and other pertinent physical features.

(c) Government surveys and reports.

(d) The hydrology of the watershed.

(e) Downstream flow requirements and impacts on downstream riparians.

(f) Fisheries and wildlife habitat protection and enhancement.

(g) Upstream drainage.

(h) Rights of riparians.

(i) Testimony and evidence offered by all interested persons.

(j) Other pertinent facts and circumstances.

(5) The court shall determine the normal level to be established and maintained, shall have continuing jurisdiction, and may provide for departure from the normal level as necessary to accomplish the purposes of this part. The court shall confirm the special assessment district boundaries within 60 days following the lake level determination. The court may determine that the normal level shall vary seasonally.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30708 Maintenance of normal level; acquisition by gift, grant, purchase, or condemnation; contract for operation and maintenance of existing dam; dam in adjoining county; operation of pumps and wells.

Sec. 30708. (1) After the court determines the normal level of an inland lake in a proceeding initiated by the county, the delegated authority of any county or counties in which the inland lake is located shall provide for and maintain that normal level.

(2) A county may acquire, in the name of the county, by gift, grant, purchase, or condemnation proceedings, an existing dam that may affect the normal level of the inland lake, sites for dams, or rights in land needed or convenient in order to implement this part. A county may enter into a contract for operation and maintenance of an existing dam. The county may construct and maintain a dam that is determined by the delegated authority to be necessary for the purpose of maintaining the normal level. A dam may be acquired, constructed, or maintained in a county adjoining the county in which the lake is located.

(3) For the purpose of maintaining the normal level, a delegated authority may drill wells or pump water from another source to supply an inland lake with additional water, may lower the level of the lake by pumping water from the lake, and may purchase power to operate pumps, wells, or other devices installed as part of a normal level project.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30709 Powers of department.

Sec. 30709. (1) After the court determines the normal level of an inland lake in a proceeding initiated by the department, the department may provide for and maintain that normal level.

(2) In a proceeding initiated by the department, the department has the same powers in connection with a normal level project as a county has under sections 30708, 30713, and 30718.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30710 Condemnation of private property.

Sec. 30710. If the department or the delegated authority determines that it is necessary to condemn private property for the purpose of this part, the department or county may condemn the property in accordance with the uniform condemnation procedures act, Act No. 87 of the Public Acts of 1980, being sections 213.51 to 213.77 of the Michigan Compiled Laws.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30711 Defraying project costs by special assessment; special assessment roll; reassessment.

Sec. 30711. (1) The county board may determine by resolution that the whole or a part of the cost of a project to establish and maintain a normal level for an inland lake shall be defrayed by special assessments against the following that are benefited by the project: privately owned parcels of land, political subdivisions of the state, and state owned lands under the jurisdiction and control of the department. If the county board determines that a special assessment district is to be established, the delegated authority shall compute the cost of the project and prepare a special assessment roll.

(2) If the revenues raised pursuant to the special assessment are insufficient to meet the computation of cost included in section 30712, or if these revenues are insufficient to meet bond obligations, the special assessment district may be reassessed without hearing using the same apportioned percentage used for the original assessment.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30712 Computation of project costs.

Sec. 30712. (1) Computation of the cost of a normal level project shall include the cost of all of the following:

(a) The preliminary study.

(b) Surveys.

(c) Establishing a special assessment district, including preparation of assessment rolls and levying assessments.

(d) Acquiring land and other property.

(e) Locating, constructing, operating, repairing, and maintaining a dam or works of improvement necessary for maintaining the normal level.

(f) Legal fees, including estimated costs of appeals if assessments are not upheld.

(g) Court costs.

(h) Interest on bonds and other financing costs for the first year, if the project is so financed.

(i) Any other costs necessary for the project which can be specifically itemized.

(2) The delegated authority may add as a cost not more than 15% of the sum calculated under subsection (1) to cover contingent expenses.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30713 Contract with agency or corporation; provisions.

Sec. 30713. The delegated authority of a county in which an inland lake is located may contract with a state or federal government agency or a public or private corporation in connection with a project for the establishment and maintenance of a normal level. The contract may specify that the agency or corporation will pay the whole or a part of the cost of the project or will perform the whole or a part of the work connected with the project. The contract may provide that payment made or work done relieves the agency or corporation in whole or in part from assessment for the cost of establishment and construction of the project.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30714 Special assessment roll; public hearing; notice; approval; appeal.

Sec. 30714. (1) A special assessment roll shall describe the parcels of land to be assessed, the name of the owner of each parcel, if known, and the dollar amount of the assessment against each parcel.

(2) The delegated authority shall set a time and place for a public hearing or hearings on the project cost and the special assessment roll. Notice of a hearing shall be by both of the following:

(a) By publication of notice at least twice prior to the hearing in a newspaper that circulates in the special assessment district, the first publication to be at least 10 days before the hearing.

(b) As provided in Act No. 162 of the Public Acts of 1962, being sections 211.741 to 211.746 of the Michigan Compiled Laws.

(3) At or after a public hearing, the delegated authority may approve or revise the cost of the project or the special assessment roll. Before construction of a project is begun, the county board shall approve the cost and the special assessment roll by resolution.

(4) The special assessment roll with the assessments listed shall be final and conclusive unless appealed in a court within 15 days after county board approval.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30715 Assessment payments; installments; amount; interest, penalty, and collection; lien; preliminary study payment credited.

Sec. 30715. (1) The county board may provide that assessments under this part are payable in installments.

(2) Assessment payments shall be sufficient to meet bond and note obligations of the special assessment district.

(3) Special assessments under this part shall be spread upon the county tax rolls, and shall be subject to the same interest and penalty charges and shall be collected in the same manner as county taxes.

(4) From the date of approval of the special assessment roll by the county board, a special assessment under this part shall constitute a lien on the parcel assessed. The lien shall be of the same character and effect as a lien created for county taxes.

(5) A payment for the cost of the preliminary study under section 30703 shall be credited against an assessment for the amount of the payment made by the person assessed.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30716 Bonds and notes; issuance.

Sec. 30716. With approval of the county board and subject to the revised municipal finance act, 2001 PA 34, MCL 141.2101 to 141.2821, the district may issue bonds or notes that shall be payable by special assessments under this part. Bonds or notes shall not be issued exceeding the cost of the lake level project that is being financed.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 2002, Act 216, Imd. Eff. Apr. 29, 2002.

Popular name: Act 451

Popular name: NREPA

324.30717 Acceptance and repayment of advance.

Sec. 30717. The delegated authority may accept the advance of work, material, or money in connection with a normal level project. The obligation to repay an advance out of special assessments under this part may be evidenced by a note or contract. Notes and contracts issued under this section are subject to the revised municipal finance act, 2001 PA 34, MCL 141.2101 to 141.2821.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 2002, Act 217, Imd. Eff. Apr. 29, 2002.

Popular name: Act 451

Popular name: NREPA

324.30718 Dam construction or maintenance; plans and specifications; approval by department; bids; work relief project.

Sec. 30718. Plans and specifications for a dam constructed or maintained under this part shall be prepared by a licensed professional engineer under the direction of the delegated authority. The plans and specifications shall be approved by the department before construction begins. The department shall review and approve or reject the plans and specifications within 30 days after they are received by the department. If the plans and specifications are rejected, the department shall propose changes in the plans and specifications that would result in their approval by the department. Bids for doing the work may be advertised in the manner the delegated authority directs. The contract shall be let to the lowest responsible bidder giving adequate security for the performance of the contract, but the delegated authority may reserve the right to reject any and all bids. The county may erect and maintain a dam as a work relief project in accordance with the law applicable to a work relief project.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30719 Dam construction; underspill device; fish ladder.

Sec. 30719. (1) The department may require that a new dam that is proposed to be constructed be equipped with an underspill device for the release of cold bottom waters for the protection of downstream fish habitats.

(2) The department may require the installation of a fish ladder or other device to permit the free passage of fish.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30720 Unauthorized change of level; penalty.

Sec. 30720. A person who is not authorized by a delegated authority or the department to operate a dam or other normal level control facility and who changes, or causes to change, the level of an inland lake, the normal level of which has been established under this part or any previous act governing lake levels, and for which the delegated authority or the department has taken steps to maintain the normal level, is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 or imprisonment for not more than 1 year, or both, and shall be required to pay the actual cost of restoration or replacement of the dam and any other property including any natural resource that is damaged or destroyed as a result of the violation.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30721 Establishment of normal inland lake level prohibited in certain cases.

Sec. 30721. A normal level shall not be established for an inland lake in either of the following cases:

(a) The inland lake is used as a reservoir for a municipal water supply system, unless a normal level determination is petitioned for by the governing body of the municipality.

(b) The state has title, flowage rights, or easements to all riparian land surrounding the inland lake, unless a normal level determination is petitioned for by the department.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30722 Inspection; report; repairs; penalty; expenditure.

Sec. 30722. (1) The delegated authority of a county shall cause an inspection to be made of each dam on an inland lake within the county which has a normal level established under this part or under any previous act governing lake levels. The inspection shall be conducted by a licensed professional engineer. The inspection shall take place every third year from the date of completion of a new dam or every third year from the determination of a normal level for an existing dam. An inspection report shall be submitted promptly to the department in the form and manner the department prescribes.

(2) If a report discloses a need for repairs or a change in condition of the dam that relates to the dam's safety or danger to natural resources, the department shall conduct an inspection to confirm the report. If the report is confirmed and the public safety or natural resources are endangered by the risk of failure of the dam, the department may require the county either to repair or to replace the dam. Plans and specifications for the repairs or replacement shall be prepared by a licensed professional engineer under the direction of the delegated authority. The plans and specifications shall be approved by the department before construction

begins. The department shall review and approve or reject the plans and specifications within 30 days after they are received by the department. If the plans and specifications are rejected, the department shall propose changes in the plans and specifications that would result in their approval by the department. If the dam is in imminent danger of failure, the department may order an immediate lowering of the lake level until necessary repair or replacement is complete.

(3) A person failing to comply with this section, or falsely representing dam conditions, is guilty of misconduct in office.

(4) If an inspection discloses the necessity for maintenance or repair, the delegated authority, without approval of the county board, may spend not more than $10,000.00 annually for maintenance and repair of each lake level project. An expenditure of more than $10,000.00 annually shall be approved by resolution of the county board.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30723 Other requirements not abrogated.

Sec. 30723. This part does not abrogate the requirements of other state statutes.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

Exhibits

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ROSCOMMON

IN THE MATTER OF THE WATER LEVEL OF HOUGHTON LAKE, HIGGINS LAKE AND LAKE ST. HELEN

File No. 81-3003-CF

ORDER

At a session of said Court held in the Courthouse in the Village of Roscommon, Roscommon County, State of Michigan, on the 24th day of February, 1982.

PRESENT: THE HONORABLE CARL L. HORN
Circuit Judge

This cause having come on to be heard on the Petition to Establish Water Level of Houghton Lake, Higgins Lake and Lake St. Helen, heretofore filed in this cause on behalf of the Roscommon County Board of Commissioners; it appearing that proper notice was given to interested parties; this having heard testimony of behalf of the Michigan Department of Natural Resources and interested persons appearing at the public hearing on said petition; it appearing that the following order will provide the most benefit to the public and best protect the natural resources of the state, and preserve and protect the values of property developed around said lakes; and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that the legal level of Higgins Lake Roscommon County, Michigan, heretofore established at 1154.11 feet above mean sea level, be continued; provided, however, that said level be lowered to a level not less than 1153.61 feet, commencing on or about November 1 of each year, and restored to its legal level, commencing on or about April 15, or ice-out, which ever shall first occur, in each year.

IT IS FURTHER ORDERED AND ADJUDGED that the legal level of Houghton Lake, Roscommon County, Michigan, heretofore established at 1138.1 feet above mean sea level, be continued; provided, however, that said level be lowered to a level not less than 1137.6 feet, commencing on or about November 1 of each year, and restored to its legal level, commencing on or about April 15, or ice-out, which ever shall first occur, in each year.

IT IS FURTHER ORDERED AND ADJUDGED that the legal level of Lake St. Helen, Roscommon County, Mcihigan, heretofore established at 1154.15 feet above mean sea level, be continued; provided, however, that said level be lowered to a level not less than 1153.65 feet, commencing on or about November 1 of each year, and restored to its legal level, commencing on or about April 15, or ice-out, which ever shall first occur, in each year.

EXHIBIT

1153.25
1154.75

IT IS FURTHER ORDERED AND ADJUDGED that, in adjusting the lake levels as herein provided, the person or persons responsible for such operations shall make every reasonable effort to take into consideration stream flows into the lake and projected snow melt runoff within the water shed, as well as providing a minimum release during refill operations.

Carl L. Horn

CARL L. HORN, Circuit Judge

lowered to a level not less than 1153.69 feet, commencing on or about November 1 of each year, and restored to its legal level, commencing on or about April 15, or ice-out, which ever shall first occur, in each year.

11-3-25

1154.75

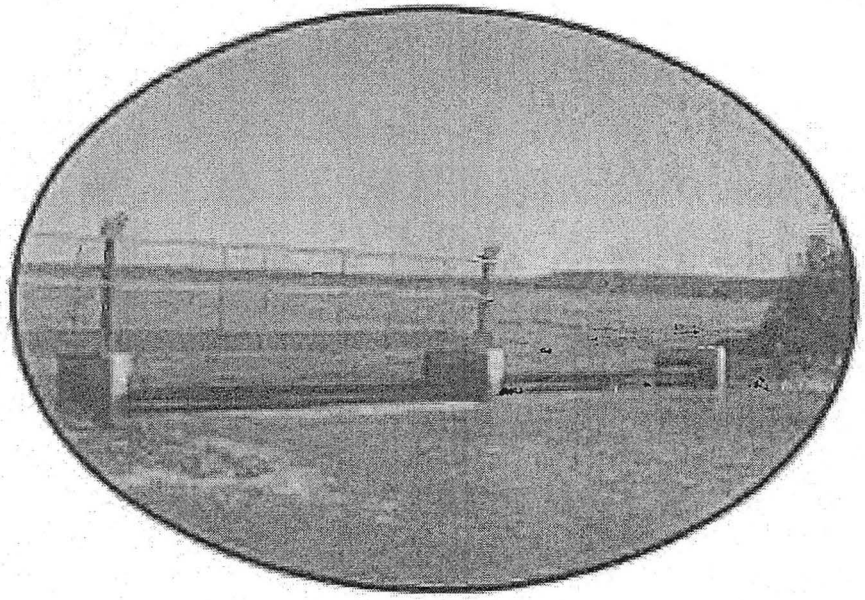
Exhibit 6

Commissioners Copy

ENGINEERS • SURVEYORS • PLANNERS

Higgins Lake Level Control Structure
2010 Engineering Report

State Identification No.: 2011
NW Quarter of Section 34, T24N, R03W
Gerrish Township, Roscommon County, Michigan
Located on the Cut River
Per Part 307, Act 451 of 1994



Prepared for:

Roscommon County Board of Commissioners
500 Lake St.
Roscommon, MI 48653

Prepared By:

Spicer Group, Inc.
230 S. Washington
Saginaw, Michigan 48607-1286
(989) 754-4717

Date of Report: December 14, 2010

Project I.D. Number 118475SG2010

TABLE OF CONTENTS

I. SUMMARY 2
II. BACKGROUND 4
III. INSPECTION 5
A. Top Deck and Railing 6
B. Center Piers 6
C. Sheet Piling Walls 6
D. Gates and Operational Features 7
E. Apron Concrete 7
IV. LAKE LEVEL 7
A. Evaporation 9
B. Precipitation 9
C. Wave Losses 10
D. Water Loss Through Low-Flow Channel 11
E. Summary of Findings 11
V. HYDRAULICS 12
VI. RECOMMENDATIONS 13
A. Structural Improvements 13
B. Operational Features 13
C. Operation Guidelines 14
1. Summer Level (NGVD 1154.11) 14
2. Winter Level (NGVD 1153.36 through winter 2013/2014) 15
APPENDIX A 16
APPENDIX B 18
APPENDIX C 27
APPENDIX D 29
APPENDIX E 42
APPENDIX F 44

I. SUMMARY

The Roscommon County Board of Commissioners has commissioned Spicer Group to complete an engineering analysis of the Higgins Lake Level Control Structure (LCS). Spicer Group has prepared this report to summarize the conclusions and recommendations of the engineering analysis. This report should be adopted as a guideline for the County related to needed improvements, maintenance and operational changes for the Higgins Lake LCS.

The scope of services, as requested by the County, that were completed by Spicer Group and summarized in this report include:

- Inspection of the existing LCS as it pertains to water control and development of recommendations to address deficiencies observed.
- Calculation of hydraulic capacity of the LCS and development of recommendations that address deficiencies determined.
- Analyze historical lake level data and, based on the data, develop recommendations regarding operation of the LCS.
- Assess impact of wave action at the LCS and estimate water loss due to wave action.
- Assess impact of flow through the unregulated section of the LCS and estimate water loss through the section.
- Assess water loss from the lake due to evaporation.
- Prepare recommendations related to the operation of the LCS.
- This study does not include an assessment of the suitability of the court established lake level as it relates to lake uses and erosion rates along the lake.

The general conclusion is that the Higgins Lake LCS has adequate hydraulic capacity during large runoff events. However, discharge from the lake is limited by the capacity of the Cut River. Additionally, this study has found that the level of Higgins Lake has averaged below the court established legal lake level during the summer months in typical years. Factors such as water loss due to evaporation, wave action and flow through an unregulated low flow channel contribute to the low summer levels. Losses due to evaporation have been calculated to be the most substantial factor followed by flow through the unregulated span and then by losses due to wave action.

In 2007, the structure was altered to include two additional tilting weir gates (also referred to as "flop gates") totaling 33 feet in length and an unregulated low-flow channel measuring roughly 4.75 feet in width. Through comparison of historical data, the average lake level was found to have been lower in the period following these alterations than the period prior. This does not appear to be attributable to a drought as precipitation in the years immediately following the structure's alteration has been well above average. Therefore, if legal levels are to be maintained annually, water levels must exceed the legal level in the early summer months to conserve an adequate volume to maintain the legal level through the later summer months.

The Higgins Lake structure is in need of minor repairs and modifications, but, overall, the LCS is in good condition. Alterations are needed to improve LCS operation to enable lake levels to be maintained closer to the legal level. Specifically, a restrictor should be placed in the low flow channel to reduce the amount of flow to the Cut River in late summer. Also, scour protection should be added to the low flow channel, improvements should be made to the sheet piling portions and improvements should be made to the stop logs. Also, the staff gage should be replaced.

II. BACKGROUND

This section outlines Spicer Group's understanding of the background and history of the LCS. The following information is based on records and data that were provided by Roscommon County.

The legal lake level in Higgins Lake was set by an order issued in 1982 by a Roscommon Circuit Court, in accordance with Part 307 of Public Act 451 of 1994. This order set the legal level at 1154.11 feet above mean sea level for summer and 1153.61 feet for winter months. In 2009, the legal winter level was temporarily amended (effective through 2013/2014) to be 1153.36 beginning between September 15 and November 1. These orders did not specify the elevation datum. Therefore, Spicer Group has assumed the datum to be NGVD '29. This assumption is corroborated by the 1969 and 1995 reports by Ayres, Lewis, Norris and May Consulting Engineers which refer to the "USGS datum." The USGS datum at Higgins Lake is based on NGVD '29 elevations. Furthermore, it is assumed that the intent of 2009 order was to lower the lake level relative to the NGVD '29 and conversions to the NAVD '88 were not completed.

In accordance with Part 307, Roscommon County is responsible for the operation, maintenance and improvement of the LCS. The purpose of this analysis and report is to provide the County with conclusions and recommendation consistent with their responsibilities pursuant to Part 307.

The Higgins Lake Level Control Structure (LCS) regulates flow leaving Higgins Lake to the Cut River. The structure was originally constructed in 1950 however an original engineering plan set of the structure has not been provided. Significant hydraulic modifications to the structure were made in 2007. Improvements to the LCS which included the addition of two (2) 17-foot tilting weir gates and the creation of a 4.75 foot low-flow channel in the center of the structure. These additions in conjunction with the existing three stop log bays, sheet pile weir, and tilting weir gate provide a total length of

approximately 90 feet. An overview drawing of the existing structure is shown in Appendix A and a photograph of the upstream face of the structure is shown in the Inspection section (see Figure 1).

Several previous studies have been done on Higgins Lake including two reports by Ayres, Lewis, Norris, and May, Inc. in 1969 and 1995. These studies assess the hydraulics of the LCS and the capacity of the Cut River. Both studies concluded that under high flow conditions, the capacity of the LCS to dewater the lake is limited by the capacity of the downstream river. The 1995 report found that flow out of Higgins Lake is limited by the capacity of the Cut River when flows exceed 110-120 cfs. Therefore, improvements to the LCS beyond the capacity of the downstream river would not be useful in operating lake levels. With the improvements made to the structure in 2007, the Higgins Lake LCS is capable of conveying more flow than the Cut River can accept. This finding is corroborated by testimony from property owners that during large storm, there is no visible head loss across the structure. Therefore, under these conditions, the Cut River capacity limits the flow from Higgins Lake.

Recently, the Board of Commissioners has received complaints of the lake level being too low. At other times, complaints have been received that the lake level is too high. A committee regarding Higgins Lake was formed. The committee includes participation from the Board of Commissioners. Based on input from the committee and the public, the Board of Commissioners directed to have this evaluation of the Higgins Lake LCS completed.

III. INSPECTION

A surface visual inspection of the Higgins Lake LCS was performed by Spicer Group on July 26, 2010. This inspection focused primarily on those aspects of the structure affecting its capacity and hydraulics and secondarily on structural components of the LCS. The following sections detail the findings of this

inspection. For reference, a drawing of the existing LCS is in Appendix A. Specific features of the structure are labeled below in Figure 1. Additional pictures of individual components of the LCS are included in Appendix B.

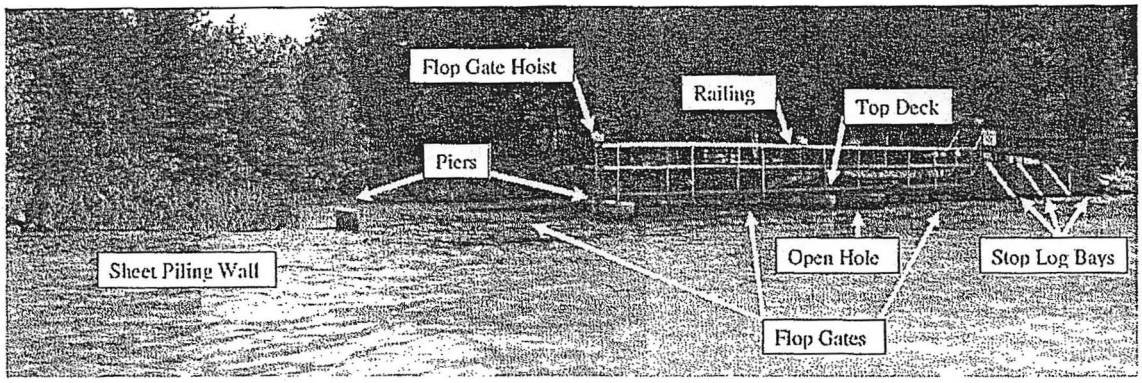


Figure 1: Structural features of the Higgins Lake LCS from the upstream face.

A. Top Deck and Railing

The top deck and railing were found to be in generally good condition with some rust. There is presently no step at the south end of the structure from which to step onto the top deck. The addition of a step here would make access easier.

B. Center Piers

Concrete comprising the center piers appears to be in good condition with only minor areas of spalling.

C. Sheet Piling Walls

The sheet piling cap at north end of structure is in poor condition and uneven. Improvements should be made to this portion of the structure and the cap elevation should be raised slightly.

D. Gates and Operational Features

Gates and gate hoists appear to be in good working order. The stop logs in the three southernmost bays are in poor condition and allow some water to flow between them. Improvements to the stop logs should be made. Also, the staff gage is worn and hard to read. A new staff gage should be installed.

E. Apron Concrete

The apron concrete is in generally good condition. However, no apron exists below the unregulated low flow channel. Scour has begun to occur in this concentrated flow area. The concrete apron should be extended across the open span to resist further erosion.

IV. LAKE LEVEL

In 1982, a court order established the legal level of Higgins Lake at 1154.11 feet for summer months and 1153.61 feet between November 1 and April 15, or ice-out, whichever occurs first. This order was amended in November of 2009 (effective until 2013/2014) to establish the legal winter level at 1153.36 feet with lowering of the lake level beginning each year between September 15 and November 1. Lake level data were obtained from USGS gage #442805084411001. For a period of record from 1986 to 2009, the lake level has averaged 0.1 feet above the legal level to 0.3 feet below the legal level during summer months and 0.15 to 0.4 feet above the legal level during winter months relative to the legal level effective prior to 2009. This comparison is shown below in Figure 2. Note that the legal winter level was amended in 2009 and therefore, the winter lake level trends shown in Figure 2 do not reflect operating procedures currently employed at the Higgins Lake LCS. However, the trends for summer months should be indicative of current procedures as the summer level has not been altered.

Average monthly precipitation data shown in the below graph was collected by the Michigan State University Climatologist's Office using gages located near Houghton and Higgins Lakes for the years of 1971 through 2000 and 1951 through 1978 respectively.

Note that Figure 2 shows the average monthly lake level for the period prior to 2007 and the average level after 2007. As stated in the Hydraulics section, the LCS was modified in 2007 and a low-flow channel was added. It appears from Figure 2 that the average lake level has decreased by 0.1 to 0.4 feet relative with the periods prior to the modification.

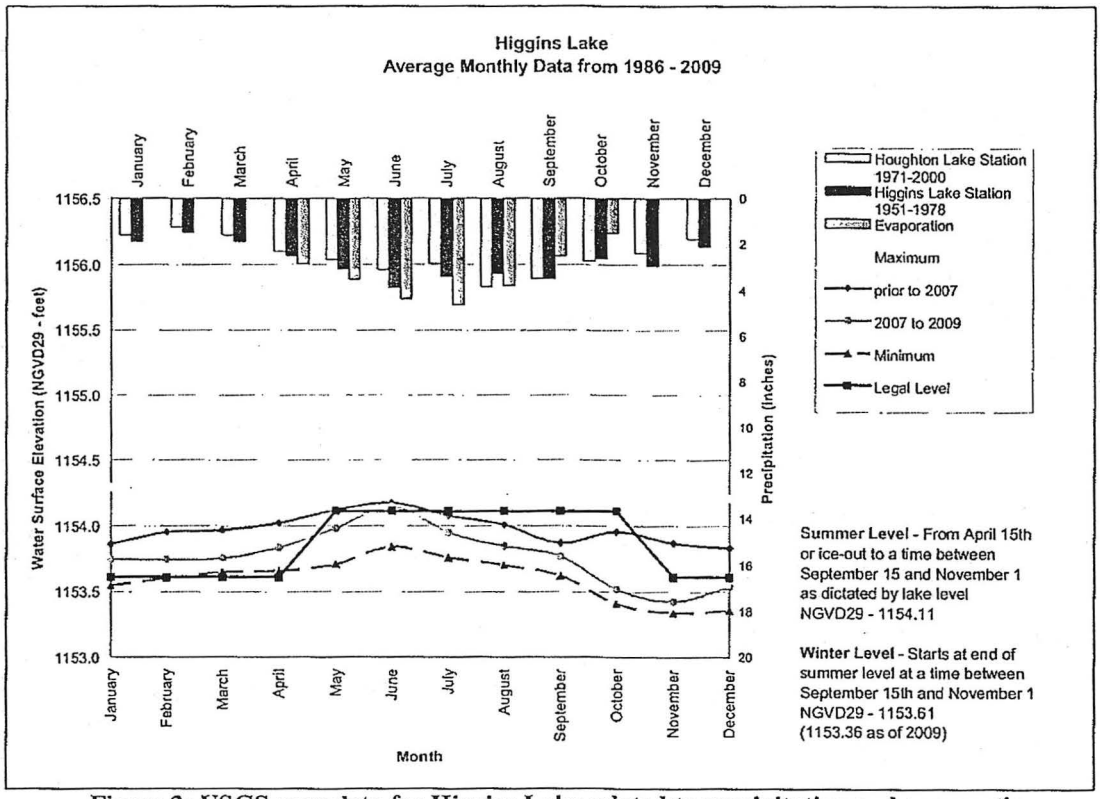


Figure 2: USGS gage data for Higgins Lake related to precipitation and evaporation.

The following sections outline various sources of water loss from Higgins Lake that impact summer water levels.

A. Evaporation

The Michigan State University "Enviro-weather" website provided potential evapo-transpiration (PET) rates for July and August of 2010. The weather station used to obtain these data is located in Arlene, approximately 20-25 miles west of Higgins Lake. Rates of PET were typically between 0.1 and 0.3 inches per day. However, these data included transpiration, which does not occur on open water bodies.

To assess evaporation alone, pan evaporation measurements were used. Monthly averages for pan evaporation were taken from the NOAA Nation Climatic Data Center (NCDC) at Lake City for the years 1967-2008. This site is also approximately 20-25 miles west of Higgins Lake. To convert these pan evaporation rates to lake evaporation rates, pan rates were multiplied by 0.7 as suggested by the "General Guidelines for Calculating a Water Budget" from the Land and Water Management Division of the Michigan DNRE (March 2010). This yielded an average summer evaporation rate of 0.11 inches/day with the highest monthly rate occurring in July (0.15 inches/day). This rate closely matched the summer rate shown in Figure 2 of the aforementioned DNRE document which was 0.11 inches/day (20 inches total evaporation for May-October). The DNRE report is included in Appendix D along with evaporation rates calculated from NCDC data in Appendix E. Monthly evaporation rates are shown on Figure 2 as a hyetograph along the top horizontal axis.

B. Precipitation

Precipitation data were collected from the Michigan State University Climatology website. These data were broken down on a monthly basis for gauging stations at both Higgins Lake and

Houghton Lake as shown in Figure 2. When compared to lake levels in Higgins Lake, months of historically high precipitation have allowed lake levels to rise during summer months.

Data were also collected from the NOAA NCDC on Houghton Lake and at the Roscommon Airport. Though these gages were not specifically on Higgins Lake, they provided a detailed view of changes in precipitation over various time periods. Of particular interest was that in the period of 2007-2010, average rainfall has been over two inches higher than the average of prior years. This appears to indicate that a lack of rainfall has not contributed to lower lake levels observed for the period after the LCS was modified in 2007.

C. Wave Losses

An estimate was created for wave action occurring over the Higgins Lake LCS. This analysis used field observations gathered on 8/31/2010 to estimate wave velocity and frequency. Based on these observations, a design wave speed of 5.0 feet/second was assumed with a frequency of 1.0 waves/second. To obtain an estimate of water loss from wave action, it was assumed that the mean water surface (midpoint of waves) was at the top of the LCS and therefore, the volume of water contained in each wave above this height left the lake. Table 1 gives average daily water loss for waves of varying heights sustained for 24 hour periods. The wave height shown is the distance from crest to trough of each wave.

Table 1: Water lost due to wave action for waves of varying height. Height is given as the total height from crest to trough.

Height (inches)	24-hr Loss (in/day)
4	0.03
6	0.05
9	0.08
12	0.10
18	0.16
24	0.21

D. Water Loss Through Low-Flow Channel

The low-flow channel cut in the dam is approximately 4.75 feet wide with a 4-inch rubber restrictor on one side. From the top of the concrete sill to the top of the pier, the opening is three feet in height however, the distance from the top of the concrete sill to summer legal lake level it is only two feet. Assuming Higgins Lake is at its normal summer level and backwater effects from the Cut River are negligible, it is calculated that 33 cfs flows through the low-flow channel. This flow rate is equivalent to 0.08 in/day draining from the lake assuming there is no inflow to the lake. If 1.0 foot of tailwater is assumed, 28 cfs is allowed to pass through the low-flow channel which equates to a loss of 0.07 in/day, again assuming no inflow to the lake.

E. Summary of Findings

Prior to 2007, the LCS on Higgins Lake did not have a center low-flow channel allowing constant flow to the Cut River and therefore water exited the lake by either evaporation, wave loss over the LCS, or operation of the LCS. By cutting a hole in the center of the structure, the amount of water leaving the LCS during summer months was calculated to increase by roughly 30 percent over the losses due to evaporation and wave action alone. This finding was corroborated through comparison of lake level trends before and after the lake level control structure was modified. Average lake levels in Higgins Lake have decreased by an average of about 0.20 feet in the past three years. Table 2 shows a summary of losses from Higgins Lake based on what are thought to be typical summer conditions.

Table 2: Summary of normal water losses from Higgins Lake.

Water Loss Type	Depth Loss (in/day)
Evaporation	0.10-0.15
Wave Action	0.05
Low-Flow Channel	0.07

Note that this observed decrease in lake level is based on only three years of available data. Upon further data collection, these findings can be reassessed. Although, since precipitation has been

above average for the past three years, it seems unlikely that a lack of precipitation has lead to this decrease in water surface.

V. HYDRAULICS

A review and basic assessment of hydraulic calculations for the Higgins Lake LCS was compiled. In performing this review, the first step was to review recently completed studies. A report by Ayres, Lewis, Norris and May, Inc. in May 1995 indicated that the LCS capacity was 55 cfs without a rise in the lake above its legal summer level. The overall capacity of the Cut River was determined to be 110-120 cfs. In general accordance with the 1995 report, modifications were made to the LCS in 2007. The modifications included the addition of two tilting weir (flop) gates totaling 33 feet in length and a low-flow channel roughly 4.75 feet in width. This altered the hydraulic characteristics of the structure such that the hydraulic capacity of the LCS now exceeds the capacity of the Cut River.

A discharge request filed with the Michigan Department of Natural Resources and Environment (MDNRE) on June 9, 2010, reported a 100-year peak flow at the Higgins Lake LCS of 330 cfs. Weir calculations for flow over the structure indicate that with all stop logs removed, gates down, and flow in the Cut River one foot above the invert of the low-flow channel (one foot below legal summer level), 330 cfs can pass through the structure with Higgins Lake at its summer level using the weir and submerged weir equations shown in Appendix C. The center span was modeled as a culvert using Culvertmaster computer software. Despite these calculations, information from the 1995 report coupled with testimony from local residents, indicates that during high flows, there is no noticeable head loss across the LCS. Therefore, flow over the Higgins Lake LCS is ultimately controlled by the downstream Cut River and the LCS provides adequate capacity.

VI. RECOMMENDATIONS

Lake level data on Higgins Lake have shown that the lake has historically been maintained below its legal summer level, notably later in the summer. The following sections outline physical and operational changes that are recommended to help maintain the lake near its legal level and to improve the structural condition of the structure.

A. Structural Improvements

The open span in the center of the Higgins Lake LCS creates high velocities which have caused scour to occur along the downstream toe of the structure therefore, the concrete apron should be extended across the open span to resist further erosion. Also, the sheet pile weir on the north end of the structure has deteriorated and should be improved. Such improvements may include the addition of riprap reinforcement, new sheet piling, and/or a concrete cap on the existing sheeting. When performing such improvements, the sheet piling should be set to an elevation roughly 0.2 feet above the legal summer level. This will assist in attempting to conserve water by holding the elevation at desired times, in excess of the legal level.

Stop logs in the three southernmost bays are in poor condition. However, since the present structure has sufficient capacity to regulate flow using primarily the gates, these logs are seldom needed for lake level regulation. Therefore, rather than replacing the stop logs with new stop logs, a fabricated insert with a top elevation slightly above the legal summer level may be used instead. This would only rarely, if ever, need to be operated.

B. Operational Features

The low-flow channel in the center of the LCS allows constant flow from the structure. Since levels have historically been lower than the legal level, this flow should be reduced during the summer months of July, August and into September. It is recommended that a removable insert

be fabricated to enable greater retention of water in the lake. An example of such an insert is shown in Appendix F. If necessary, further control of water leaving the lake could be achieved by mitigating the effects of wave action. This could be done through the installation of a concrete, riprap, or steel break wall. However, the option of controlling wave loss would likely be far more costly than the installation of a restrictor plate and produce less results as more flow discharges via the center span than via wave action.

Operational features which provide accurate and reliable lake level data can facilitate more precise control of lake levels. Spicer Group recommends that the existing staff gage be replaced with one calibrated to the current lake datum. Since Higgins Lake has not been shown to be prone to large, frequent fluctuations in lake level (see Figure 2), the structure does not typically require that the LCS gates be operated regularly to adjust level. Therefore, a remotely transmitting lake level sensor would not be cost effective. Furthermore, the wave action near the Higgins Lake LCS would likely cause any digital sensor to be inaccurate.

C. Operation Guidelines

Note that these guidelines will depend largely on the capacity of the Cut River downstream of the LCS. The 1995 report indicated that the capacity of the Cut River was between 110 and 120 cfs. This is substantially less than the 330 cfs 100-year peak flow rate identified by the MDNRE.

1. Summer Level (NGVD 1154.11)

As stated previously, the level of Higgins Lake has historically been maintained below the court established summer level. Therefore, additional water must be retained in the months of May and June. Recent flow data suggests that roughly 0.4 feet of water is lost between July and September. Therefore, to maintain an average level near the summer

legal level, approximately 0.2 feet of water above the legal lake level should be achieved in June.

Around April 15 or ice-out each year, the LCS should be closed to limit flow from the lake. Maintain the LCS to limit flow unless levels rise to more than 0.2 feet above the legal level. If this should occur, operate the LCS to allow the lake to return to a level of 0.2 feet above the legal level.

In the months of July, August, and September, the lake level will naturally decrease. Therefore, the LCS should remain closed in an effort to maintain the lake near the court established legal level. Also, the flow restriction device should be installed in the unregulated section of the LCS. Under the court order effective for winter seasons of 2009/2010 through 2013/2014, the LCS should be opened beginning between September 15 and November 1 to draw the lake down to its legal winter level. Due to the limitation of the Cut River to accept flow, it should not be necessary to remove stop logs during this drawdown period.

2. *Winter Level (NGVD 1153.36 through winter 2013/2014)*

Maintain the LCS in its open position during the winter months. In the event that the lake level drops more than 0.2 feet below the legal level, operate the LCS. On April 15 or ice-out, the LCS gate should be incrementally raised.

Exhibit 7

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT (EXCERPT)
Act 451 of 1994

PART 301
INLAND LAKES AND STREAMS

324.30101 Definitions.

Sec. 30101. As used in this part:

(a) "Bottomland" means the land area of an inland lake or stream that lies below the ordinary high-water mark and that may or may not be covered by water.

(b) "Bulkhead line" means a line that is established pursuant to this part beyond which dredging, filling, or construction of any kind is not allowed without a permit.

(c) "Dam" means an artificial barrier, including dikes, embankments, and appurtenant works, that impounds, diverts, or is designed to impound or divert water.

(d) "Department" means the department of environmental quality.

(e) "Expand" means to occupy a larger area of an inland lake or stream than authorized by a permit issued under this part for marina mooring structures and watercraft moored at the marina.

(f) "Fund" means the land and water management permit fee fund created in section 30113.

(g) "Height of the dam" means the difference in elevation measured vertically between the natural bed of an inland lake or stream at the downstream toe of the dam, or, if it is not across a stream channel or watercourse, from the lowest elevation of the downstream toe of the dam, to the design flood elevation or to the lowest point of the top of the dam, whichever is less.

(h) "Impoundment" means water held back by a dam, dike, floodgate, or other barrier.

(i) "Inland lake or stream" means either of the following:

(*i*) An artificial or natural lake, pond, or impoundment that is a water of the United States as that term is used in section 502(7) of the federal water pollution control act, 33 USC 1362.

(*ii*) A natural or artificial lake, pond, or impoundment; a river, stream, or creek which may or may not be serving as a drain as defined by the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630; or any other body of water that has definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water, including the St. Marys, St. Clair, and Detroit Rivers.

Inland lake or stream does not include the Great Lakes, Lake St. Clair, or a lake or pond that has a surface area of less than 5 acres.

(j) "Marina" means a facility that is owned or operated by a person, extends into or over an inland lake or stream, and offers service to the public or members of the marina for docking, loading, or other servicing of recreational watercraft.

(k) "Minor offense" means either of the following violations of this part if the project involved in the offense is a minor project or the department determines that restoration of the affected property is not required:

(*i*) The failure to obtain a permit under this part.

(*ii*) A violation of a permit issued under this part.

(*l*) "Mooring structures" means structures used to moor watercraft, including, but not limited to, docks, piers, pilings, mooring anchors, lines and buoys, and boat hoists.

(m) "Ordinary high-water mark" means the line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation. On an inland lake that has a level established by law, it means the high established level. Where water returns to its natural level as the result of the permanent removal or abandonment of a dam, it means the natural ordinary high-water mark.

(n) "Project" means an activity that requires a permit pursuant to section 30102.

(o) "Property owners' association" means any group of organized property owners publishing a directory of their membership, the majority of which are riparian owners and are located on the inland lake or stream that is affected by the proposed project.

(p) "Reconfigure" means to, without expanding the marina, do either of the following:

(*i*) Change the location of the dock or docks and other mooring structures at the marina to occupy an area of the inland lake or stream that was not previously authorized by a permit issued under this part.

(*ii*) Decrease the distance available for ingress and egress to an outside slip as described in section 30106a.

(q) "Riparian interest area" means that portion of an inland lake or stream over which a riparian owner has an ownership interest.

(r) "Riparian owner" means a person who has riparian rights.

(s) "Riparian rights" means those rights which are associated with the ownership of the bank or shore of an inland lake or stream.

(t) "Seasonal structure" includes any type of dock, boat hoist, ramp, raft, or other recreational structure that is placed into an inland lake or stream and removed at the end of the boating season.

(u) "Seawall" means a vertically sloped wall constructed to break the force of waves and retain soil for the purpose of shore protection.

(v) "Structure" includes a wharf, dock, pier, seawall, dam, weir, stream deflector, breakwater, groin, jetty, sewer, pipeline, cable, and bridge.

(w) "Upland" means the land area that lies above the ordinary high-water mark.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 1999, Act 106, Imd. Eff. July 7, 1999;—Am. 2006, Act 275, Imd. Eff. July 7, 2006;—Am. 2009, Act 139, Imd. Eff. Nov. 4, 2009;—Am. 2014, Act 351, Eff. Jan. 16, 2015;—Am. 2018, Act 631, Eff. Mar. 29, 2019.

Compiler's note: For transfer of authority, powers, duties, functions, and responsibilities of the Land and Water Management Division, with the exception of the farmland and open space preservation program, natural rivers program, and Michigan information resource inventory system, to the Director of the Michigan Department of Environmental Quality, see E.R.O. No. 1995-16, compiled at MCL 324.99901 of the Michigan Compiled Laws.

Popular name: Act 451

Popular name: NREPA

324.30101a Applicability of powers and duties of department to "navigable waters" and "waters of the United States" as defined in federal law.

Sec. 30101a. For the purposes of this part, the powers, duties, functions, and responsibilities exercised by the department because of federal approval of Michigan's permit program under section 404(g) and (h) of the federal water pollution control act, 33 USC 1344, apply only to "navigable waters" and "waters of the United States" as defined under section 502(7) of the federal water pollution control act, 33 USC 1362, and further refined by federally promulgated rules and court decisions that have the full effect and force of federal law. Determining whether additional regulation is necessary to protect Michigan waters beyond the scope of federal law is the responsibility of the Michigan legislature based on its determination of what is in the best interest of the citizens of this state.

History: Add. 2013, Act 98, Imd. Eff. July 2, 2013.

Popular name: Act 451

Popular name: NREPA

324.30102 Operations prohibited without permit; exception.

Sec. 30102. (1) Except as provided in this part, a person without a permit from the department shall not do any of the following:

(a) Dredge or fill bottomland.

(b) Construct, enlarge, extend, remove, or place a structure on bottomland.

(c) Construct, reconfigure, or expand a marina.

(d) Create, enlarge, or diminish an inland lake or stream.

(e) Structurally interfere with the natural flow of an inland lake or stream.

(f) Construct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream, or where any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing inland lake or stream.

(g) Connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or similar water with an existing inland lake or stream for navigation or any other purpose.

(2) A person shall not remove submerged logs from rivers or streams for the purpose of submerged log recovery. This subsection does not prohibit the department from issuing a permit under this part for other purposes, including removing logjams or removing logs that interfere with navigation of the river or stream.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 2009, Act 139, Imd. Eff. Nov. 4, 2009;—Am. 2011, Act 218, Imd. Eff. Nov. 10, 2011.

Compiler's note: For transfer of authority, powers, duties, functions, and responsibilities of the Land and Water Management Division, with the exception of the farmland and open space preservation program, natural rivers program, and Michigan information resource inventory system, to the Director of the Michigan Department of Environmental Quality, see E.R.O. No. 1995-16, compiled at MCL 324.99901 of the Michigan Compiled Laws.

Popular name: Act 451

Popular name: NREPA

324.30103 Exceptions; "water withdrawal" and "agricultural drain" defined.

Sec. 30103. (1) A permit is not required under this part for any of the following:

(a) Any fill or structure existing before April 1, 1966, in waters covered by former 1965 PA 291, and any fill or structures existing before January 9, 1973, in waters covered for the first time by former 1972 PA 346.

(b) A seasonal structure placed on bottomland to facilitate private noncommercial recreational use of the water if it does not unreasonably interfere with the use of the water by others entitled to use the water or interfere with water flow.

(c) Reasonable sanding of beaches to the existing water's edge by the riparian owner or a person authorized by the riparian owner.

(d) Maintenance of an agricultural drain, regardless of outlet, if all of the following requirements are met:

(*i*) The maintenance includes only activities that maintain the location, depth, and bottom width of the drain as constructed or modified at any time before July 1, 2014.

(*ii*) The maintenance is performed by the landowner or pursuant to the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630.

(e) Maintenance and operation of a waste collection or treatment facility either ordered to be constructed or approved for operation under a state or a federal water pollution control law and this part. For purposes of this subdivision, "operation" includes dredging, filling, or construction and placement of structures in the waste collection or treatment facility in compliance with this act.

(f) Construction and maintenance of minor drainage structures and facilities that are identified by rule promulgated by the department under section 30110. Before a rule is promulgated pursuant to this subsection, the rule must be approved by the majority of a committee consisting of the director of the department, the director of the department of agriculture and rural development, and the director of the state transportation department or their designated representatives. The rules shall be reviewed at least annually.

(g) Maintenance of a drain that either was legally established and constructed before January 1, 1973, pursuant to the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630, except those legally established drains constituting mainstream portions of certain natural watercourses identified in rules promulgated by the department under section 30110, or was constructed or modified under a permit issued pursuant to this part. As used in this subdivision, "maintenance of a drain" means the physical preservation of the location, depth, and bottom width of a drain and appurtenant structures to restore the function and approximate capacity of the drain as constructed or modified at any time before July 1, 2014, and includes, but is not limited to, the following activities if performed with best management practices:

(*i*) Excavation of accumulated sediments back to original contours.

(*ii*) Reshaping of the side slopes.

(*iii*) Bank stabilization where reasonably necessary to prevent erosion. Materials used for stabilization must be compatible with existing bank or bed materials.

(*iv*) Armoring, lining, or piping if a previously armored, lined, or piped section is being repaired and all work occurs within the footprint of the previous work.

(*v*) Replacement of existing control structures, if the original function of the drain is not changed and the original approximate capacity of the drain is not increased.

(*vi*) Repair of stabilization structures.

(*vii*) Culvert replacement, including culvert extensions of not more than 24 additional feet per culvert.

(*viii*) Emergency reconstruction of recently damaged parts of the drain. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(h) Projects constructed under the watershed protection and flood prevention act, 16 USC 1001 to 1012.

(i) Construction and maintenance of privately owned cooling or storage ponds used in connection with a public utility except at the interface with public waters.

(j) Maintenance of a structure constructed under a permit issued pursuant to this part and identified by rule promulgated under section 30110, if the maintenance is in place and in kind with no design or materials modification.

(k) A water withdrawal.

(*l*) Annual installation of a seasonal dock or docks, pilings, mooring buoys, or other mooring structures previously authorized by and in accordance with a permit issued under this part.

(m) Controlled access of livestock to streams for watering or crossing if constructed in accordance with applicable practice standards set by the United States Department of Agriculture, Natural Resources Conservation Service.

(n) Temporary drawdowns of impoundments at hydroelectric projects licensed by the federal energy regulatory commission (FERC) and subject to FERC's authority if both of the following apply:

(*i*) The FERC licensee has consulted this state during the drawdown plan development and this state's concerns have been addressed in the drawdown plan as FERC considers appropriate.

(*ii*) Adverse environmental impacts, including stream flow, aquatic resources, and timing, have been avoided and minimized to the extent practical.

(o) Removal, by the riparian owner or a person authorized by the riparian owner, of plants that are an aquatic nuisance as defined in section 3301, if the removal is accomplished by hand-pulling without using a powered or mechanized tool and all plant fragments are removed from the water and properly disposed of on land above the ordinary high-water mark as defined in section 30101.

(p) Raking of lake bottomlands by the riparian owner or a person authorized by the riparian owner. To minimize effects on the lake bottomlands, the areas raked shall be unvegetated before raking and predominantly composed of sand or pebbles, and the raking shall be performed without using a powered or mechanized tool. For the purposes of this subdivision, the pulling of a nonpowered, nonmechanized tool with a boat is not the use of a powered or mechanized tool.

(2) As used in this section, "water withdrawal" means the removal of water from its source for any purpose.

(3) As used in this part, "agricultural drain" means a human-made conveyance of water that meets all of the following requirements:

(a) Does not have continuous flow.

(b) Flows primarily as a result of precipitation-induced surface runoff or groundwater drained through subsurface drainage systems.

(c) Serves agricultural production.

(d) Was constructed before January 1, 1973, or was constructed in compliance with this part or former 1979 PA 203.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 2006, Act 33, Imd. Eff. Feb. 28, 2006;—Am. 2009, Act 139, Imd. Eff. Nov. 4, 2009;—Am. 2013, Act 98, Imd. Eff. July 2, 2013;—Am. 2014, Act 253, Imd. Eff. June 30, 2014;—Am. 2018, Act 163, Eff. Aug. 21, 2018.

Popular name: Act 451

Administrative rules: R 281.811 et seq. of the Michigan Administrative Code.

Popular name: NREPA

324.30104 Application for permit; fees; refund.

Sec. 30104. (1) A person shall not undertake a project subject to this part except as authorized by a permit issued by the department pursuant to part 13. An application for a permit shall include any information that may be required by the department. If a project includes activities at multiple locations, 1 application may be filed for the combined activities.

(2) Except as provided in subsections (3) and (4), until October 1, 2019, an application for a permit shall be accompanied by an application fee based on an administrative cost in accordance with the following schedule:

(a) For a permit for a seasonal drawdown or associated reflooding, or both, of a dam or impoundment for the purpose of weed control that is issued for the first time after October 9, 1995, an initial fee of $500.00 with subsequent permits for the same purpose being assessed a $50.00 fee.

(b) For activities included in a minor project category established under section 30105(7), a fee of $100.00.

(c) For activities included in a general permit category established under section 30105(8), a fee of $50.00.

(d) For construction or expansion of a marina, a fee as follows:

(*i*) $50.00 for an expansion of 1-10 slips to an existing permitted marina.

(*ii*) $100.00 for a new marina with 1-10 proposed marina slips.

(*iii*) $250.00 for an expansion of 11-50 slips to an existing permitted marina, plus $10.00 for each slip over 50.

(*iv*) $500.00 for a new marina with 11-50 proposed marina slips, plus $10.00 for each slip over 50.

(*v*) $1,500.00 if an existing permitted marina proposes maintenance dredging of 10,000 cubic yards or more, unless the dredge material has been determined through testing to be 90% or more sand, or the addition of seawalls, bulkheads, or revetments of 500 feet or more.

(e) For major projects other than a project described in subdivision (d)(*v*), involving any of the following, a fee of $2,000.00:

(*i*) Dredging of 10,000 cubic yards or more, unless the dredge material has been determined through testing to be 90% or more sand.

(*ii*) Filling of 10,000 cubic yards or more.

(*iii*) Seawalls, bulkheads, or revetments of 500 feet or more.

(*iv*) Filling or draining of 1 acre or more of wetland contiguous to a lake or stream.

(*v*) New dredging or upland boat basin excavation in areas of suspected contamination.

(*vi*) Shore projections, such as groins and underwater stabilizers, that extend 150 feet or more into a lake or stream.

(*vii*) New commercial docks or wharves of 300 feet or more in length.

(*viii*) Stream enclosures 100 feet or more in length.

(*ix*) Stream relocations 500 feet or more in length.

(*x*) New golf courses.

(*xi*) Subdivisions.

(*xii*) Condominiums.

(f) For the removal of submerged logs from bottomland of an inland lake, a $500.00 fee.

(g) For all other projects not listed in subdivisions (a) through (f), a fee of $500.00.

(3) A project that requires review and approval under this part and 1 or more of the following acts or parts of acts is subject to only the single highest fee required under this part or the following acts or parts of acts:

(a) Section 3104.

(b) Part 303.

(c) Part 323.

(d) Part 325.

(e) Section 117 of the land division act, 1967 PA 288, MCL 560.117.

(4) If work has been done in violation of a permit requirement under this part and restoration is not ordered by the department, the department may accept an application for a permit if the application is accompanied by a fee equal to 2 times the permit fee required under this section.

(5) If the department denies an application for a permit under this part, the department shall promptly refund the application fee paid under this section.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 1995, Act 171, Imd. Eff. Oct. 9, 1995;—Am. 1996, Act 97, Imd. Eff. Feb. 28, 1996;—Am. 1999, Act 106, Imd. Eff. July 7, 1999;—Am. 2003, Act 163, Imd. Eff. Aug. 12, 2003;—Am. 2004, Act 325, Imd. Eff. Sept. 10, 2004;—Am. 2006, Act 275, Imd. Eff. July 7, 2006;—Am. 2006, Act 531, Imd. Eff. Dec. 29, 2006;—Am. 2008, Act 276, Imd. Eff. Sept. 29, 2008;—Am. 2009, Act 139, Imd. Eff. Nov. 4, 2009;—Am. 2011, Act 90, Imd. Eff. July 15, 2011;—Am. 2011, Act 218, Imd. Eff. Nov. 10, 2011;—Am. 2013, Act 13, Imd. Eff. Mar. 27, 2013;—Am. 2013, Act 98, Imd. Eff. July 2, 2013;—Am. 2015, Act 76, Eff. Oct. 1, 2015.

Popular name: Act 451

Popular name: NREPA

324.30104b Applicability of MCL 324.30306b to proposed project or proposed permit application.

Sec. 30104b. Section 30306b applies to a proposed project or a proposed permit application under this part.

History: Add. 2006, Act 592, Imd. Eff. Jan. 3, 2007;—Am. 2010, Act 179, Imd. Eff. Sept. 30, 2010;—Am. 2015, Act 76, Eff. Oct. 1, 2015.

Popular name: Act 451

Popular name: NREPA

324.30105 Pending applications; posting on website; public hearing; review of application; statement; final inspection and certification; notice of hearing; conditional permit in emergency; provisions applicable to minor project; issuance of general permits; minor project category; general permit for activities in drains; definitions.

Sec. 30105. (1) The department shall post on its website all of the following under this part:

(a) A list of pending applications.

(b) Public notices.

(c) Public hearing schedules.

(2) The department may hold a public hearing on pending applications.

(3) Except as otherwise provided in this section, upon receiving an application, the department shall submit copies for review to the director of the department of community health or the local health department designated by the director of the department of community health, to the city, village, or township and the county where the project is to be located, to the local conservation district, to the watershed council established under part 311, if any, to the local port commission, if any, and to the persons required to be included in the application pursuant to section 30104. Each copy of the application shall be accompanied by a statement that unless a written request is filed with the department within 20 days after the submission for review, the department may grant the application without a public hearing where the project is located. The department may hold a public hearing upon the written request of the applicant or a riparian owner or a

governmental unit or other person that is entitled to receive a copy of the application pursuant to this subsection.

(4) After completion of a project for which an application is approved, the department may cause a final inspection to be made and certify to the applicant that the applicant has complied with the department's permit requirements.

(5) At least 10 days' notice of a hearing to be held under this section shall be given by publication in a newspaper circulated in the county where the project is to be located, to the person requesting the hearing, and to the governmental units and other persons that are entitled to receive a copy of the application pursuant to subsection (3).

(6) In an emergency, the department may issue a conditional permit before the expiration of the 20-day period referred to in subsection (3).

(7) After providing notice and an opportunity for a public hearing, the department shall establish minor project categories of activities and projects that are similar in nature, have minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. The department may act upon an application received pursuant to section 30104 for an activity or project within a minor project category without providing notices pursuant to subsection (3). The department shall develop a minor project category under this subsection for repair or replacement of a failed seawall. All other provisions of this part, except provisions applicable only to general permits, are applicable to a minor project.

(8) The department, after notice and an opportunity for a public hearing, shall issue general permits on a statewide basis or within a local unit of government for projects that are similar in nature, that will cause only minimal adverse environmental effects when performed separately, and that will only have minimal cumulative adverse effects on the environment. Before authorizing a specific project to proceed under a general permit, the department may provide notice pursuant to subsection (3) but shall not hold a public hearing and shall not typically require a site inspection. A general permit issued under this subsection shall not be valid for more than 5 years. Among the activities the department may consider for general permit eligibility under this subsection are the following:

(a) The removal of qualifying small dams.

(b) The maintenance or repair of an existing pipeline, if the pipeline is maintained or repaired in a manner to ensure that any adverse effects on the inland lake or stream will be minimized.

(9) The department may issue, deny, or impose conditions on project activities authorized under a minor project category or a general permit if the conditions are designed to remove an impairment to the inland lake or stream, to mitigate the effects of the project, or to otherwise improve water quality. The department may also establish a reasonable time when the proposed project is to be completed or terminated.

(10) If the department determines that activity in a proposed project, although within a minor project category or a general permit, is likely to cause more than minimal adverse environmental effects, the department may require that the application be processed according to subsection (3) and reviewed for compliance with section 30106.

(11) The department shall develop by December 31, 2013 and maintain a general permit for activities in drains legally established pursuant to the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630. The general permit is subject to all of the following:

(a) The general permit shall cover installation and replacement of culverts, clear span bridges, and end sections; culvert extensions; drain realignments; installation of bank stabilization structures and grade stabilization structures; spoil placement; and other common drain activities that use best management practices.

(b) A drain commissioner or drainage board may submit an application for an authorization under the general permit on a countywide basis. The department of agriculture and rural development may submit an application for an authorization under the general permit on behalf of an intercounty drainage board on a drainage-district-wide basis.

(c) The department shall grant or deny an authorization under the general permit by March 1 if the drain commissioner or drainage board applies for the authorization by the preceding January 20. An authorization under the general permit is valid until March 30 of the year after the year in which the authorization is granted.

(d) By December 31 of each year, the drain commissioner or drainage board shall submit a report to the department that includes the names of the drains on which activities were performed under the general permit during that calendar year, the locations and nature of the activities, and plans and other documentation demonstrating that those activities met the general permit requirements.

(e) A drain commissioner or drainage board is not eligible to be granted a new authorization under the

general permit if significant violations of the general permit under a previous authorization granted to that drain commissioner or drainage board have not been corrected.

(12) As used in this section:

(a) "Failed seawall" means a seawall that has deteriorated to the point that it no longer effectively breaks the force of waves or retains soil for the purpose of shore protection and meets either or both of the following:

(*i*) The seawall is currently breaking the force of waves and retaining soil across a minimum of 50% of its length and there is evidence of a previous seawall along the other 50% of its length.

(*ii*) The seawall was breaking the force of waves and retaining soil but was damaged by a single catastrophic event which occurred within the 2 years prior to the repair or replacement of the seawall.

(b) "Qualifying small dam" means a dam that meets all of the following conditions:

(*i*) The height of the dam is less than 2 feet.

(*ii*) The impoundment from the dam covers less than 2 acres.

(*iii*) The dam does not serve as the first dam upstream from the Great Lakes or their connecting waterways.

(*iv*) The dam is not serving as a sea lamprey barrier.

(*v*) There are no threatened or endangered species that have been identified in the area that will be affected by the project.

(*vi*) There are no known areas of contaminated sediments in the area that will be affected by the project.

(*vii*) The department has received written permission for the removal of the dam from all riparian property owners adjacent to the dam's impoundment.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 1995, Act 171, Imd. Eff. Oct. 9, 1995;—Am. 1999, Act 106, Imd. Eff. July 7, 1999;—Am. 2004, Act 325, Imd. Eff. Sept. 10, 2004;—Am. 2006, Act 275, Imd. Eff. July 7, 2006;—Am. 2006, Act 531, Imd. Eff. Dec. 29, 2006;—Am. 2009, Act 120, Eff. Nov. 6, 2009;—Am. 2013, Act 98, Imd. Eff. July 2, 2013;—Am. 2014, Act 351, Eff. Jan. 16, 2015.

Compiler's note: Enacting section 1 of Act 120 of 2009 provides:

"Enacting section 1. This amendatory act does not take effect unless both of the following requirements are met:

"(a) $4,000,000.00 from the cleanup and redevelopment trust fund created in section 3e of 1976 IL 1, MCL 445.573e, and $4,000,000.00 from the community pollution prevention fund created in section 3f of 1976 IL 1, MCL 445.573f, is appropriated by the legislature to the environmental protection fund created in section 503a of the natural resources and environmental protection act, 1994 PA 451, MCL 324.503a.

"(b) $2,000,000.00 is appropriated by the legislature from the environmental protection fund to support the program under part 303 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.30301 to 324.30329."

Popular name: Act 451

Popular name: NREPA

Administrative rules: R 281.811 et seq. of the Michigan Administrative Code.

324.30106 Prerequisite to issuance of permit; specification in permit.

Sec. 30106. The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state. This part does not modify the rights and responsibilities of any riparian owner to the use of his or her riparian water. A permit shall specify that a project completed in accordance with this part shall not cause unlawful pollution as defined by part 31.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30106a Construction, expansion, or reconfiguration of marina; issuance of permit; conditions; definitions.

Sec. 30106a. (1) The department shall issue a permit to construct, expand, or reconfigure a marina if the department determines that the marina meets the conditions of section 30106 and all of the following conditions:

(a) The marina extends from riparian property of the applicant.

(b) The marina does not unreasonably interfere with navigation.

(c) The marina is located and designed to be operated consistently with the correlative rights of other riparians, including the rights of adjacent riparians.

(2) In order to be designed consistently with the correlative rights of other riparians as required under

subsection (1), the marina shall be configured so that all boat mooring under any wind condition will occur solely within the marina's riparian interest area. Additionally, boat mooring and ingress and egress for an outside slip shall require a minimum maneuvering distance of 1.5 times the length of the slip. This minimum distance shall be measured from the end of the slip or, for broadside moorage, the outside beam of a watercraft moored at the slip, to the boundary of the marina's riparian interest area.

(3) In order to support the determinations under this section, the department may require the applicant to do either of the following:

(a) Submit a riparian interest area estimate survey, sealed by a licensed surveyor. In making its determination on the need for a riparian interest area estimate survey, the department shall consider factors such as the shape of the water body, the location of the marina on the water body, how much frontage is available to locate the marina, and the dock and mooring configurations.

(b) Obtain an easement from any affected adjacent riparian owner authorizing an incursion and record the easement with the register of deeds for the county in which the marina is located.

(4) The owner or operator of a marina existing on the effective date of the amendatory act that added this section that has not been authorized by a permit issued under this part shall obtain a permit under this section before expanding or reconfiguring the marina, or by January 1, 2012, whichever comes first. The owner or operator of a marina existing on the effective date of the amendatory act that added this section that has been authorized by a construction permit under this part does not need to obtain a new construction permit except to expand or reconfigure.

(5) As used in this section:

(a) "Marina's riparian interest area" means the riparian interest area of an applicant for a permit under subsection (1) and any adjacent area for which the applicant has secured written authorization from the riparian owner whose interest is or may be affected.

(b) "Outside slip" means a slip that is accessed from a location between the boundary of the marina's riparian interest area and the mooring structure.

(c) "Slip length" means the longer of either of the following:

(*i*) The total length of all mooring structures, including the docks and pilings.

(*ii*) The total length of the vessel moored in the slip, including, but not limited to, outboard engines, boat hoists, bowsprits, and swim platforms.

History: Add. 2009, Act 139, Imd. Eff. Nov. 4, 2009.

Popular name: Act 451

Compiler's note: NREPA

324.30106b Dredging or placing dredged spoils on bottomland; permit; conditions.

Sec. 30106b. A permit under this part to dredge or place dredged spoils on bottomland is subject to both of the following:

(a) The permit shall be valid for a period of 5 years.

(b) During the term of the permit, the department shall not require additional environmental studies or surveys unless an act of God results in significant geological or ecological changes to the permitted area.

History: Add. 2013, Act 87, Imd. Eff. June 28, 2013.

Popular name: Act 451

Popular name: NREPA

324.30107 Duration, terms, and revocation of permit; hearing; modification or revocation of general permit.

Sec. 30107. (1) A permit is effective until revoked for cause but not beyond its term and may be subject to renewal. A permit may specify the term and conditions under which the work is to be carried out. A permit may be revoked after a hearing for violation of any of its provisions, any provision of this part, any rule promulgated under this part, or any misrepresentation in application.

(2) A general permit may be modified or revoked if, after opportunity for a public hearing, the department determines that the activities authorized by the general permit have more than a minimal adverse impact on the environment on an individual or cumulative basis, or the activities generally would be more appropriately processed according to section 30105(3) and reviewed for compliance with section 30106.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 2006, Act 531, Imd. Eff. Dec. 29, 2006.

Popular name: Act 451

Popular name: NREPA

324.30108 Bulkhead line; establishment; application; jurisdiction; duties.

Sec. 30108. The department may establish by permit a bulkhead line on its own application or on the application of a local unit of government. The application shall be filed as provided in section 30104(1) with public notice and hearings as provided in section 30105. Upon acceptance of the bulkhead line by the affected units of government, the area landward of the bulkhead line shall after that acceptance be under the jurisdiction of those units of government as to the placement of structures and fills in the waters unless jurisdiction is returned to the state. In establishing a bulkhead line, the department shall provide for local requirements and ensure the public trust in the adjacent waters against unreasonable interferences.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30109 Ordinary high-water mark agreement with riparian owner; agreement as proof of location; fee.

Sec. 30109. Upon the written request of a riparian owner and upon payment of a service fee, the department may enter into a written agreement with the riparian owner establishing the location of the ordinary high-water mark for his or her property. In the absence of substantially changed conditions, the agreement shall be conclusive proof of the location in all matters between the state and the riparian owner and his or her successors in interest. Until October 1, 2019, the service fee provided for in this section shall be $500.00. The department shall forward all service fees collected under this section to the state treasurer for deposit into the fund.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 1995, Act 171, Imd. Eff. Oct. 9, 1995;—Am. 1999, Act 106, Imd. Eff. July 7, 1999;—Am. 2003, Act 163, Imd. Eff. Aug. 12, 2003;—Am. 2008, Act 276, Imd. Eff. Sept. 29, 2008;—Am. 2011, Act 90, Imd. Eff. July 15, 2011;—Am. 2015, Act 76, Eff. Oct. 1, 2015.

Popular name: Act 451

Popular name: NREPA

324.30110 Rules; promulgation and enforcement; hearing; review; proceeding by riparian owner.

Sec. 30110. (1) The department may promulgate and enforce rules to implement this part.

(2) If a person is aggrieved by any action or inaction of the department, he or she may request a formal hearing on the matter involved. The hearing shall be conducted by the commission in accordance with the provisions for contested cases in the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) A determination, action, or inaction by the commission following the hearing is subject to judicial review as provided in Act No. 306 of the Public Acts of 1969.

(4) This section does not limit the right of a riparian owner to institute proceedings in any circuit court of the state against any person when necessary to protect his or her rights.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

Administrative rules: R 281.811 et seq. of the Michigan Administrative Code.

324.30111 Rights of riparian owner as to water frontage and exposed bottomland.

Sec. 30111. This part does not deprive a riparian owner of rights associated with his or her ownership of water frontage. A riparian owner among other rights controls any temporarily or periodically exposed bottomland to the water's edge, wherever it may be at any time, and holds the land secure against trespass in the same manner as his or her upland subject to the public trust to the ordinary high-water mark.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995.

Popular name: Act 451

Popular name: NREPA

324.30111b Public road end; prohibited use; violation as misdemeanor; fine; civil action; definitions.

Sec. 30111b. (1) A public road end shall not be used for any of the following unless a recorded deed, recorded easement, or other recorded dedication expressly provides otherwise:

(a) Construction, installation, maintenance, or use of boat hoists or boat anchorage devices.

(b) Mooring or docking of a vessel between 12 midnight and sunrise.

(c) Any activity that obstructs ingress to or egress from the inland lake or stream.

(2) A public road end shall not be used for the construction, installation, maintenance, or use of a dock or wharf other than a single seasonal public dock or wharf that is authorized by the local unit of government, subject to any permit required under this part. This subsection does not prohibit any use that is expressly authorized by a recorded deed, recorded easement, or other recorded dedication. This subsection does not permit any use that exceeds the uses authorized by a recorded deed, recorded easement, other recorded dedication, or a court order.

(3) A local unit of government may prohibit a use of a public road end if that use violates this section.

(4) A person who violates subsection (1) or (2) is guilty of a misdemeanor punishable by a fine of not more than $500.00. Each 24-hour period in which a violation exists represents a separate violation of this section. A peace officer may issue an appearance ticket as authorized by sections 9c to 9g of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.9c to 764.9g, to a person who violates subsection (1) or (2).

(5) This section does not prohibit a person or agency from commencing a civil action for conduct that violates this section.

(6) As used in this section:

(a) "Local unit of government" means a township, city, or village in which the public road end is located.

(b) "Public road end" means the terminus at an inland lake or stream of a road that is lawfully open for use by the public.

History: Add. 2012, Act 56, Imd. Eff. Mar. 22, 2012;—Am. 2014, Act 168, Imd. Eff. June 12, 2014.

Popular name: Act 451

Popular name: NREPA

324.30112 Civil action; commencement by department; fine; violation as misdemeanor; penalty; civil sanction as appropriate to violation.

Sec. 30112. (1) The department may commence a civil action in the circuit court of the county in which a violation occurs to enforce compliance with this part, to restrain violation of this part or any action contrary to an order of the department denying a permit, to enjoin the further performance of, or order the removal of, any project that is undertaken contrary to this part or after denial of a permit by the department, or to order the restoration of the affected area to its prior condition.

(2) In a civil action commenced under this part, the circuit court, in addition to any other relief granted, may assess a civil fine of not more than $5,000.00 per day for each day of violation.

(3) Except as provided in subsection (4), a person who violates this part or a permit issued under this part is guilty of a misdemeanor, punishable by a fine of not more than $10,000.00 per day for each day of violation.

(4) A person who commits a minor offense is guilty of a misdemeanor, punishable by a fine of not more than $500.00 for each violation. A law enforcement officer may issue and serve an appearance ticket upon a person for a minor offense pursuant to sections 9c to 9g of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.9c to 764.9g.

(5) A person who knowingly makes a false statement, representation, or certification in an application for a permit or in a notice or report required by a permit, or a person who knowingly renders inaccurate any monitoring device or method required to be maintained by a permit, is guilty of a misdemeanor, punishable by a fine of not more than $10,000.00 per day for each day of violation.

(6) Any civil sanction assessed, sought, or agreed to by the department shall be appropriate to the violation.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 2018, Act 631, Eff. Mar. 29, 2019.

Popular name: Act 451

Popular name: NREPA

324.30113 Land and water management permit fee fund.

Sec. 30113. (1) The land and water management permit fee fund is created within the state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the fund. The state treasurer shall direct the investment of the fund. The state treasurer shall credit to the fund interest and earnings from fund investments. The state treasurer shall annually present to the department an accounting of the amount of money in the fund. The department shall be the administrator of the fund for auditing purposes.

(3) Money in the fund at the close of the fiscal year shall remain in the fund and shall not lapse to the general fund.

(4) The department shall expend money from the fund, upon appropriation, only to implement this part and

the following:

(a) Sections 3104, 3107, and 3108.

(b) Part 303.

(c) Part 315.

(d) Part 323.

(e) Part 325.

(f) Part 339.

(g) Part 353.

(h) Section 117 of the land division act, 1967 PA 288, MCL 560.117.

(5) The department shall annually report to the legislature how money in the fund was expended during the previous fiscal year.

History: Add. 1995, Act 59, Imd. Eff. May 24, 1995;—Am. 1995, Act 171, Imd. Eff. Oct. 9, 1995;—Am. 2004, Act 246, Eff. Oct. 1, 2004;—Am. 2004, Act 325, Imd. Eff. Sept. 10, 2004;—Am. 2006, Act 496, Imd. Eff. Dec. 29, 2006;—Am. 2014, Act 253, Imd. Eff. June 30, 2014.

Popular name: Act 451

Popular name: NREPA

Exhibit 8

FILE COPY

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
CADILLAC DISTRICT OFFICE

JENNIFER M. GRANHOLM
GOVERNOR

STEVEN E. CHESTER
DIRECTOR

January 12, 2007

Roscommon County
Commissioner's Office
500 Lake Street
Roscommon, MI 48653

Dear Roscommon County:

SUBJECT: DEQ File Number 06-72-0056-P
T24N, R3W, Section 34, Gerrish Township, Roscommon County

The Department of Environmental Quality, Land and Water Management Division (LWMD) has reviewed the plans submitted regarding the proposed modifications to the Higgins Lake outlet structure (dam). With the following revisions, the LWMD can issue a permit for revisions to the dam.

Move the functions of the low flow outlet bay, now located towards the northeast end of the dam, to the five foot stop log bay located most northeast. This would allow some minimum flow to continue by design. The new low flow bay would have to be modified to permanently prevent boards being inserted into the angle iron slots on either side.

In addition, Mr. Herb Weatherly, the contact person for the County, has requested the permit be modified to allow for the addition of fieldstone riprap to be placed along the shoreline near the dam. He stated this would lessen bank erosion in the area of the dam.

Any permit or structural design would not eliminate the need to manage the flows in accordance with the Circuit Court Order. This includes maintaining minimum flows to the Cut River that would be more then the one five foot bay capacity in many instances. Maximum flows should also be managed to allow for maintenance of the required levels, while minimizing harmful effects such as downstream bank erosion and degradation of the aquatic environment.

If the above revisions are acceptable, please send a cover letter with revised plans. Include top view and cross section drawings, with dimensions, of the dam and riprap area.

Sincerely,

Jeff Silagy
Land and Water Management Division
231-775-3960 ext. 6201

JS:ELM
cc: Mr Herb Weatherly

RECEIVED
JAN 19 2007
By

120 WEST CHAPIN STREET • CADILLAC, MICHIGAN 49601-2158
www.michigan.gov • (231) 775-3960

Exhibit 9

ROSCOMMON COUNTY
BOARD OF COMMISSIONERS

Location: 112 S. Fourth Street
Mailing Address: 500 Lake Street
Roscommon, Michigan 48653
989-275-8021
Fax 989-275-5675

February 14, 2007

Michigan DEQ
Atten: Jeff Silagy
120 West Chapin Street
Cadillac, MI 49601-2158

Dear Mr. Silagy:

We are in receipt of your letter dated January 12, 2007 in regards to DEQ File Number 06-72-0056-P for improvements to the Higgins Lake Dam in Gerrish Township. After meeting with the entire Board of Commissioners we agree to have a five (5) foot cut in the center for permanent flow and then add the two (2) proposed flop gates just to the north of this cut (see attached drawing). We are also requesting the permit be modified to allow for the addition of fieldstone riprap that Mr. Weatherly requested on our behalf. Also enclosed are revised drawings per your request.

With our agreement to the above we look forward to our permit being issued as soon as possible.

Sincerely,

Larry D. Mead
Chairman
Roscommon County Board of Commissioners

LDM:rls

Deqresponseletter/wd/07

Exhibit 10

Notice of Authorization

Permit Number 06-72-0056-P Issued: March 12, 2007
Expiration Date: December 31, 2008

The State of Michigan, Department of Environmental Quality, Land and Water Management Division, 120 West Chapin St., Cadillac, Michigan, 49601-2158, 231-775-3960, under provisions of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, and specifically:

- ☒ Part 31 Floodplain/Water Resources Protection.
- ☒ Part 301 Inland Lakes and Streams.
- ☐ Part 303 Wetland Protection.
- ☐ Part 315 Dam Safety.
- ☐ Part 325 Great Lakes Submerged Lands.
- ☐ Part 323 Shorelands Protection and Management.
- ☐ Part 353 Sand Dune Protection and Management.

RECEIVED
MAR 15 2007
By

Authorized activity:

Maintenance and modifications to the Higgins Lake Outlet Structure. All work shall be completed in accordance with permit conditions.

To be conducted at property located: Roscommon County, Waterbody: Cut River
Section 34, Town 24N, Range 3W, Gerrish Township

Permittee: Roscommon County
Commissioner's Office
500 Lake Street
Roscommon, MI 48653

Steven E. Chester, Director
Department of Environmental Quality

Jeff Silagy
District Representative

This notice must be displayed at the site of work.
Laminating this notice or utilizing sheet protectors is recommended.

Please refer to the above Permit Number with any questions or concerns.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
PERMIT

ISSUED TO:

Roscommon County
Commissioner's Office
500 Lake Street
Roscommon, MI 48653

Permit No.	06-72-0056-P
Issued	March 12, 2007
Extended	
Revised	
Expires	December 31, 2008

This permit is being issued by the Michigan Department of Environmental Quality (MDEQ) under the provisions of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA) and specifically:

- ☒ **Part 301 Inland Lakes and Streams**
- ☐ **Part 315 Dam Safety**
- ☐ **Part 325 Great Lakes Submerged Lands**
- ☐ **Part 323 Shorelands Protection and Management**
- ☐ **Part 303 Wetlands Protection**
- ☐ **Part 353 Sand Dune Protection and Management**
- ☒ **Part 31 Floodplain/Water Resources Protection**

Permission is hereby granted, based on permittee assurance of adherence to State requirements and permit conditions to:

Maintenance and modifications to the Higgins Lake Outlet Structure. All work shall be completed in accordance with permit conditions, information submitted, and the approved attached plans.

RECEIVED
MAR 15 2007
By

Water Course Affected: Cut River
Property Location: Roscommon **County,** Gerrish Township, **Section** 34
Surf Side Shores **Subdivision, Lot** **Town/Range** 24N, 3W **Property Tax No.**

Authority granted by this permit is subject to the following limitations:

A. Initiation of any work on the permitted project confirms the permittee's acceptance and agreement to comply with all terms and conditions of this permit.
B. The permittee in exercising the authority granted by this permit shall not cause unlawful pollution as defined by Part 31, Floodplain/Water Resources Protection of the NREPA.
C. This permit shall be kept at the site of the work and available for inspection at all times during the duration of the project or until its date of expiration.
D. All work shall be completed in accordance with the plans and the specifications submitted with the application and/or plans and specifications attached hereto.
E. No attempt shall be made by the permittee to forbid the full and free use by the public of public waters at or adjacent to the structure or work approved herein.
F. It is made a requirement of this permit that the permittee give notice to public utilities in accordance with Act 53 of the Public Act of 1974 and comply with each of the requirements of that act.
G. This permit does not convey property rights in either real estate or material, nor does it authorize any injury to private property or invasion of public or private rights, nor does it waive the necessity of seeking federal assent, all local permits or complying with other state statutes.
H. This permit does not prejudice or limit the right of a riparian owner or other person to institute proceedings in any circuit court of this state when necessary to protect his rights.
I. Permittee shall notify the MDEQ within one week after the completion of the activity authorized by this permit, by completing and forwarding the attached, preaddressed post card to the office addressed thereon.
J. This permit shall not be assigned or transferred without the written approval of the MDEQ.
K. Failure to comply with conditions of this permit may subject the permittee to revocation of permit and criminal and/or civil action as cited by the specific State Act, Federal Act and/or Rule under which this permit is granted.
L. Work to be done under authority of this permit is further subject to the following special instructions and specifications:

1. Riprap shall be clean fieldstone, and shall not extend out into the water more then three feet.

2. This permit does not eliminate managing Higgins Lake and the Cut River in accordance with the Court Ordered Lake Level. Minimum and maximum flows must be maintained in the Cut River as necessary to prevent harm to the aquatic ecosystem.

3. Prior to initiating construction, authorized by this permit, the permittee is required to provide a copy of the permit to the contractor(s) for his/her review.

4. The property owner, contractor(s), and any agent involved in obtaining or exercising this permit, are held responsible to ensure the project is constructed in accordance with all drawings and specifications contained in this permit. The contractor is required to provide a copy of the permit to any and all subcontractors doing work authorized by this permit.

5. Authority granted by this permit does not waive permit requirements under Part 91, Soil Erosion and Sedimentation Control, of the NREPA, or the need to acquire applicable permits from the County Enforcing Agent (CEA). To locate the Soil Erosion Program Administrator for your county visit www.deq.state.mi.us/sesca/.

6. Prior to the initiation of any permitted construction activities, a siltation barrier shall be constructed immediately downgradient of the construction site. Siltation barriers shall be specifically designed to handle the sediment type, load, water depth, and flow conditions of each construction site throughout the anticipated time of construction and unstable site conditions. The siltation barrier shall be maintained in good working order throughout the duration of the project. Upon project completion, the accumulated materials shall be removed and disposed of at an upland (non-wetland, non-floodplain) site. The siltation barrier shall then be removed in its entirety and the area restored to its original configuration and cover.

7. All raw areas resulting from the permitted construction activity shall be promptly and effectively stabilized with sod and/or seed and mulch (or other technology specified by this permit or project plans) in a sufficient quantity and manner so as to prevent erosion and any potential siltation to surface waters or wetlands.

8. All dredge/excavated spoils including organic and inorganic soils, vegetation, and other material removed shall be placed on upland (non-wetland, non-floodplain or non-bottomland), prepared for stabilization, and stabilized with sod and/or seed and mulch in such a manner so as to prevent and ensure against erosion of any material into any waterbody, wetland, or floodplain.

9. All fill/backfill shall consist of clean inert material which will not cause siltation nor contain soluble chemicals, organic matter, pollutants, or contaminants. All fill shall be CONTAINED in such a manner so as not to erode into any surface water, floodplain, or wetland. All raw areas associated with the permitted activity shall be STABILIZED with sod and/or seed and mulch, riprap, or other technically effective methods as necessary to prevent erosion.

10. If the project, or any portion of the project, is stopped and lies uncompleted for any length of time other than that encountered in a normal work week, every precaution shall be taken to protect the uncompleted work from erosion, including the placement of temporary gravel bag riprap or other acceptable temporary protection.

11. No work shall be done in the stream during periods of above-normal flows except as necessary to prevent erosion.

12. The permittee is cautioned that grade changes resulting in increased runoff onto adjacent property is subject to civil damage litigation.

13. In issuing this permit, the MDEQ has relied on the information and data which the permittee has provided in connection with the permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete, or inaccurate, the MDEQ may modify, revoke, or suspend the permit, in whole or in part, in accordance with the new information.

14. The permittee shall indemnify and hold harmless the State of Michigan and its departments, agencies, officials, employees, agents and representatives for any and all claims or causes of action arising from acts or omissions of the permittee, or employees, agents, or representatives of the permittee, undertaken in connection with this permit. This permit shall not be construed as an indemnity by the State of Michigan for the benefit of the permittee or any other person.

15. If any change or deviation from the permitted activity becomes necessary, the permittee shall request, in writing, a revision of the permitted activity and/or mitigation plan from the MDEQ. Such revision requests shall include complete documentation supporting the modification and revised plans detailing the proposed modification. Proposed modifications must be approved, in writing, by the MDEQ prior to being implemented.

16. This permit may be transferred to another person upon written approval of the MDEQ. The permittee must submit a written request to the MDEQ to transfer the permit to the new owner. The new owner must also submit a written request to accept transfer of the permit. The new owner must agree, in writing, to accept all conditions of the permit. A single letter signed by both parties which includes all the above information may be provided to the MDEQ. The MDEQ will review the request and if approved, will provide written notification to the new owner.

17. A permit may be extended for cause. To request an extension of a permit a written request must be submitted to the MDEQ before the expiration date of the permit. The request must indicate the reasons for the extension. The MDEQ will review the request, and if approved, will provide written notification to the permittee.

18. Prior to initiation of construction, a preconstruction meeting shall be held with the contractor, permittee or her/his representative(s), and representatives of the MDEQ. To arrange the required meeting, please contact this office..

19. Notification shall be made to the MDEQ's Land and Water Management Division, five days prior to starting the project. Please notify Mr. Jeff Silagy, 231-775-3960 ext. 6201..

20. "As-Built" construction plans of the project shall be submitted to this office within 30 days of project completion. The "as-built" plans shall be sealed and signed by a licensed professional engineer registered in the State of Michigan, and shall certify the project has been completed in accordance with this permit.

21. All slurry resulting from any dewatering operation shall be discharged through a filter bag or pumped to a sump located away from wetlands and surface waters and allowed to filter through natural upland vegetation, gravel filters, or other engineered devices for a sufficient distance and/or period of time necessary to remove sediment or suspended particles.

22. The project is limited to the area of permittee's ownership and riparian interest. Care shall be taken to minimize downstream siltation. Raw banks shall be sodded or riprapped to prevent erosion. It is understood that a fish ladder waiver and local government approval have been obtained. This permit does not authorize deterioration of downstream water quality or quantity.

23. Any modification or revision to the approved design plans and/or specifications must be approved in writing by the MDEQ.

24. The permittee shall provide passage of flow during and after construction. During periods of low stream flow the permittee shall provide a minimum flow release approximately equivalent to the stream flow into the impoundment.

25. This permit shall become effective on the date of the MDEQ representative's signature. Upon signing by the permittee named herein, this permit must be returned to the MDEQ's Land and Water Management Division, Jeff Silagy for final execution.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

Larry D. Head 3-9-07

Permittee Date

Larry D. Head, Chairman

Printed Name and Title of Permittee

Steven E. Chester, Director
Department of Environmental Quality

By

Jeff Silagy
District Representative
Land and Water Management Division
231-775-3960 ext. 6201

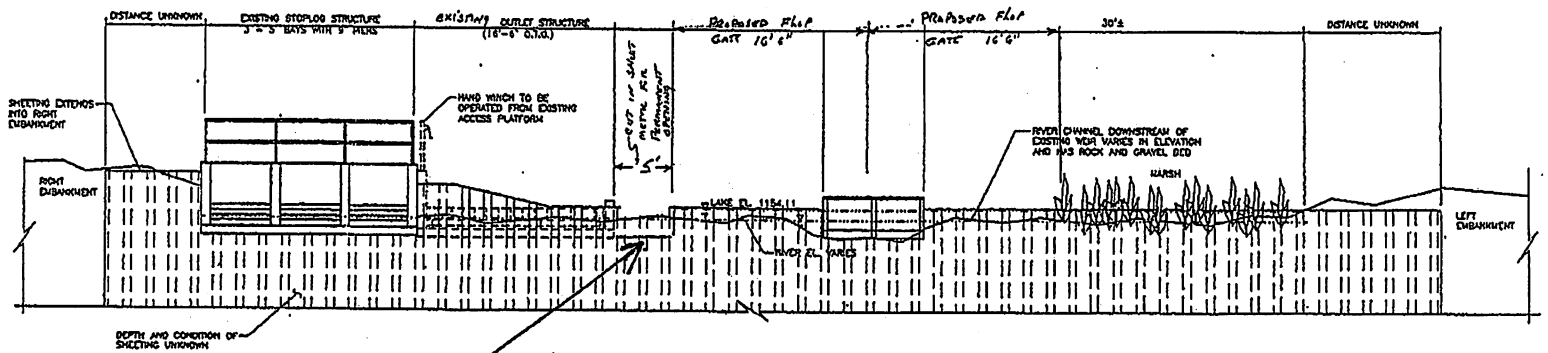
cc: Herb Weatherly
Rich O'Neal, DNR Fisheries
Roscommon CEA
Gerrish Township

DEQ copy

MAR 12

06-72-56-P

2 of 7



1/2-01 ELEVATION: WEIR LOOKING UPSTREAM
K.I.S.

NOTES:

1. DRAWING IS BASED ON VISUAL OBSERVATIONS AND FIELD MEASUREMENTS OF VISIBLE PORTIONS OF THE STRUCTURE. DO NOT SCALE THIS DRAWING.
2. EXISTING SHEET PILE MEASURES APPROXIMATELY 2" DEEP CORRUGATIONS, WITH 6" BETWEEN CORRUGATION PEAKS. THE STEEL SHEET IS ABOUT 3/16" THICK. ONLY SHEETING ABOVE GROUND WAS MEASURED. IT IS ASSUMED THAT THE SHEETING PASSES BELOW THE EXISTING STRUCTURES AS SHOWN.

Bottom elevation or apron at same level as stream bottom

REFERENCE DRAWING
NOT FOR CONSTRUCTION

NO.	BY	CHK'D	APP'D	DATE	REVISION DESCRIPTION

I HEREBY CERTIFY THAT THIS PLAN WAS PREPARED BY ME OR UNDER MY DIRECT SUPERVISION AND THAT I AM A DULY REGISTERED PROFESSIONAL ENGINEER UNDER THE LAWS OF THE STATE OF MICHIGAN.
DATE _____ REG. NO. _____

CLIENT
JOB LOCATION
RELEASED TO/FOR
DATE RELEASED A B C D 1 2 3

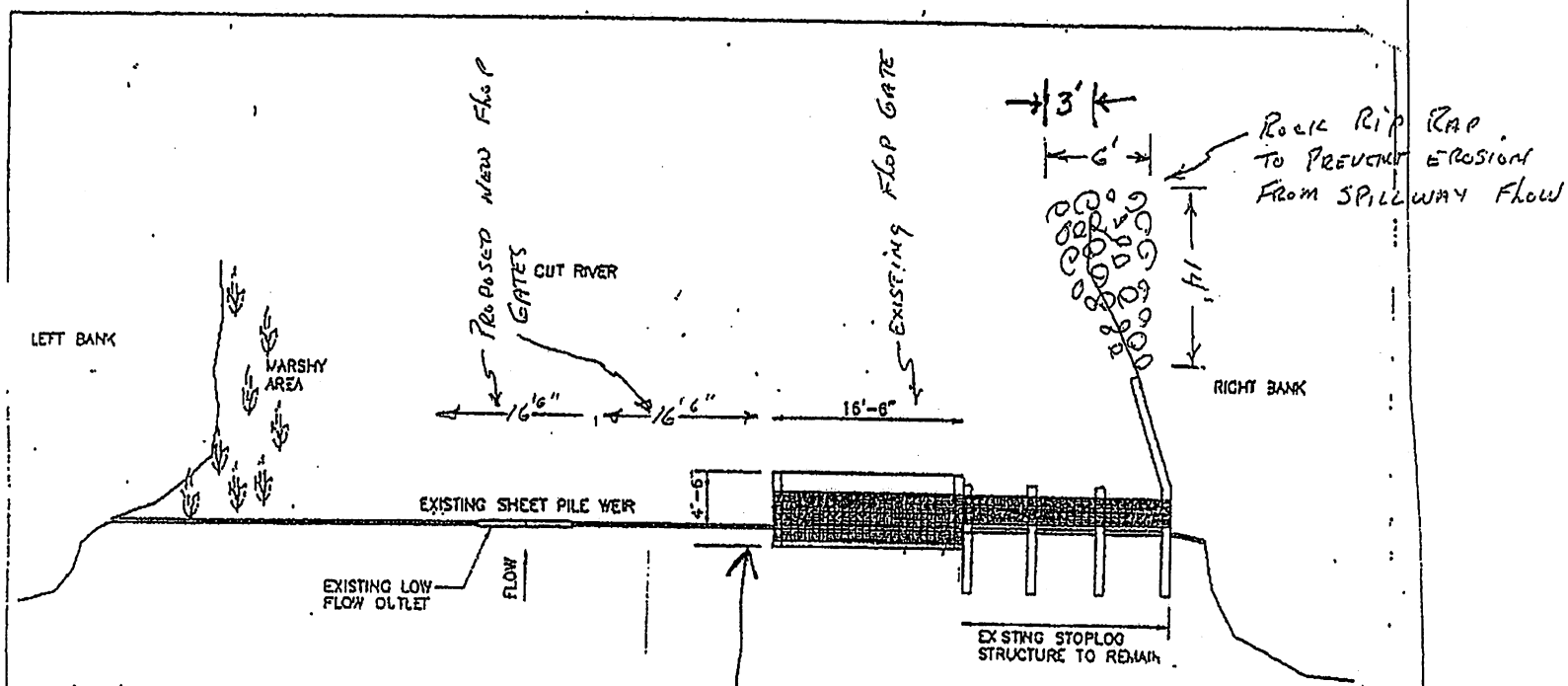
Bart Engineering Company
8300 NORMAN CENTER DRIVE, BLOOMINGTON, MINNESOTA
345 WEST 27TH STREET, HIBBING, MINNESOTA

Scale	AS SHOWN
Date	5/11/98
Drawn	PHS
Checked	JEG
Designed	
Approved	

ROSCOMMON COUNTY, MICHIGAN
PRUDENVILLE, MICHIGAN

HIGGINS LAKE OUTLET STRUCTURE
CUT RIVER AT HIGGINS LAKE
SECTION OF EXISTING STRUCTURE

BART PROJECT No. 22/72-001
CLIENT PROJECT No.
SHEET No. REV. NO



06-72-56-P

FIGURE 1
HIGGINS LAKE OUTLET
PLAN OF SPILLWAY

Exhibit 11

FILE COPY

E

Carey & Jaskowski

William L. Carey, J.D.
Richard J. Jaskowski, J.D.
Miranda J. Bailey, J. D.
Adam T. Vernon, J.D.

Attorneys at Law
A Professional Limited Liability Company

2373 S. I-75 Business Loop
P.O. Drawer 665
Grayling, MI 49738
Phone: 989-348-5232
Fax: 989-348-7102
E-Mail:wcarey@carey-jaskowski.com
rjaskowski@carey-jaskowski.com

June 20, 2008

RECEIVED
JUN 23 08
By cm

Ms. Cheryl Molliard, Controller
Roscommon County
Roscommon County Building
500 Lake Street
Roscommon, MI 48653

RE: Higgins Lake Water Legal Level

Dear Commissioner:

The undersigned represents the Higgins Lake Property Owners Association. As the Association's legal counsel I have been asked to address the maintenance of Higgins Lake water levels. More specifically, this correspondence is intended to place Roscommon County on notice of possible legal action to be taken against the county.

As a county commissioner you are certainly aware that the lake level of Higgins Lake is artificially maintained by manipulation of the Cut River dam. The Roscommon County Circuit Court has, by court order, dictated a maximum legal winter level and a maximum legal summer level for the waters of Higgins Lake. You are further aware that the current limits established by this circuit court are being reviewed by my client. Preliminarily, it is my client's view that both the winter and summer levels of Higgins Lake are set too high for maximum environmental protection of the lake.

The winter and spring of 2008 have brought unusually high amounts of precipitation to our area. Accordingly, the manipulation of the Cut River dam has become extremely important. Recently, the maintenance of the water level of Higgins Lake has been critically neglected. The dam has not been maintained in a fashion to allow for maximum draw down of the waters. As a result, the current level of the lake is well above the maximum legal limit. Because the water level is too high, many Association members are experiencing significant shoreline destruction. The property destruction is the direct, albeit not total, fault of negligent management of the Cut River dam.

RECEIVED
JUN 23 2008
By

The Higgins Lake Property Owners Association is made up of nearly 800 members, all of whom own property on Higgins Lake. The Association speaks in one unified voice as to the mismanagement of the Cut River dam. The Association does, by this correspondence, notify Roscommon County that it will seek legal redress in the courts if the circumstances leading to the most recent property destruction is not immediately addressed in a viable manner. The Michigan Natural Resources and Environmental Protection Act provides for a direct legal cause of action against Roscommon County. There are additional common law actions which my client would also undertake to protect the property interest of its members. If the county wishes to avoid immediate litigation, we request that a special meeting be convened of the County Board of Commissioners for the sole purpose of restructuring the policy related to the management of the Cut River dam.

Thank you for your kind and immediate attention to this matter.

Sincerely,

William L. Carey

WILLIAM L. CAREY
Attorney at Law

WLC/sav

cc: Client

Exhibit 12

Higgins Lake Property Owners Association

P.O. Box 55 • Roscommon, Michigan 48653-0055

Phone: (989) 275-9181 • Fax: (989) 275-9182

August 26, 2009

Mr. Ken Melvin
Roscommon County Board of Commissioners
500 Lake St.
Roscommon, MI 48653

Dear Mr. Melvin:

With all the recent discussions regarding Higgins Lake level and with the public hearing on lowering the legal winter level an additional 3" scheduled for 8-28-09, the Higgins Lake Property Owners Association executive board felt that a letter clarifying our organization's position on this and related matters would be timely. At an Aug 15th, 2009 meeting our board, with all members present and voting, unanimously voted to send to the county commissioners a letter with the following requests:

We request that the current legal summer lake level be adhered to and that at no time should this level be intentionally exceeded.

We request that you seek court action to make last year's temporary winter lake level of 4.62 the new permanent legal winter level.

We request that one member of the Higgins Lake Lake Level Committee be appointed as the person primarily responsible for the operation of the dam and that a second member of the committee be appointed as their backup.

We request that all requirements of the permit for the dam be adhered to.

Thank you for your attention to our concerns.

Rick Meeks, Vice President and
Chair of the HLPOA Environmental Committee

Exhibit B

STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENT
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

REBECCA A. HUMPHRIES
DIRECTOR

September 21, 2010

Commissioner Bob Schneider
Roscommon County Board of Commissioners
500 Lake Street
Roscommon, Michigan 48653

Dear Commissioner Schneider,

The Higgins Lake Property Owners Association recently contacted the Department of Natural Resources and Environment (DNRE) in regard to the lake-level control dam on Higgins Lake. They have concerns with the regulation of lake levels in Higgins Lake on shoreline erosion.

On August 12, 2010 several DNRE representatives from Fisheries Division and Water Resources Division toured the lake with the Property Owners Association. It was very clear that ongoing shoreline erosion was occurring and site photographs indicate significant shoreline loss has occurred in some areas of the lake. The presence of seawalls also indicates shoreline erosion is occurring in various areas of the lake.

The DNRE also is concerned with manipulating natural lake levels in Higgins Lake due to the effects on natural resources. Artificial lake levels are one of the primary causes of shoreline erosion from wave energy during ice-free periods and ice scour during winter. Altering natural water fluctuations in lakes affects the establishment of wetland plant communities and nesting and rearing habitat for fish, mammals and water birds. Amphibian and reptiles are also affected by loss of habitat from erosion and construction of seawalls. Water control dams affect seasonal fish movements in the system and stream flows below the structure. We generally recommend against manipulation of lake levels and promote removal of control dams when possible.

DNRE Fisheries Division is in agreement with the Higgins Lake Property Owners Association that removal of the lake-level control structure on Higgins Lake should be considered. We recognize there will be questions on how this will affect property owners around the lake, especially in reference to boat dockage, boat mooring, and changes in shoreline beach areas. Removing the dam could cause an overall drop in the lake level of Higgins Lake exposing and widening beach areas.

Higgins Lake has a fairly wide shallow, sandy shelf near shore around most of the lake. It is our belief that the primary effect of removing the dam and dropping the lake level will be more beach exposure, which will significantly reduce shoreline erosion. Boat mooring and docking should not be affected with the exception that a wider beach area will be present. It will require engineering information to determine the effects of removing the dam during low and high water conditions. We understand you may be contracting an engineering study of lake levels in Higgins Lake in the near future and

Exhibit 14

Department of Natural Resources, Fisheries Division

Higgins Lake Dam Study File Notes
Richard O'Neal, March 8, 2017

Purpose: Higgins Lake Fisheries Division summary notes of the study: Ecohydrological evaluation of removing the Higgins Lake-Level control structure.

This study was a joint effort between the Higgins Lake Property Owners Association, the Higgins Lake Foundation and DNR Fisheries Division. Funding was provided through the Consumers Energy Habitat Improvement Account (managed by Fisheries Division) and the Higgins Lake Foundation. The study was designed by a collaboration of Michigan State University, the University of Michigan, the Muskegon River Watershed Assembly, Huron Pines, the Higgins Lake Foundation, the Higgins Lake Property Owners Association and Fisheries Division. The University of Michigan provided the final fishery habitat analyses (Wiley and Layman 2015) and Michigan State University provided analyses for the other parts of the study (Kendall et al. 2016).

The primary interests by Fisheries Division were the potential effects the dam was having on fisheries habitat in Higgins Lake and the Cut River. These concerns included the historical manipulation of flows in the Cut River that included complete stoppage of flows to excessive high flows, and the effects of vegetative habitat in Higgins Lake. Property owners on the lake were concerned with excessive shore erosion that was documented through photographs collected over a number of years. Shoreline erosion rates had continued to increase as lake levels continued to increase above the legal established lake levels.

The purpose of the proposed study was to evaluate the likely effects of removing the control structure (returning the lake levels to their "natural" condition) on Higgins Lake and the Cut River system; including surface water levels, shore-line characteristics and erosion, and fishery-related habitat. Various other lake levels were also evaluated. The intent was to provide information to stakeholders regarding the influence of the hydrologic connection between Higgins Lake and the Cut River on: lake and stream water levels, seasonal level fluctuations, beach areas and bank erosion, boating and boat dockage, aquatic plant distributions, areas of gravel bottom, and other fishery-relevant habitat and characteristics. As a part of this study, the Huron Pines group conducted a survey of stakeholders to determine if they had other concerns that need to be evaluated. The information from this study will be used as a basis for stakeholder discussions regarding lake-level management and restoration of natural hydrologic conditions to Higgins Lake and the Cut River. The University of Michigan focused primarily on fishery habitat evaluations and worked jointly with Michigan State University on data collection.

The court established lake level for Higgins Lake is 1154.11 above mean sea level on April 15, and is to be lowered to 1153.612 feet above mean sea level on or about November 1. During 2009 – 2013/2014, the winter level was set at 1153.36 feet above mean sea level.

Study Results

The results of the study indicated that lake level management does not have significant effects on fishery habitat in Higgins Lake but does have significant effects on shoreline erosion. Lake-level manipulations have significant effects on fisheries habitat in the Cut River.

Figures 1-4 provide probability information from the study for Cut River flows and lake levels in Higgins Lake that will be referenced in this summary (Data from Appendices A-D in Kendall et.al 2016). Table 1

provides lake level information used in the study. The "No Dam" scenario best indicates flow and lake level probability under natural conditions.

The study results indicate that flows of 100-150 cfs are necessary to provide optimal habitat for fish in the Cut River (Figure 5). Flows of 50 cfs are a target flow rate to protect Cut River fisheries and cannot be achieved when all dam gates are closed (Figure 6). Flows of 50 cfs during summer have a much greater likelihood of occurring in the unmanaged dam scenarios (No dam and Gates 4-6 open, Table 2). A summer flow of 33cfs is likely to be exceeded 95% of the time under natural conditions, 90% of the time with Gates 4-6 open, and 63% of the time under current operation. Note that with the 4.75 ft low flow opening in the dam, Cut River flows are lower than recommended under current operation. Presently, the low flow opening is not large enough to consistently provide even 33cfs (the 95% natural flow).

Flows of 50 cfs during winter have a greater likelihood of occurring under current operation than in the managed dam scenario (Table 2). A winter flow of 25 cfs is likely to be exceeded 95% of the time under natural conditions, 90% of the time with Gates 4-6 open, and 99% of the time under current operation.

The probability of achieving the established summer lake level (1154.11 feet) is 15% under current operation and 0% for the unmanaged dam scenarios (Table 2). The probability of achieving an established summer lake level 100% of the time under current operation would occur at 1153.28 feet (SLL-10), and at lower levels (1152.92, SLL-14.3) for the unmanaged dam scenarios. Additional study information regarding lake levels are provided in Tables 3 & 4.

Other issues to address include:

- Drying of the stream bed and excessive high flows with dam gate manipulations, especially in the one mile section of the Cut River upstream of Marl Lake.
- The reason for maintaining a winter lake level.
- Climate warming and evaporation rates (currently 110-210 cfs/day, 0.01 – 0.1 inches/day) and groundwater inputs (110-219cfs/day).

Literature Cited

Kendall, D. K., B. M. Budd and D. W. Hyndman. 2016. Ecohydrologic evaluation of removing the Higgins Lake-Level control structure. Michigan State University, Lansing, Michigan.

Wiley, M. J., and A. J. Layman. 2015. Ecohydrologic evaluation of removing the Higgins Lake-Level control structure, Study Job Part D6: Habitat modeling to examine fishery related impacts. University of Michgan, Ann Arbor, Michigan

Figure 1. Cut River cumulative flow probabilities for summer. Curves represent estimated flows (data from Appendix A in Kendall et al. 2016) under current dam operation, with all gates open (includes radial gates 4, 5, and 6), and with the dam structure removed. Summer flows have the probability of meeting or exceeding 50 cfs this percentage of the time: current operation = 26%, radial always gates open = 66%, and with no dam = 69%. Summer flows have the probability of exceeding these levels 90% of the time: Current operation = 22 cfs, radial always gates open = 34 cfs, and with no dam = 40 cfs. Summer flows have the probability of exceeding these levels 95% of the time: Current operation = 18 cfs, radial always gates open = 26 cfs, and with no dam = 33 cfs.

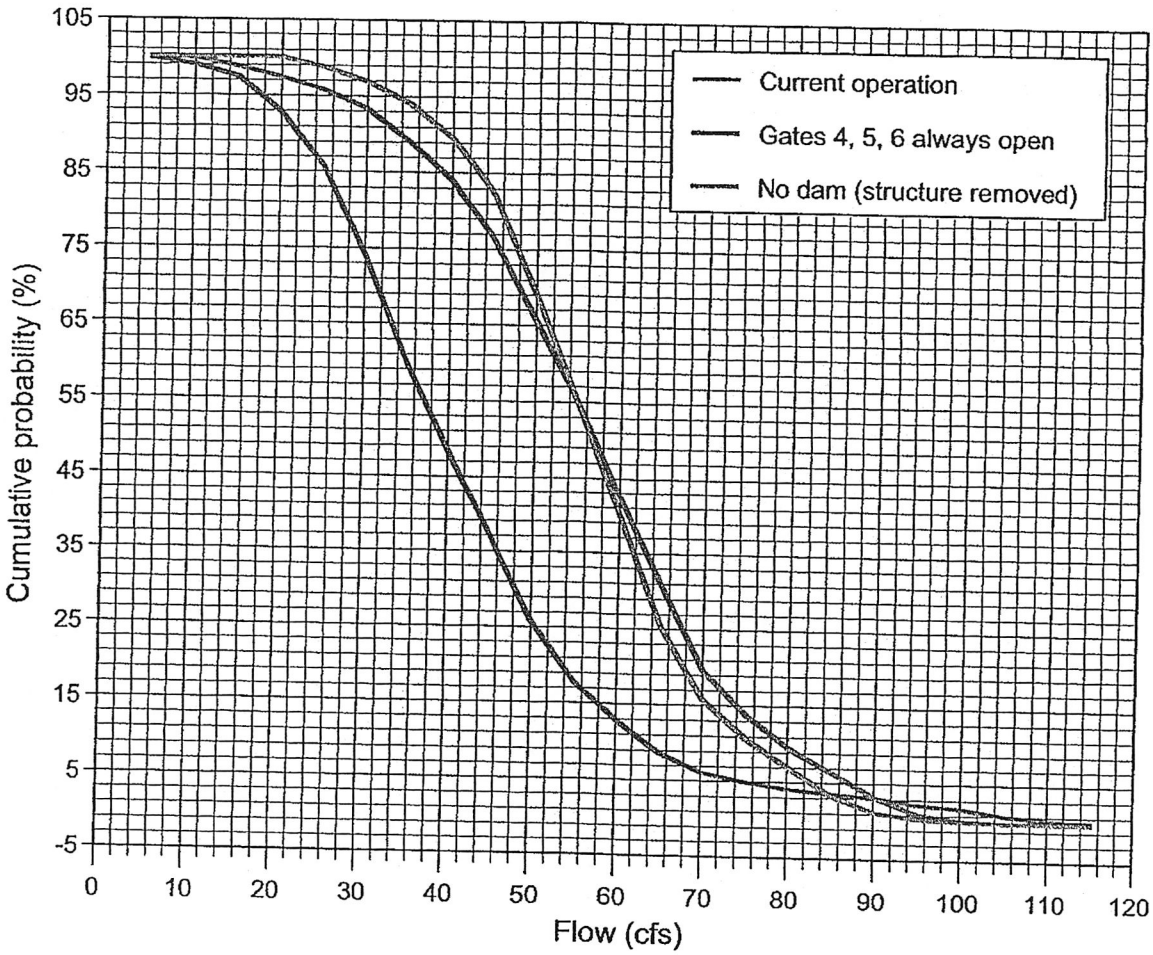


Figure 2. Cut River cumulative flow probabilities for winter. Curves represent estimated flows (data from Appendix B in Kendall et al. 2016) under current dam operation, with all gates open (includes radial gates 4, 5, and 6), and with the dam structure removed. Winter flows have the probability of meeting or exceeding 50 cfs this percentage of the time: current operation = 77%, radial always gates open = 44%, and with no dam = 42%. Winter flows have the probability of exceeding these levels 90% of the time: current operation = 41 cfs, radial always gates open = 24 cfs, and with no dam = 28 cfs. Winter flows have the probability of exceeding these levels 95% of the time: current operation = 37 cfs, radial always gates open = 20 cfs, and with no dam = 25 cfs.

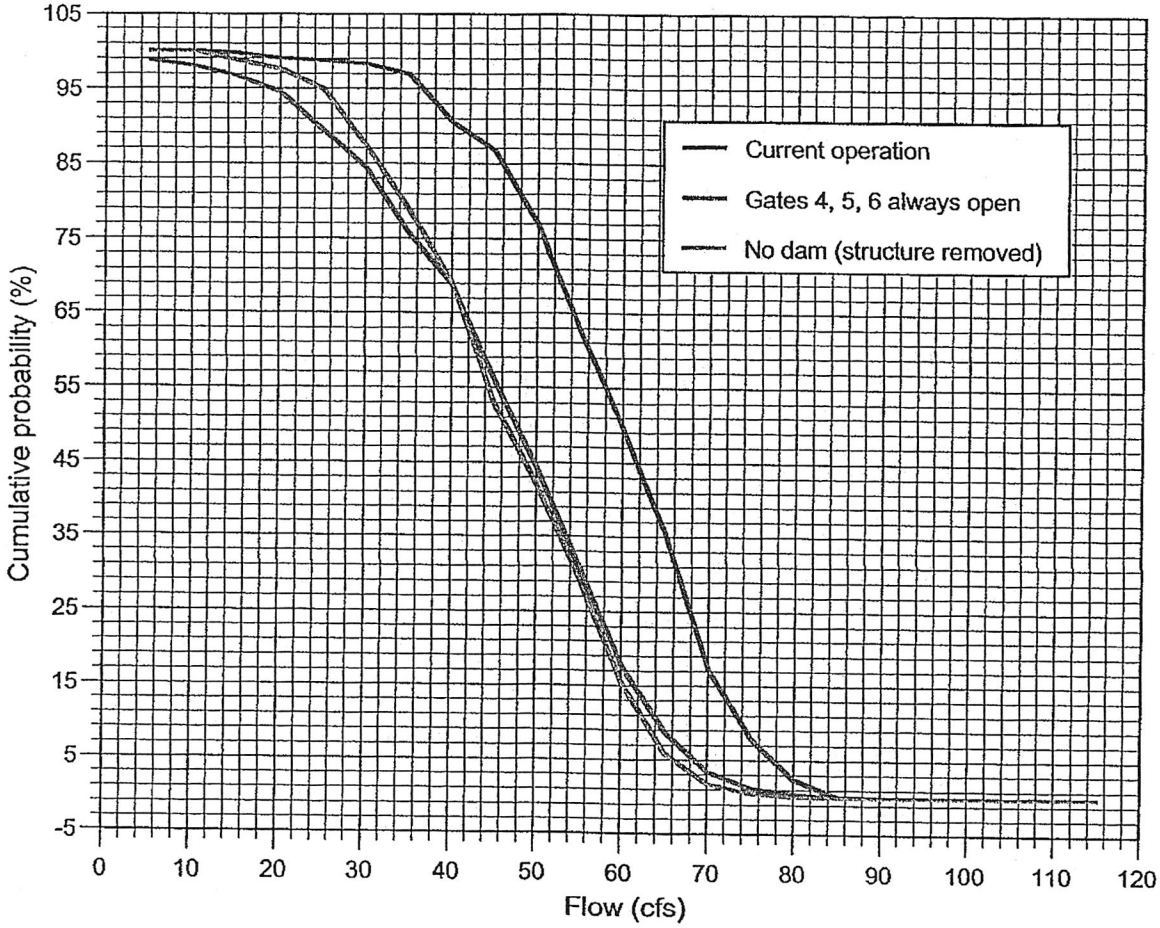


Figure 3. Higgins Lake cumulative lake level probabilities for summer. Curves represent estimated lake levels (data from Appendix C in Kendall et al. 2016) under current dam operation, with all gates open (includes radial gates 4, 5, and 6), and with the dam structure removed.

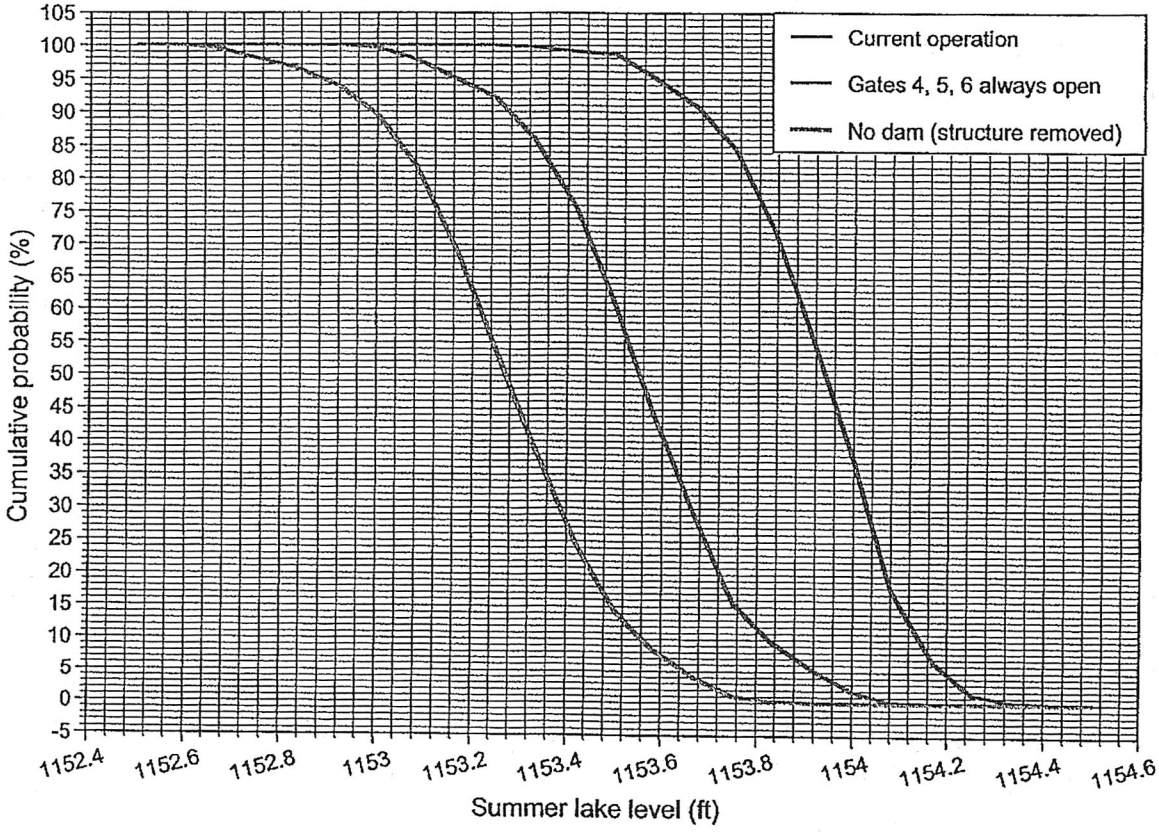


Figure 4. Higgins Lake cumulative lake level probabilities for winter. Curves represent estimated lake levels (data from Appendix D in Kendall et al. 2016) under current dam operation, with all gates open (includes radial gates 4, 5, and 6), and with the dam structure removed.

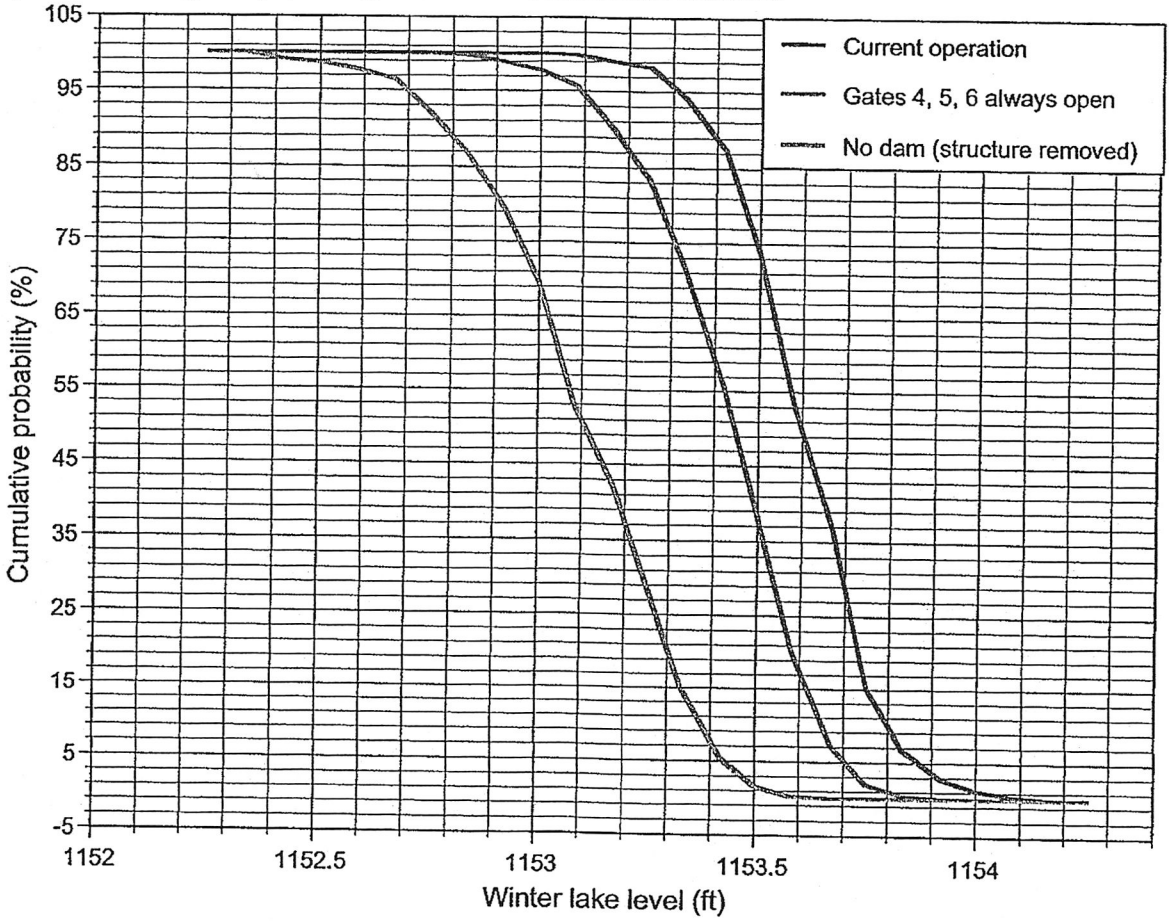


Figure 5. Average Cut River fish habitat response curves (from Wiley and Layman 2015).

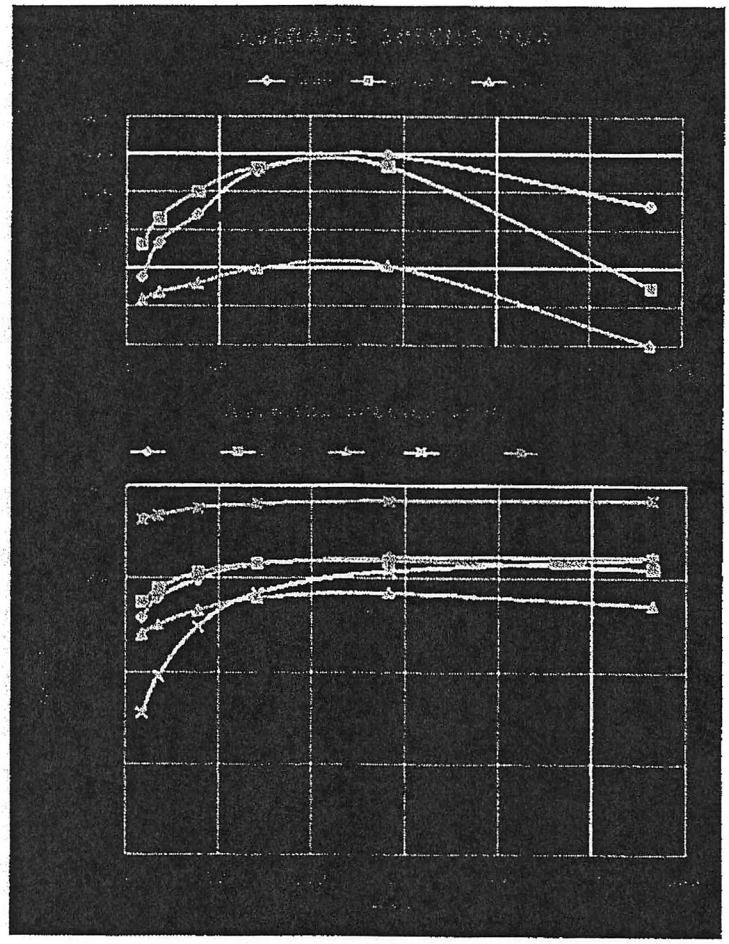


Figure 6. Relationships between Higgins Lake water surface elevations, dam configuration, dam discharge rate and instream fish habitat at the Lansing Road bridge reach of the Cut River (from Wiley and Layman 2015). Note that 1.5 cms equals 53 cfs and 1 cms equals 35 cfs.

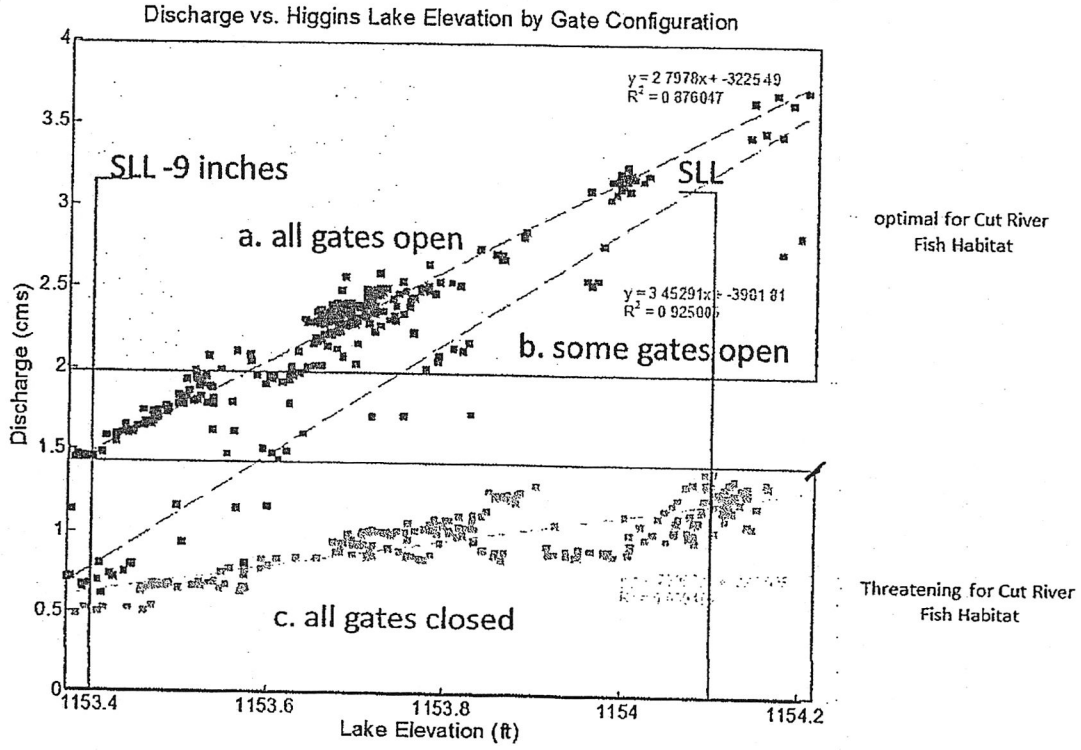


Table 1. Higgins Lake water elevations used in the study. Note that SLL indicates the court established summer lake level for Higgins Lake (from Wiley and Layman 2015 and Kendall et al. 2016). All gates open refers to radial gates 4, 5, and 6 only.

Description	SLL ± inch	Elevation (feet)	SLL ± feet	MSU model	UM model
	SLL+60	1159.03	4.92		High sensitivity
All gates closed	SLL+1	1154.21	0.1		X
Summer legal level (1926, 1941, 1956)	SLL	1154.11	0	X	X
	SLL-4	1153.78	-0.3	X	
Winter legal level (1926 & 1956)	SLL-6	1153.61	-0.5	X	
Winter legal level (2009-2014)	SLL-9	1153.36	-0.75	X	X
	SLL-13	1153.03	-1.08	X	
All gates open (4, 5, 6)	SLL-18	1152.61	-1.51	X	X
Dam removed MSU model	SLL-20	1152.44	-1.67	X	
Natural Bottom MSU 2013	SLL-24	1152.07	-2.04		
Dam removed UM model	SLL-26	1151.95	-2.17		X
Natural bottom DNR 1956	SLL-37	1151	-3.11		
	SLL-60	1149.19	-4.92		Low sensitivity

1961

Table 2. Information on Cut River flows and Higgins Lake water levels from figures 1-4.

	Current operation	Gates 4-6 open	No dam
Summer (April-October)			
Flow			
50 cfs	26%	66%	69%
90%	22 cfs	34 cfs	40 cfs
95%	18 cfs	26 cfs	33 cfs
34 cfs	63%	90%	95%
Lake level			
SLL=1154.11 (Current)	15%	0%	0%
1153.71 (SLL-4.8 inches)	88%	22%	2%
1153.41 (SLL-8.4 inches)	98%	77%	26%
1153.28 (SLL-10 inches)	100%	86%	48%
1152.92 (SLL-14.3 inches)	100%	100%	94%
1152.60 (SLL-18.1 inches)	100%	100%	100%
Winter (November-April)			
Flow			
50 cfs	77%	44%	42%
90%	40 cfs	24 cfs	28 cfs
95%	36 cfs	19 cfs	25 cfs
25 cfs	99%	90%	95%
Lake level			
Current WLL=1153.61 (SLL-6 inches)	47%	15%	0%
1153.41 (WLL-2.4 inch)	87%	57%	5%
1153.36 (alternate, WLL-3.0 inches)	91%	67%	11%
1153.11 (WLL-6.0 inch)	99%	93%	49%
1153.0 (WLL-7.3 inches)	100%	98%	69%
1152.80 (WLL-9.7 inches)	100%	100%	88%
1152.30 (WLL-15.7 inches)	100%	100%	100%

Table 3. Summer lake level information for Higgins Lake. Note that "SLL" denotes the legal summer lake level, "WLL" denotes the legal winter lake level, "ALT" denotes the alternate winter legal lake level. Percentages indicate the amount of time the lake elevation meets or exceeds the summer legal lake level (from Figure 3). Shoreline gain indicates the average change in shoreline position (in feet) as water levels decline from the SLL (from Tables 2.3.1 and 2.3.2 in the main report). The amount of dredging required to maintain adequate boating depths for five of the marinas and boat ramps is also provided (from Table 2.3.3 in Kendall et al. 2016).

Lake level elevation (ft)	Summer level	Winter level	Current	Gates 4-6 open	No dam	Shoreline gain (feet, acres)	Dredging (yards^3)
1154.11	Current SLL		15%	0%	0%		
	SLL-4.0 inches					12.3, 35	1,955
1153.71	SLL-4.8 inches		88%	22%	2%		
1153.61	SLL-6.0 inches	WLL				17.0, 48	2,539
1153.41	SLL-8.4 inches		98%	77%	26%		
1153.36	SLL-9.0 inches	WLL-3.0 inches, ALT				25.3, 69	3,889
1153.28	SLL-10.0 inches		100%	86%	48%		
1153.11	SLL-11.9 inches	WLL-6.0 inches					
	SLL-13.0 inches					45.1, 118	5,812
1153.00	SLL-13.2 inches	WLL-7.3 inches					
1152.92	SLL-14.3 inches		100%	100%	94%		
1152.80	SLL-15.6 inches	WLL-9.7 inches					
All gates open	SLL-18.0 inches					64.1, 170	8,720
1152.60	SLL-18.1 inches		100%	100%	100%		
No dam	SLL-20.0 inches					83.6, 215	9,461
1152.30	SLL-21.6 inches	WLL-15.7 inches					

Table 4. Winter lake level information for Higgins Lake. Note that "SLL" denotes the legal summer lake level, "WLL" denotes the legal winter lake level, "ALT" denotes the alternate winter legal lake level. Percentages indicate the amount of time the lake elevation meets or exceeds the winter legal lake level (from Figure 4). Shoreline gain indicates the average change in shoreline position (in feet) as water levels decline from the SLL (from Tables 2.3.1 and 2.3.2 in the main report). The amount of dredging required to maintain adequate boating depths for five of the marinas and boat ramps is also provided (from Table 2.3.3 in Kendall et al. 2016).

Lake level elevation (ft)	Summer level	Winter level	Current	Gates 4-6 open	No dam	Shoreline gain (feet, acres)	Dredging (yards^3)
1154.1	Current SLL						
	SLL-4.0 inches					12.3, 35	1955
1153.71	SLL-4.8 inches						
1153.61	SLL-6.0 inches	WLL	47%	15%	0%	17.0, 48	2539
1153.41	SLL-8.4 inches		87%	57%	5%		
1153.36	SLL-9.0 inches	WLL-3.0 inches, ALT	91%	67%	11%	25.3, 69	3889
1153.28	SLL-10.0 inches						
1153.11	SLL-11.9 inches	WLL-6.0 inches	99%	93%	49%		
	SLL-13.0 inches					45.1, 118	5812
1153	SLL-13.2 inches	WLL-7.3 inches	100%	98%	69%		
1152.92	SLL-14.3 inches						
1152.8	SLL-15.6 inches	WLL-9.7 inches	100%	100%	88%		
All gates open	SLL-18.0 inches					64.1, 170	8720
1152.6	SLL-18.1 inches						
No dam	SLL-20.0 inches					83.6, 215	9461
1152.3	SLL-21.6 inches	WLL-15.7 inches	100%	100%	100%		


DNR

Exhibit 15

1

Prepared Statement to Roscommon County Commissioners – Eric Ostergren, March 27, 2019

I've read the proposed Motion you plan on voting on and I hope that vote takes place today, however I object to the Motion. I have several reasons for my objections as follows:

As everyone here knows, the Roscommon County Commissioners have been ordered by the Circuit Court to maintain the legal levels of Higgins Lake but have failed to do so for several years. Of course, this Commission is limited by the constraints of Mother Nature but the main problem with failing to maintain the legal levels is the Lake Level Control Structure or Dam that was modified back in 2007. The 4.75 foot uncontrolled spillway which if modified, would help the Commission control the levels much better. Modifying the Dam is something within your control. Back in 2010 this Commission hired, at great expense, the Spicer Group to make recommendations to help the Commission maintain the legal level. These recommendations have been ignored by this Commission for 9 years. Repeated pleas have been made by various organizations over the years to implement the Spicer Group's recommendations and they have still been ignored by the Commission. Last year I made a presentation to the Commission which highlighted 636 Petitions that were signed at one time, 227 Petitions that were signed at another time and at another time a Survey that 496 participated in. Everyone asked the Commissioners to enforce the legal level and modify the 4.75 foot permanent opening in the Dam. I'm providing you a copy of that presentation in case you have forgotten for the record.

The problem is that the lower levels on Higgins during the mid to late summer season are causing diminished usage which is devaluating property values and decreasing the enjoyment of the lake. It is a serious problem and most on the lake are extremely upset about it.

The fact is that this Commission is under Court Order to maintain the Legal level on Higgins. You have failed. The Court Order doesn't say it is an option for the Commission to maintain the legal levels or you can do it if you feel like it or that you need the permission of 2/3rds of the lake front owners to maintain the legal levels. It says you are ordered to maintain the legal levels. You do not need anyone's permission to maintain the legal levels, including the DEQ, the DNR, or anyone else. Anyone who prevents you from maintaining the legal levels would need to get permission from the Court to change that. Just because the DEQ and DNR are powerful agencies doesn't change the fact that the Court is a higher authority and Court Orders are to be followed and obeyed. If you don't believe me, ask the Court. I have a feeling we are going to find out soon.

Your proposed Motion is fatality flawed, illegal and dishonest. You have conflated the statutes with how lake communities are supposed to establish or change legal levels with how you are supposed to maintain the established Court Ordered legal levels. No one is asking you to change the legal level. You should have obtained competent legal counsel who would have told you that your Motion will not hold up under legal challenge. The Commission can't forgo its legal responsibility by requiring 2/3rds of the lakefront property owners to approve before they could fulfill their legal responsibility.

Think about this: Why weren't 2/3rds of the lakefront property owners required back in 2007 when the LLCS was modified and why weren't 2/3rds of the lakefront property owners required when the Court modified the winter drawdown back in 2009 when it was lowered 3 inches? The reason is because the 2/3rds requirement is only required when you are trying to modify the legal level on a permanent basis. This motion you are trying to jam through is extremely dishonest, ill-conceived and is going to leave a stain on this Commission for years to come.

Finally, with that being said, I hope this Commission will vote today on the proposed Motion so this can move on to the next phase.

Exhibit 16

The Houghton Lake Resorter
Houghton Lake, Michigan

Ostergren supports Artz for commissioner

July 19, 2018

Ostergren

supports Artz

for commissioner

This election year is different in Roscommon County's District 2. For the first time since Ken Melvin was elected as District 2 County Commissioner in 2008, someone is running to replace him. Glenn Artz stepped up to the plate and now we have a choice. It's time for a change. Mark Twain once said, "Politicians and diapers must be changed often, and for the same reason." I couldn't agree more. Melvin has been there long enough and he needs to be replaced.

One reason we need a change is because Commissioner Melvin has a proven record of failure with regards to the management of lake levels on Higgins. The commissioners are responsible for maintaining the legal levels of Higgins, Houghton and Lake St. Helen and Melvin is responsible for Higgins. Higgins is constantly below its legal level and Melvin refuses to ask the DEQ for a permit to change the lake level control structure (LLCS) to modify the defective 4.75-foot uncontrolled spillway that was installed in 2007. The controlled spillway is what is responsible for the illegal low lake levels we've experienced since then. In 2010, the commissioners spent $80,000 for recommendations to correct this problem and the Spicer Group said that installing a restrictor plate would help. Two years ago Melvin promised to contact the DEQ and he never did. I recently filed a Freedom of Information Act request with the Commissioners' office and not one document exists regarding any communications with the DEQ to modify the LLCS. The current levels are around four inches below the legal level. Our other lakes are rarely below their legal level.

Why doesn't Melvin want the water levels on Higgins maintained at their natural and legal level? It's not surprising. Melvin says that he's lived here most of his life but make no mistake, he's controlled by downstate interest. Melvin is politically aligned with downstaters that support him because they want lower levels on their lakefront properties. These low-level supporters are a minority of Higgins lakefront property owners who don't care about how low lake levels hurt our local economy and property values. Make no mistake, low levels on Higgins are not good for the Roscommon County economy.

Melvin doesn't mind insulting his constituents either. At a Gerrish Township meeting back in July of 2016, Melvin said that those who didn't like the way

he runs things here in Roscommon were "cidiots" and he used that word over a dozen times. His comments were interesting when you consider that most of his supporters live in cities downstate. I guess if you don't agree with the way Melvin does things and you didn't grow up in Roscommon County, you are a "cidiot" also. We need to retire Commissioner Melvin and get some new blood in the Roscommon County Commissioners' office. It's time for a change. Melvin doesn't deserve to be re-elected. Vote for Glenn Artz for commissioner in District 2 Aug. 7.

Eric Ostergren

Roscommon

Exhibit 17

Higgins Lake Property Owners Association℠

PO Box 55 211 N. Main Street Roscommon, MI 48653
Website: hlpoa.org email: hlpoa0@gmail.com
Ph.: (989) 275-9181 Fax: (989) 275-9182

Higgins Lake Property Owners Association
Board Meeting Minutes
April 15, 2019

The meeting was called to order by President Charlene Cornell at 9:02 A.M.
Board Members Present: Charlene Cornell, Greg Semack, Bruce Carleton, Herb Weatherly, Chuck Brick, Wayne Brooks, Bob McKellar, Fred Swinehart and John Ogren. Mark Lutz was absent.

Agenda: No changes.

President's Comments: Charlene noted that Vicki Springstead from the HLF will be calling at 10:00 A.M.

March Minutes: Bob moved to accept the March 18, 2019 Minutes as written, seconded by Bruce. Motion passed.

Committee Reports:
Secretary/Office: None.

Treasurer's Report: The preliminary financials through March 31, 2019 were presented.

Bruce stated that our CPA firm has just made the final entries for 2018 and we will be receiving the adjusted year-end financials soon.

Membership & Communication: Wayne recapped the advertising sales for our annual directory and reported we are close to the budgeted amount of $9,100.00.

Wayne stated that committee reports for the directory are due May 1, 2019.

Wayne reported that we have 366 members as of April 12, 2019. For 2018 members that have not yet joined this year, Board members will personally contact them in an effort to receive their membership in time to be included in the directory.

Chuck reported that the website has been updated. The Board thanked Chuck, Herb and Mark for their help.

Conference Call with Vicki Springstead: Vicki called to update us on HLF plans for 2019.

Riparian Committee: Greg mentioned there will be a future law enforcement meeting. Greg will attempt to set up a meeting at the end of April or early May.

Environmental Committee: Fred said there will be a presentation from the High School students at the next Board meeting, to discuss the water sampling program.

There was a discussion on SSW, looking at different methods to proceed to combat this AIS.

Herb shared his success in procuring the necessary material for the HLPOA Friend of the Lake award, to be presented at our annual meeting. Herb also suggested that two people receive the award this year. Fred moved to give the award to two people, seconded by John. Motion passed.

Fred said that he will be delivering a letter to HLF President Vicki Springstead today, that has back-up information concerning the success of the 2018 water sampling program, in an effort to gain their support for 2019.

PAC: Greg shared that State Senator Curt VanderWall will be scheduling monthly coffee hours in his Senate District which includes the Roscommon area and encouraged Board members to attend if they can. Greg will share future coffee hour dates as they become available.

HLSIO: A discussion was held about expanding the scope of the HLSIO to include AIS, but the decision was made that it would be best to keep the two issues separate.

Elections Committee: Bob reported that they are reviewing candidates and will set up interviews with potential candidates to fill the Board vacancy position.

Ongoing Business: Charlene said there is no update on the AMVETS lawsuit.

Greg said that Lyon Township's application has been approved and they are going forward with a sewer feasibility study.

Chuck, Mark, Herb and Charlene met to discuss a HLPOA open house prior to our annual meeting. Chuck recapped the meeting and said they would publish an invitation in the Houghton Lake Resorter and would share who the HLPOA is, when we were formed and display presentations in an effort to increase membership. The team is looking at a date for late June.

New Business: The following motions were made by Chuck Brick:

Motion #1:

I move that the HLPOA Board approved resolution, titled: "Resolution of The Higgins Lake Property Owners Association Regarding The Legal Summer Water Level of Higgins Lake", be revised by substituting the word "modification" for "alteration" in the last paragraph of this resolution, subject to HLPOA Legal Counsel's approval, urging the Roscommon County Board of Commissioners to adopt/incorporate the Spicer Group recommendations for modifying and operating the Higgins Lake Level Control Structure, including the addition

of a restrictor plate in the 4.75 ft. unregulated spillway; and further, that the Board immediately prepare and send a comprehensive message to our members detailing the HLPOA Board's position of support for the existing 1926 and 1982 Court ordered legal lake levels and our position that the County should immediately adopt the Spicer Group's recommendations for modifying and operating the Lake Level Control Structure to better maintain the existing 1926 and 1982 Court ordered legal summer level annually throughout the period from April 15th or Ice Out, which ever shall first occur, to November 1st.

Motion made by Chuck Brick, motion not seconded, motion failed.

Motion #2:

I move that the HLPOA Board instruct our Legal Counsel to file an Amicus Brief in support of the organization known as "Citizens for Higgins Lake Legal Levels" (CHLLL) at an appropriate time following the CHLLL's filing of its action to legally compel the Roscommon County Board of Commissioners to better maintain the existing 1926 and 1982 Court ordered legal summer level annually throughout the period from April 15th or Ice Out, which ever shall first occur, to November 1st. (Optional: Amicus Briefs are legal documents filed by non-litigants with a strong interest in the subject matter. The briefs advise the court of relevant, additional information or arguments that the court might wish to consider. A well-written amicus brief can have a significant impact on judicial decision-making. Cases are occasionally decided on grounds suggested by an amicus, and decisions may rely on information or factual analysis provided only by an amicus.)

Motion made by Chuck Brick, motion not seconded, motion failed.

Motion #3:

I move that the HLPOA Board pledge monetary support to the organization known as "Citizens for Higgins Lake Legal Levels" (CHLLL) in an amount not to exceed $4,500.00 in the CHLLL's efforts to legally compel the Roscommon County Board of Commissioners to better maintain the existing 1926 and 1982 Court ordered legal summer level annually throughout the period from April 15th or Ice Out, which ever shall first occur, to November 1st.

Motion made by Chuck Brick, motion not seconded, motion failed.

Adjournment: Bob moved to adjourn the meeting, seconded by Chuck. Motion passed. The meeting adjourned at 12:30 P.M.

The next meeting will be May 20, 2019 at 9:00 A.M.

Exhibit 18

Filed by Corporations Division Administrator Filing Number: 201956206160 Date: 04/01/2019 D

LARA Corporations Online Filing System
Department of Licensing and Regulatory Affairs

Form Revision Date 07/2016

ARTICLES OF INCORPORATION

For use by DOMESTIC NONPROFIT CORPORATION

Pursuant to the provisions of Act 162, Public Acts of 1982, the undersigned corporation executes the following Articles:

ARTICLE I

The name of the corporation is:

CITIZENS FOR HIGGINS LAKE LEGAL LEVELS

ARTICLE II

The purpose or purposes for which the corporation is formed are:

Promote and defend the legal lake levels on Higgins Lake

ARTICLE III

The Corporation is formed upon Non Stock basis.

If formed on a stock basis, the total number of shares the corporation has authority to issue is

If formed on a nonstock basis, the description and value of its real property assets are (if none, insert "none"):

None

The description and value of its personal property assets are (if none, insert "none"):

None

The corporation is to be financed under the following general plan:

Donations

The Corporation is formed on a Directorship basis.

ARTICLE IV

The street address of the registered office of the corporation and the name of the resident agent at the registered office (P.O. Boxes are not acceptable):

1. Agent Name: ERIC J OSTERGREN
2. Street Address: 6016 FOXBORO COURT
   Apt/Suite/Other:
   City: MIDLAND
   State: MI Zip Code: 48640
3. Registered Office Mailing Address:
   P.O. Box or Street Address: 6016 FOXBORO COURT
   Apt/Suite/Other:
   City: MIDLAND
   State: MI Zip Code: 48640

ARTICLE V

The name(s) and address(es) of the incorporator(s) is (are) as follows:

Name	Residence or Business Address
ERIC J OSTERGREN	6016, MIDLAND, MI 48640 USA

Signed this 1st Day of April, 2019 by the incorporator(s).

Signature	Title	Title if "Other" was selected
Eric Ostergren	Incorporator	

By selecting ACCEPT, I hereby acknowledge that this electronic document is being signed in accordance with the Act. I further certify that to the best of my knowledge the information provided is true, accurate, and in compliance with the Act.

○ Decline ◉ Accept

Filed by Corporations Division Administrator Filing Number: 201956206160 Date: 04/01/2019

MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

FILING ENDORSEMENT

This is to Certify that the ARTICLES OF INCORPORATION

for

CITIZENS FOR HIGGINS LAKE LEGAL LEVELS

ID Number: 802306007

received by electronic transmission on April 01, 2019 ***, is hereby endorsed.***

Filed on April 01, 2019 ***, by the Administrator.***

The document is effective on the date filed, unless a subsequent effective date within 90 days after received date is stated in the document.

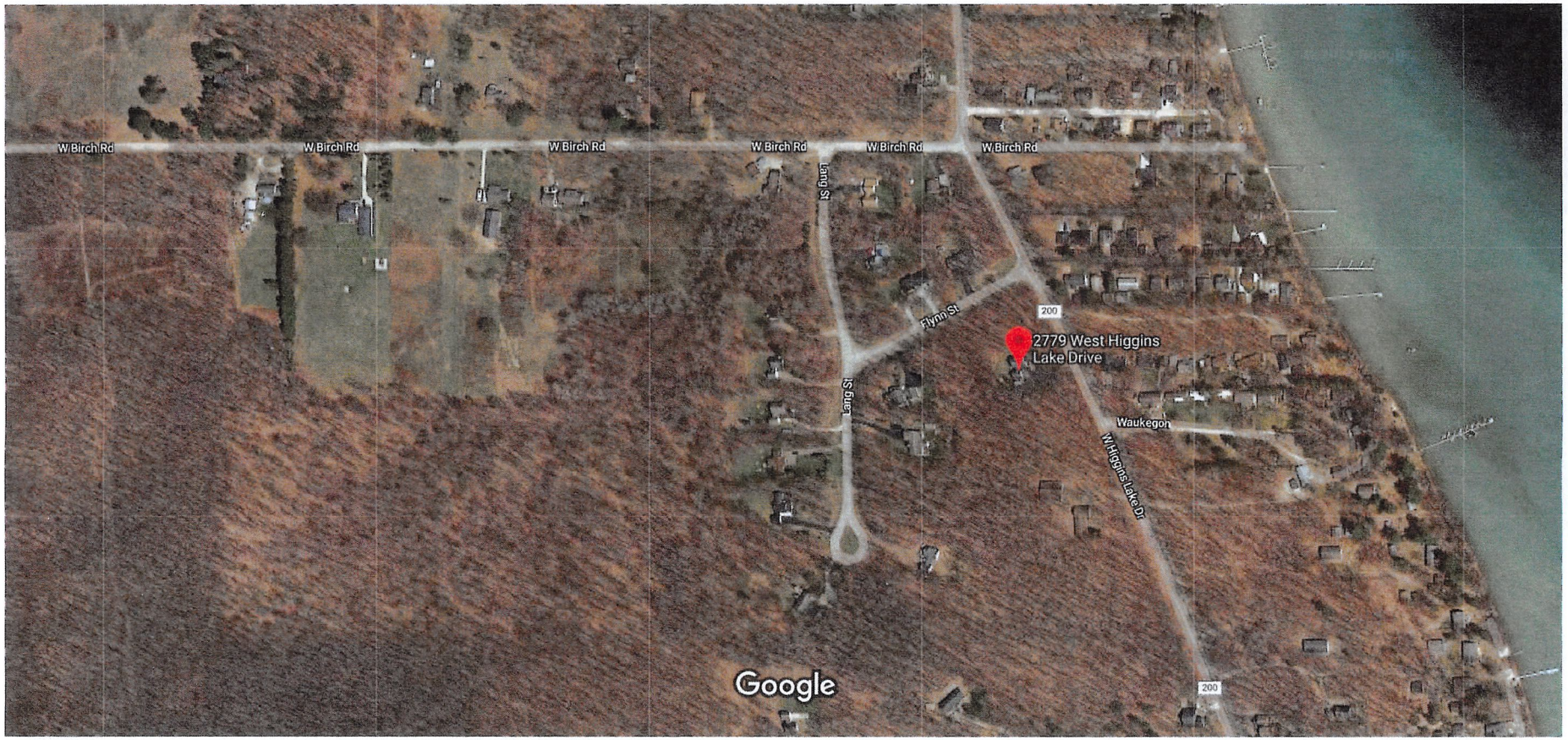
LICENSING AND REGULATORY AFFAIRS
Corporations, Securities & Commercial Licensing Bureau
TUEBOR
CIRCUMSPICE

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Department, in the City of Lansing, this 1st day of April, 2019.

Julia Dale, Director
Corporations, Securities & Commercial Licensing Bureau

Exhibit 19

Google Maps 2779 W Higgins Lake Dr



Imagery ©2019 DigitalGlobe, USDA Farm Service Agency 200 ft

Exhibit 20

2014 WL 7212895
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

CITY OF DEARBORN, Plaintiff-Appellee-Cross-Appellee-Cross-Appellant,
and
West Village Square Condominium Association, Intervening Plaintiff,
v.
BURTON–KATZMAN DEVELOPMENT COMPANY, INC., Burton–Share Management Company,
Defendants–Cross–Appellants–Cross–Appellees,
and
West Village Commons, LLC, Westminster Homes, LLC f/k/a Abbey Homes, LLC, Charles DiMaggio, Daniel Share, Defendants,
and
Peter Burton, Individually and as Trustee of the Peter K. Burton Revocable Living Trust, and Robert M. Katzman, Individually and as Trustee of Robert M. Katzman Revocable Living Trust,
Defendants–Appellants,
and
Laurence R. Goss, Individually and as Trustee of the Laurence R. Goss Revocable Living Trust, Steven Bentley, B/K/G Investors, LLC, and Burton–Katzman Manager, LLC,
Defendants–Cross–Appellees.

Docket Nos. 309758, 313213.
|
Dec. 18, 2014.

Wayne Circuit Court; LC No. 09–001342–CK.

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

Opinion

PER CURIAM.

*1 Defendants-appellants, Peter Burton, individually and as trustee of the Peter K. Burton Revocable Living Trust, and Robert M. Katzman, individually and as trustee of Robert M. Katzman Revocable Living Trust, appeal by leave[1] an order requiring them to specifically perform duties of a Developer under a Development Agreement involving defendant, West Village Commons, LLC (West Village), and plaintiff-appellee-cross-appellee-cross-appellant, city of Dearborn (city). Defendants-cross-appellants-cross-appellees, Burton–Katzman Development Company (BKDC) and Burton–Share Management Company (BSMC), also challenge orders granting summary disposition to the city and finding them liable for the Developer's duties under the Development Agreement. BKDC, on cross-appeal, and BSMC, in a separate appeal by leave,[2] challenge orders requiring them to specifically perform. BKDC also argues the trial court should not have held it in contempt for failing to specifically perform and should have granted its motion for summary disposition of the city's silent fraud claim. The city challenges an order denying its motion for summary disposition against Burton and Katzman (and their trusts), along with defendants-cross-appellees, Laurence R. Goss, individually and as trustee of the Laurence R. Goss Revocable Living Trust, Steven Bentley, B/K/G Investors, LLC, and Burton–Katzman Manager, LLC. The city also challenges orders denying its motion to amend the complaint, striking allegations from the complaint, denying the request to refer the case back to case evaluation, and denying discovery requests. We affirm, in part, and reverse, in part.

I

This lawsuit arises from the construction of the West Village Commons Project ("Project"), which is a "mix-use" development in Dearborn, along Michigan Avenue that was intended to revitalize the city's West Downtown area. The city solicited development proposals from several entities, including BKDC.[3] On April 25, 2002, the city and BKDC executed a Preferred Developer Agreement ("PDA"). In relevant part, the purpose of the PDA was to provide a six-month period during which BKDC would work "exclusively" with the city to refine plans for development, to evaluate the feasibility of the development, and to arrange financing.[4] The PDA provided that, if it was successful, the Mayor would recommend to the City Council that the city enter into a development agreement with BKDC, or an affiliate BKDC could create (provided the affiliate included as

principals Burton, Katzman, and Goss, and was managed by BKDC).

Before a development agreement for the project was executed, West Village[5] was created as a single-purpose entity ("SPE"). The record demonstrated that commercial real estate lenders typically require the creation of an SPE so a particular project can be secured with the specific property on which it is being built, and the lender is better able to take possession in the event of a default.

*2 On July 31, 2003, the city and the "Developer" (West Village) executed a Development Agreement. Burton signed the agreement on behalf of the Developer. Burton was acting as President of BKDC. The signature line provided that BKDC was a "Member" of West Village. Attorney Daniel Share testified that B/K/G Investors, LLC was the sole member of West Village and it was a typographical error to list BKDC as a member. Share testified, instead, BKDC was the manager of West Village.

Section 1.03 of the Development Agreement indicated that the project was divided by areas: 1) Areas A–1 and A–2 (retail and commercial), 2) Area A–3 (residential), 3) Area B (parking decks), and 4) Area C (hotel and office or residential). According to the complaint, Westminster Homes, LLC f/k/a Abbey Homes, LLC (Abbey Homes) is an affiliate of BKDC, which was responsible for developing the residential areas. The city agreed to acquire the property, demolish structures on that property, and construct two parking decks on Area B. The Developer agreed to construct Areas A–1, A–2, A–3, and C. In the event of the Developer's default, Section 5.02 included the right "to seek and obtain an order of specific performance against Developer without the necessity of proving immediate irreparable harm or inadequate remedy at law."[6] Although the timeframe for performance of the contract could be extended for unavoidable delays, the parties agreed in Section 1.09 that the inability to obtain financing did not constitute such a delay.

In May 2005, the city sold West Village the property for the individual portions of the project. Also in 2005, the city began constructing two parking decks, at a cost of over $12 million. The city raised money for the project by issuing bonds, which it intended to repay with tax revenue from the project, parking space leases, monthly parking permits, and daily parking revenues.

West Village constructed the retail buildings in Areas A–1 and A–2, which opened in June 2006, and 36 of the 48 condominiums in Area A–3. But West Village did not begin construction on the hotel and office or residential buildings in Area C. On March 7, 2007, the city sent a written notice of default.

In February 2008, Burton–Katzman Manager[7] replaced BKDC as the Manager for West Village. Burton and Katzman then dissolved BKDC, which, according to BKDC, had no assets except receivables that it had no expectation to collect. The city was not informed of the dissolution or replacement of BKDC and the record shows some correspondence from Charles DiMaggio[8] on behalf of BKDC to the city and at least one agreement signed by BKDC after its dissolution.

On January 16, 2009, the city filed a lawsuit against BKDC,[9] West Village Commons, LLC, Abbey Homes, Burton, Katzman, DiMaggio, and Share.[10] The first count asserted a claim for breach of contract against BKDC, West Village, and Abbey Homes, alleging that they breached the Development Agreement by failing to complete construction of Areas A–3 and C. Among other relief, the city sought specific performance for these defendant entities to finish the construction.

*3 The second count asserted a claim for silent fraud against all defendants by failing to disclose the dissolution of BKDC. The city alleged disclosure was required by the Development Agreement. The city alleged that it had detrimentally relied on the silent fraud by continuing negotiations, believing BKDC would fulfill its obligations, and delaying alternative remedies and litigation for breach of the Development Agreement.[11]

The defendants filed a partial motion for summary disposition, arguing that only West Village was a party to the Development Agreement. The city responded that whether BKDC was a party to the Development Agreement was a latent ambiguity, which could be resolved by reviewing the history of the negotiations. Former President of the Dearborn City Council and then Dearborn Mayor John B. O'Reilly averred that BKDC was the only company that had been subject to vetting during the PDA period and approved by the city to be a party to the Development Agreement. Even if West Village was the only Developer under the Development Agreement, the city urged the trial court to pierce the corporate veil over West Village to reach the other defendants.

At a June 12, 2009 hearing on defendants' motion, the trial court asked, "And is it not fair to say that [BKDC's] ... fingerprints are over everything ... from the beginning until ... we stand here today?" On the record, the trial court ruled, "in fact the parties to this development agreement are [BKDC] and City of Dearborn...." Then,

the trial court entered an order denying defendants' motion on August 25, 2009.

The city filed a motion for summary disposition and specific performance, arguing that BKDC, West Village, and Abbey Homes were in default of the Development Agreement and the city was entitled to damages and specific performance. Defendants responded that there was at least a question of fact regarding the identity of the parties to the Development Agreement, whether veil-piercing was appropriate, and whether performance was impossible. Burton averred that West Village could not find a developer for Area C because of the recession, could not obtain financing to proceed, and even if the project could be financed, no tenants or buyers would utilize the buildings.

On September 3, 2009, the trial entered an order granting the motion with respect to Count I (breach of contract) and ruling: (1) BKDC was the "Developer" referenced in the Development Agreement, and (2) defendants BKDC, West Village and Abbey Homes breached the agreement. The trial court initially declined to rule whether specific performance was excused due to impossibility, including a lack of financing and demand for the project. After several more hearings, on December 8, 2009, the trial court rejected that defense and ordered BKDC, West Village, and Abbey Homes to complete construction no later than April 3, 2010. Regarding Count II (silent fraud), the trial court found questions of fact for a jury to decide and denied the city's motion for summary disposition.

*4 The trial court subsequently allowed the city to file an amended complaint to add as defendants BSMC, B/K/G Investors, LLC, Burton–Katzman Manager, LLC, Bentley, Goss, and the trusts of Burton, Katzman, and Goss. In relevant part, the amended complaint requested veil-piercing to reach these new defendants because of their interrelationships and alleged failure to regard corporate formalities. But the trial court denied the city's motion to amend the complaint to include a claim of fraud in the inducement as to all defendants. The city had alleged that it chose BKDC as the Developer based on its representations that it had the financial resources to complete the project and BKDC was a member (not just manager) of West Village. The city had further alleged that, as a result of the city's reliance on defendants' fraud, the city entered into the Development Agreement and built the parking decks. The trial court concluded that the fraud in the inducement claim was subject to a six-year statute of limitations and unenforceable as a matter of law.

On April 2, 2010, West Village, Abbey Homes, and BKDC moved for an extension to comply with the specific performance order, explaining their unsuccessful efforts to obtain financing, find local developers, and interest tenants for Area C. On May 14, 2010, the trial court ordered (1) BKDC, West Village, and Abbey Homes to commence construction by October 1, 2010, (2) if construction was not commenced, an evidentiary hearing would be held to determine whether BKDC, West Village, and Abbey Homes should be held in contempt of court, (3) BKDC, West Village, and Abbey Homes to pay the accumulated debt service ($3 million) on the city's bonds issued to pay for the parking deck construction. The trial court characterized the debt-service payment as "kind of a delayed finding of civil contempt."

BKDC, West Village, and Abbey Homes filed a claim of appeal from the May 14, 2010 order and, on August 26, 2010, this Court granted the city's motion to dismiss for lack of jurisdiction, because the May 14, 2010, order was not a final order under MCR 7.202(6).

On the same day as the dismissal of the claim of appeal, BKDC, West Village, and Abbey Homes filed Chapter 7 petitions in the federal bankruptcy court. On June 30, 2011, the bankruptcy court dismissed BKDC because it filed in bad faith and lifted the automatic stay. The bankruptcy court found that there was no legitimate purpose for the bankruptcy since BKDC had been dissolved two years before the filing of the bankruptcy petition, BKDC had no assets or liabilities except the city's lawsuit, and it appeared the filing was purely a litigation tactic.

After the automatic stay was lifted in the bankruptcy court as to BKDC, the city filed a motion to reinstate the order of specific performance and enforce contempt sanctions against BKDC. BKDC responded that it had no assets to pay the sanctions or complete construction. The city replied that BKDC only lacked assets because it dissolved to avoid liabilities. On August 24, 2011, the trial court ordered: (1) the specific performance order be reinstated as to BKDC only, (2) BKDC to commence construction by August 25, 2011, and (3) BKDC to pay the city's accumulated debt service.

*5 The parties subsequently filed cross-motions for summary disposition of the veil piercing, breach of contract, and silent fraud claims. On February 7, 2012, the trial court granted summary disposition to the city against BSMC on the breach of contract claim by piercing the corporate veil:

> The court agrees with Defendants

> that the City has failed to meet the elements necessary to pierce the corporate veil, with respect to all entity and individual defendants, except with respect to [BSMC]. Plaintiff has presented evidence to pierce the corporate veil to reach [BSMC]. [BSMC] did supply employees to [BKDC] and these employees did make decisions with respect to the project. Deposition evidence indicates that there was no written lease agreement between [BSMC] and [BKDC] prior to 2003 and the 2004 agreement did not specify which employees were being leased. Moreover, Plaintiff has pointed out that according to Mr. Bentley, Mr. DiMaggio continued to work with the City to try to develop Parcel C as an employee of [BSMC] as [BSMC] was not receiving reimbursement from any other entity for his work. Finally, there is evidence that [BSMC] controlled the "F660" account[12] and that funds from the various entities were com[m]ingled with this account. [Footnote added.]

The trial court refused to pierce the corporate veil to reach the other defendants added in the amended complaint (B/K/G Investors, LLC, Burton–Katzman Manager, LLC, Bentley, Goss, and the trusts of Burton, Katzman, and Goss) and dismissed the breach of contract and silent fraud claims against them. The only remaining claims were for silent fraud against BSMC, West Village, BKDC, and Abbey Homes.

The city filed a motion for BKDC, Burton, and Katzman to be held in civil contempt pursuant to MCR 3.606(a), requesting Burton and Katzman be fined $7,500, imprisoned until BKDC specifically performed, and ordered to pay at least the accumulated debt service. BKDC argued it could not be held in contempt for failing to comply with the order where it lacked the ability to comply. The trial court ruled on the record, "I am not finding anybody in contempt today." On March 30, 2012, the trial court ordered Burton and Katzman to commence construction by May 18, 2012. The trial court explained the basis for ruling that Burton and Katzman should comply with the specific performance order:

> Because there is nobody else around who potentially can do this other than those 2. And the entity can't do it, because the entity has been dissolved by the 2 of them. That's why.

In Docket No. 309758, this Court subsequently granted leave to Burton and Katzman following their emergency application seeking leave to appeal the August 24, 2011 and March 30, 2012 orders. A stay was granted regarding those specific orders, but not the entire lower court proceedings. After leave to appeal was granted, BKDC, BSMC, and the city each filed claims of cross-appeal.

Meanwhile, on October 19, 2012, the trial court granted the city's motion for an order of specific performance against BSMC. Then, the trial court entered an order staying the proceedings pending appeal. In Docket No. 313213, this Court granted BSMC's application for leave to appeal the October 19, 2012 order. In the same order, this Court consolidated the appeals in Docket Nos. 309758 and 313213.

II

A

***6** BKDC first argues on appeal that the trial court erred when it denied BKDC's motion for summary disposition of the breach of contract claim on August 25, 2009, granted the city's motion for summary disposition of that claim on September 3, 2009, and ruled that BKDC was the Developer under the Development Agreement. We agree.

"We review de novo a trial court's decision on a motion for summary disposition[.]" *Bronson Methodist Hosp. v. Auto–Owners Ins. Co.*, 295 Mich.App. 431, 440; 814 NW2d 670 (2012). A motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law ." *MEEMIC Ins. Co. v. DTE Energy Co.*, 292 Mich.App. 278, 280; 807 NW2d 407 (2011). Evidence

should be viewed in the light most favorable to the nonmoving party. *Greene v. A.P. Prod., Ltd.*, 475 Mich. 502, 507; 717 NW2d 855 (2006).

" 'A contract must be interpreted according to its plain and ordinary meaning.' " *Wells Fargo Bank, NA v. Cherryland Mall Ltd. Partnership (On Remand)*, 300 Mich.App. 361, 386; 835 NW2d 593, 607 (2013), quoting *Holmes v. Holmes*, 281 Mich.App. 575, 593; 760 NW2d 300 (2008).

> "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning." [*Wells Fargo*, 300 Mich.App. at 386, quoting *Holmes*, 281 Mich.App. at 594.]

The first sentence of the Development Agreement provides:

> THIS DEVELOPMENT AGREEMENT (the "Agreement") is made as of the 23rd day of April, 2003, by and between THE CITY OF DEARBORN, a municipal corporation, organized and existing under the laws of the State of Michigan (the "City"), and WEST VILLAGE COMMONS, LLC, a Michigan limited liability company (the "Developer").

This language is plain—the parties to the contract are the city and West Village. BKDC is not a listed party to the contract. As BKDC argues on appeal, BKDC was an agent of West Village. The signature page evidences this relationship. Burton signed on behalf of BKDC, which was acting on behalf of West Village. Where an agent signs in a representative capacity on behalf of the principal, the agent is not a party. *Riddle v. Lacey & Jones*, 135 Mich.App. 241, 246–247; 351 NW2d 916 (1984). Moreover, "an agent for a disclosed principal ... cannot be held liable for his principal's failure to perform." *Id.* at 247.

Contrary to the city's claim, no latent ambiguity existed regarding the term "Developer."

> *7 To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue. [*Shay v. Aldrich*, 487 Mich. 648, 668; 790 NW2d 629 (2010) (footnotes omitted).]

The city cited the fact that the BKDC, not West Village, performed actions in the recitals and throughout the Development Agreement, which were required to be performed by the Developer (i.e., entering the PDA, providing a site plan, and receiving communications). But West Village was an SPE created for the purpose of financing the project, and BKDC was acting as an agent of West Village. That BKDC performed certain actions on behalf of the SPE is not inconsistent with this agency relationship.

The city argues that West Village, which was newly created at the time the Development Agreement was executed, could not be the "experienced and capable developer" referenced by the parties in Section 3.01. But as BKDC argues, a corporate entity acts through its employees and the combined knowledge of employees or agents may be imputed to the entity. *Upjohn Co. v. New Hampshire Ins. Co.*, 438 Mich. 197, 213–214; 476 NW2d 392 (1991). Here, West Village was represented by BKDC, which was led by Burton, Katzman, and Goss who undisputedly have a wealth of experience in building development projects. Therefore, the reference to the Developer's experience created no ambiguity.

Section 6.01 also created no ambiguity that the Developer was distinct from BKDC. That section provides:

> Notwithstanding anything in this

> Agreement to the contrary, Developer may, without the City's consent, assign all or any of its rights and obligations under this Agreement to any other entity that is wholly-owned by Developer for purposes of acquiring and constructing the Project; or *to an entity affiliated with Developer that is managed by Burton–Katzman Development Company, Inc* . and in which Peter K. Burton, Robert M. Katzman and Laurence R. Goss are principals.... [Emphasis added.]

If BKDC was the Developer, the parties would have required an assignee to be both affiliated and managed by BKDC, and the parties would not have distinguished the Developer (affiliate) and BKDC (manager).

Last, the publication offered as evidence by the city creates no ambiguity. Although the publication provides the city chose "Burton–Katzman" for the project, it also clearly identifies, in bold, that the "Owner" is West Village. Share testified that "Burton–Katzman" refers to Burton, Katzman, or their organization, not BKDC specifically. It was not inconsistent to advertise that the organization had obtained a new project by using the Burton–Katzman name, which was more familiar than the SPE created solely for the project.

***8** In sum, BKDC was not the Developer under the Development Agreement.

B

BKDC next argues that the trial court erred by piercing West Village's corporate veil to impose the requirement on BKDC that it specifically perform the duties of the Developer under the Development Agreement. We agree.

" '[A]bsent some abuse of corporate form, ... corporations are separate and distinct entities.' " *Dutton Partners, LLC v. CMS Energy Corp.*, 290 Mich.App. 635, 643; 802 NW2d 717 (2010), quoting *Seasword v. Hilti, Inc. (After Remand)*, 449 Mich. 542, 547; 537 NW2d 221 (1995). "For the corporate veil to be pierced, the plaintiff must aver facts that show (1) that the corporate entity is a mere instrumentality of another entity or individual, (2) that the corporate entity was used to commit fraud or a wrong, and (3) that, as a result, the plaintiff suffered an unjust injury or loss." *Id.;* see also *Florence Cement Co. v. Vettraino*, 292 Mich.App 461, 469; 807 NW2d 917 (2011) and *Rymal v. Baergen*, 262 Mich.App. 274, 293–294; 686 NW2d 241 (2004).

In *Dutton*, this Court noted, "We were unable to locate any binding Michigan case that has held that the corporate veil may be disregarded absent a showing of fraud, wrongdoing, or some misuse of the corporate form." *Id.* at 645 n. 5. This Court concluded it was not sufficient grounds to pierce the corporate veil when the parent and subsidiary are merely alter egos. *Id.* at 644–645.[13] Summary disposition was appropriate where, even though questions of fact existed regarding whether a subsidiary was a mere instrumentality of the parent company, the plaintiff failed to demonstrate any evidence of fraud, wrongdoing, or misuse of the corporate form. Cf *Bash v. Textron Financial Corp.*, 483 BR 630 (ND OH, 2012) (appropriate to disregard the corporate form of an SPE where it was a mere instrumentality and it could be fairly inferred that the debtor set up the SPE to further its fraudulent scheme).

The city argues on appeal that West Village was under BKDC's complete control and staffed by employees leased by BKDC; they shared an officer (Burton), owners, office space, letterhead, email, and insurance. The city also claims that West Village and BKDC commingled assets and paid bills from BSMC's F660 account. Just as in *Dutton* and viewing the facts in a light most favorable to the city, *Greene*, 475 Mich. 507, we conclude that even if a question of fact existed regarding an alter-ego relationship between West Village and BKDC, the city has failed to demonstrate any evidence of fraud, wrongdoing, or misuse of the corporate form that caused the city unjust injury or loss. On appeal, the city merely states in passing that "West Village's corporate form was abused to injure the City."

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." [*People v. Kevorkian*, 248 Mich.App. 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v. Detroit*, 355 Mich. 182, 203; 94 NW2d 388 (1959).]

***9** Therefore, the city has waived any claim that West Village's corporate veil should be pierced to reach BKDC. We note that, in the trial court, the city made

silent fraud and fraud in the inducement claims involving the project. But even if the city had not waived its veil-piercing claim to reach BKDC, we conclude later in this opinion that those claims could not survive summary disposition. Absent any fraud or wrong by BKDC that caused the city unjust injury or loss with respect to the Development Agreement, West Village's corporate veil cannot be pierced to impose liability on BKDC.

Because we conclude that BKDC was not the Developer and could not be reached to impose liability for breach of contract by piercing West Village's corporate veil, the trial court erred by denying BKDC's motion for summary disposition of the breach of contract claim, and instead granting summary disposition to the city and ordering BKDC to specifically perform the duties of the Developer under the Development Agreement.[14]

C

BKDC also argues that the trial court abused its discretion by finding it in contempt for failing to specifically perform the obligations of the Developer under the Development Agreement. We agree. Even though the order for specific performance against BKDC was erroneous, we must nevertheless consider the propriety of the trial court's May 14, 2010 and August 24, 2011 orders of contempt for the failure to specifically perform because, generally, a party must comply with a court's order, even if it is clearly incorrect. *Johnson v. White,* 261 Mich.App. 332, 346; 682 NW2d 505 (2004). But an inability to comply with a trial court's order is a defense to a civil contempt proceeding. *United States v. Rylander,* 460 U.S. 752, 757; 103 S.Ct. 1548; 75 L.Ed.2d 531 (1983); *City of Detroit v. Dep't. of Social Servs.,* 197 Mich.App. 146; 494 NW2d 805 (1992).

Again, the December 8, 2009 order required BKDC, West Village, and Abbey Homes to specifically perform the duties imposed on the Developer in the Development Agreement. The record demonstrates that when the trial court found BKDC, West Village and Abbey Homes in contempt for failing to specifically perform and ordered them to pay the city's accumulated debt service, each of the entities was unable to comply with the trial court's order. *Id.* Bentley explained that these entities did not have the financial resources to pay for the project independently, and according to expert opinions, financing for the Project was impossible. Burton, DiMaggio, and Bentley submitted affidavits about the entities' unsuccessful requests for financing from five banks and for development of the Project to 10 developers. The trial court abused its discretion by finding BKDC, West Village, and Abbey Homes in contempt on May 14, 2010.

Moreover, when trial court proceedings resumed following the temporary stay occasioned by the bankruptcy proceeding, the trial court reinstated its order against BKDC for specific performance and to pay the accumulated debt service despite having made a specific finding that BKDC was unable to "pay anything." In light of the trial court's factual conclusion that BKDC had no resources, it was outside the range of principled outcomes for the trial court to use an order of contempt to attempt to coerce BKDC to perform the duties of the Developer. Thus, in reinstating the order of contempt against BKDC, the trial court abused its discretion.

III

***10** BKDC next argues that the trial court erred by denying BKDC's motion for summary disposition of the silent fraud claim on August 25, 2009. We agree.

The elements of silent fraud are: (1) the defendant failed to disclose a material fact about the subject matter at issue; (2) the defendant had actual knowledge of the fact; (3) the failure to disclose the fact gave the plaintiff a false impression; (4) when the defendant failed to disclose the fact, he or she knew that the failure to disclose would create a false impression; (5) when the defendant failed to disclose the fact, he or she intended that the plaintiff rely on the resulting false impression; (6) the plaintiff indeed relied on the false impression; and (7) the plaintiff suffered damages resulting from his or her reliance. See *Hord v. Environmental Research Institute of Michigan,* 228 Mich.App. 638, 645; 579 NW2d 133 (1998).

Section 2.05 of the Development Agreement provided, in relevant part:

> City and Developer shall periodically keep one another informed of their respective efforts to satisfy the conditions precedent to Closing. In the event City or Developer become aware that any

> of the representations and warranties they have made in this Agreement have *become untrue,* they shall promptly notify the other, and the party making such representation or warranty shall take reasonable steps to cause the representation and warranty to become true. [Emphasis added.]

The thrust of the city's silent fraud claim was that when it contracted for the project, it relied on the representations and warranties that BKDC (with its good reputation and knowhow) would be involved (at least as a manager). Therefore, when BKDC dissolved, the city should have been informed that this representation had "become untrue" pursuant to Section 2.05.

As BKDC argues, misrepresentations relating to the performance of a contract do not give rise to an independent cause of action in tort. See *Huron Tool & Engineering Co. v. Precision Consulting Servs., Inc.,* 209 Mich.App. 365, 373; 532 NW2d 541 (1995). Fraud must be extraneous to the contract in order to cause harm distinct from that caused by the breach of contract. *Id.* A plaintiff must establish a "violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's Constr. Corp. v. Mich. Bell Tel. Co.,* 454 Mich. 65, 84; 559 NW2d 647 (1997). No cause of action in tort exists when the plaintiff fails to "allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship." *Id.* at 85.

The city maintained that it entered the agreement believing that BKDC was involved and continued to attempt to obtain performance of the agreement after the dissolution based on the belief that BKDC was still involved. Thus, any duties to disclose that BKDC dissolved would have arisen from the Development Agreement (see Section 2.05) or the performance of the Development Agreement (including meetings and communications with officers and employees of the Burton–Katzman organization regarding performance where information about the dissolution was withheld). Because any duty to disclose cannot be extracted from the Development Agreement, the trial court erred when it denied BKDC's motion for summary disposition of the silent fraud claim. *Rinaldo's,* 454 Mich. at 84–85; *Huron,* 209 Mich.App. at 373.[15]

IV

***11** Next, Burton and Katzman argue the trial court erred by directing them to specifically perform the duties of the Developer, either under the Development Agreement or by virtue of piercing the corporate veil of BKDC. We agree.

Again, the language of the Development Agreement is plain—the parties to the contract are the city and West Village. Burton and Katzman are not parties to the contract. Burton signed the contract in his representative capacity as a President of BKDC and is therefore not a party under *Riddle.* 135 Mich.App. 246–247. The city did not bargain for a personal guarantee from individual representatives or other entities. Therefore, the Development Agreement did not provide a basis for the trial court's order requiring specific performance by Burton and Katzman. As discussed further below, and as the trial court correctly found, corporate veil-piercing could not provide a basis for the order requiring Burton and Katzman to specifically perform. There is no evidence Burton and Katzman dissolved BKDC for their own purposes, *Dutton,* 290 Mich.App. at 643–644, and the dissolution did not cause the city unjust injury or loss because BKDC was only the manager of the Project and it was replaced by a new manager with the same experienced representatives and principals.[16]

V

BSMC argues that the trial court erred by piercing BKDC's corporate veil and thereafter ordering BSMC to specifically perform the Developer's duties under the Development Agreement. Consistent with our conclusion in Section II that BKDC was not liable for the duties of the Developer under the Development Agreement or through corporate veil-piercing, we conclude that the city cannot pierce BKDC's corporate veil to hold BSMC liable for those duties.

Although not specifically raised by BSMC, we note that the trial court's orders actually pierced the corporate veils of West Village and Abbey Homes, not just BKDC. This Court does not generally address issues not raised by the parties on appeal, *Clohset v. No Name Corp. (On Remand),* 302 Mich.App. 550, 560; 890 NW2d 375 (2013), citing *Mayberry v. Gen. Orthopedics, PC,* 474 Mich. 1, 4 n .3; 704 NW2d 69 (2005), but this Court may properly review "an unpreserved question of law where

the facts necessary for its resolution have been presented," *People v. Houston,* 237 Mich.App. 707, 712; 604 NW2d 706 (1999).

BSMC maintains that it was merely the centralized manager or paymaster that leased employees for the Burton–Katzman organization, which it claims is legal, a common practice in business, and does not make it a mere instrumentality of the entities in the organization. See *Judson Atkinson Candies, Inc., v. Latini–Hohberger Dhimantec,* 529 F3d 371, 380 (CA 7, 2008), *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.,* 878 F.2d 1259, 1264 (CA 10, 1989), and Michigan Administrative Code 421.190 (regarding employee leasing). Moreover, BSMC explains that the F660 account was merely used as a pooled entity checking account, and as an agent of the Burton–Katzman organization entities, BSMC used the F660 account to pay invoices and manage the entities' accounts.

***12** The city cites to facts that suggest there exists at least a question of fact regarding whether BSMC was a mere instrumentality: 1) West Village had no employees, 2) West Village was managed by BKDC, but BKDC's employees were leased from BSMC, 3) Burton supervised BKDC and BSMC, and employees would not be able to distinguish whether Burton was directing them as the head of BKDC or the head of BSMC, 3) DiMaggio, who was paid by BSMC, continued to pursue development of the Project after BKDC was dissolved, and 4) BSMC accepted more money into the F660 account from West Village than BSMC was owed so West Village could avoid setoff from Bank of America.

Regardless whether a question of fact exists regarding whether BSMC was a mere instrumentality, however, the city has yet again failed to establish fraud, wrongdoing, or misuse of the corporate form that caused the city unjust injury or loss. The city claims that the breach of the Development Agreement, alone, amounts to wrongdoing that harmed the city. The city relies on *United States Fire Insurance Co. v. Polestar Constr. of Florida,* unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 27, 2010 (Docket No. 09–12362) to argue that the mere breach of the Development Agreement warrants piercing the corporate veil here.[17] In *Polestar,* the interrelationship between a Florida business and a Michigan business involved loosely transferred money between the businesses to maintain the "heartbeat" of the Michigan business. As a result of the transfer of money to the Michigan business, the Florida business could not pay its insurance premiums to the plaintiff insurer. *Id.* at 35–36. The *Polestar* court concluded that, when the plaintiff insurer contracted with the Florida business, it was entitled to assume that it would be operated for the Florida business's benefit and not that of the Michigan business. *Id.* at 37.

Unlike the breach in *Polestar,* however, the breach of the Development Agreement here was not caused by the any interrelationship of BSMC to entities in the Burton–Katzman organization. There is no evidence that, but for the leasing of employees, Burton's concurrent leadership, or the use of the F660 account, the city would not have suffered the $19,841,771.67 in damages it claims. The evidence in the record demonstrates that the development of Area C was hampered by the economic downturn. Accord *Nogueras v. Maisel & Assocs. of Michigan,* 142 Mich.App. 71, 86; 369 NW2d 492 (1985) (nothing in the record to support a finding of fraud or wrongdoing, or that the alleged interrelationship caused the alleged loss or injury). Therefore, the trial court erred when it granted the city's motion for summary disposition of the breach of contract claim against BSMC by piercing the corporate veil, and ordered it to specifically perform the duties of the Developer under the Development Agreement.[18]

VI

The city argues on cross-appeal that the trial court erred by denying an October 2009 motion to amend the city's complaint to include a fraud in the inducement claim. The trial court found that the six-year period of limitations had expired because the claim accrued when the city entered the Development Agreement in July 2003. The city maintains the claim accrued later, at the time of the breach of the Development Agreement in 2006, and that therefore, the statute of limitations had not expired. The city also argues that, even if the period of limitations had expired, the claim should relate back to the date of the filing of the complaint.

***13** The denial of leave to amend is reviewed for abuse of discretion. *Franchino v. Franchino,* 263 Mich.App. 172, 189; 687 NW2d 620 (2004), but the application of a statute of limitations is a question of law reviewed de novo. *Attorney Gen. v. Harkins,* 257 Mich.App. 564, 569; 669 NW2d 296 (2003). Even if a trial court abuses its discretion by denying the amendment, this Court will only reverse if the amendment would have averted summary disposition. *PT Today, Inc. v. Comm. of the Office of Fin. & Ins. Servs.,* 270 Mich.App. 110, 144–145; 715 NW2d 398 (2006).

To establish a claim of fraud in the inducement, a plaintiff must establish that:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that is was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC,* 276 Mich.App. 146, 161; 742 NW2d 409 (2007) (citation and quotation marks omitted) .]

The first basis of the city's fraud in the inducement claim was that Share made representations that BKDC had the "financial resources" to complete the Project and the Development Agreement provided that the Developer had the "financial resources" to complete the Project.[19] The city claims it entered the Development Agreement, based on these representations, believing the Project would be completed with the entities' cash reserve, as opposed to financing. But any representation about "financial resources" was not limited to the Developer's cash reserve. "[R]esources" is defined as "a source of supply or support," *Merriam–Webster's Collegiate Dictionary* (2012), and therefore "financial resources" could include financing as a source of money to complete the Project. Moreover, the city cannot prove that any representation about West Village's "financial resources" was false at the time it was made. Rather, the Development Agreement provides West Village had arranged for financing for Areas A–1, A–2, and A–3, and the city's mayor had approved evidence of West Village's capacity to arrange for financing for Area C. Any change in West Village's financial resources following the execution of the Development Agreement due to the economic downturn did not amount to fraud.

The second basis of the fraud in the inducement claim was that BKDC signed the Development Agreement as a member, not the manager, of West Village. But as BKDC argues, whether it was a member or a manager of Development Agreement was not material and should not have affected the city's decision-making, because either way, Burton and Katzman (whose reputations the city valued) were involved in the Project. In addition, even assuming that BKDC was a member of West Village, it could not be held personally liable for the acts, debts, or obligations of West Village. MCL 450.4501(4).

***14** Because the city's fraud in the inducement claim could not survive summary disposition, any error in the failure to allow the city to amend the complaint to include the fraud in the inducement claim was harmless. *PT Today,* 270 Mich.App. 144–145.[20]

VII

Next, the city argues on cross-appeal that irregularities in the case evaluation process required that the case be referred back for a new case evaluation. We disagree.

First, the city claims that a panelist was potentially biased because he had previously served as opposing counsel in a case against the city and the city won a large award. Pursuant to MCR 2.403(E), MCR 2.003 governs the determination whether a case evaluator should be disqualified. Because "[a] trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption," *Mitchell v. Mitchell,* 296 Mich.App. 513, 523; 823 NW2d 153 (2012), we apply the same test with regard to the city's claim that the case evaluator was biased. MCR 2.003(C)(1)(d) provides that a judge should be disqualified if "[t]he judge has been consulted or employed as an attorney in the matter in controversy." Here, the case evaluator was not employed as an attorney in the matter, but in a past matter involving only one party. "Merely proving that a judge was involved in a prior trial or other proceeding against the same defendant does not amount to proof of bias for purposes of disqualification." *People v. Upshaw,* 172 Mich.App. 386, 388; 431 NW2d 520 (1988); see also *People v. Rich,* 172 Mich.App. 494, 495–496; 432 NW2d 352 (1988). The city does not allege or establish that any of the case evaluator's conduct or awards displayed deep-seated favoritism or antagonism that would have made a fair case evaluation impossible. See *Cain v. Dep't. of Corrections,* 451 Mich. 470, 496; 548 NW2d 210 (1996). Therefore, the trial court did not abuse its discretion by denying the motion to refer the case back to case

evaluation based on the alleged bias of a case evaluator.

Second, the city claims the award was tainted because it was amended after ex parte communications with defendants and it is unclear if the amendment was unanimous. As BKDC argues, the city apparently agreed that defendants should attempt to seek clarification regarding the award. Therefore, any objection to that communication is waived. *Acorn. Inv. Co. v. Mich. Basic Prop. Ins. Ass'n.*, 495 Mich. 338, 357; 852 NW2d 22 (2014), quoting *People v.. Vaughn,* 491 Mich. 642, 663; 821 NW2d 288 (2012) ("A 'waiver is the intentional relinquishment or abandonment of a known right.' "). Moreover, there is no dispute that, while the amendments to the award were not initialed by each case evaluator, the provision in the award that it was unanimous was not amended. For these reasons, the trial court did not abuse its discretion by denying the motion to refer the case back to case evaluation based on alleged irregularities regarding the amendment.

***15** Last, although MCR 2.403(K)(2) requires a separate award as to each claim against each defendant, the case evaluators here made seven separate awards, but each award involved several defendants. On appeal, the city claims that, as a result of the combined awards, it could not determine whether liability was joint and several as to the defendants in each individual award or as to all the defendants in the case. At the hearing on the motion to refer the case back to case evaluation, defendants conceded that liability was joint and several as to the defendants in each individual award. This concession was supported by the awards, which did not impose blanket joint and several liability to all defendants, but noted whether joint and several liability was applicable to the defendants in the box for each individual award. Following the hearing, the trial court provided the city extra time to make its decision whether to accept or reject the awards. Because the joint and several nature of the award was clear and any lack of clarity was resolved at the hearing, the city again fails to establish the trial court abused its discretion by denying the motion to refer the case back to case evaluation.

VIII

The city also argues on cross-appeal that the trial court abused its discretion by denying discovery requests for production of: 1) two papers Bentley brought to his deposition, 2) post-complaint attorney billing records for defendants, 3) further deposition of Bentley,[21] and 4) Burton and Katzman's personal financial information. We disagree.

"This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion." *King v. Oakland County Prosecutor,* 303 Mich.App. 222, 236; 842 NW2d 403 (2013), quoting *Shinkle v. Shinkle (On Rehearing),* 255 Mich.App. 221, 224; 663 NW2d 481 (2003). "This Court reviews any factual findings underlying a trial court's decision for clear error." *Harrison v.. Munson Healthcare, Inc.*, 304 Mich.App. 1, 17; 851 NW2d 549 (2014).

First, Bentley brought four documents to his deposition and only two were produced for discovery. The city moved for discovery of the other two documents pursuant to MRE 612(a), which provides, "If, while testifying, a witness uses a writing or object to refresh memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." Bentley testified that the two documents produced were "the two that [he] specifically referred to in trying to answer one of your questions." Attorneys who were present at the deposition similarly noted their observations that he only relied on the two documents produced. At the motion hearing, the trial court found that Bentley did not rely on the other two documents and refused to order their production. On appeal, the city does not argue that this factual finding amounted to clear error. Because Bentley did not rely on the other documents, it was not an abuse of discretion to deny the motion for discovery of them under MRE 612(a). In light of this conclusion, we decline to address whether the attorney-client privilege would preclude production under MRE 612(a).

***16** Second, the city claims the trial court abused its discretion by denying motions for production of information, including billing records and Burton and Katzman's personal financial information, which the city claims would have further demonstrated the interrelationship between West Village and the Burton–Katzman organization entities to pierce the corporate veil. But even if this information was admitted to demonstrate a question of fact regarding whether West Village was a mere instrumentality of any of the other entities, the city has not established that any evidence could have been admitted to satisfy the remaining elements of the veil-piercing test, i.e., that the entity was used to commit fraud or a wrong, and as a result, the city suffered an unjust injury or loss fraud/wrong and resulting injury. Thus, regardless of the outcome of the requests for production of discovery, the city could not prevail on its

corporate veil-piercing claims. MRE 2.613(a); *Lewis v. LeGrow*, 258 Mich.App. 175, 200; 670 NW2d 675 (2003).

IX

Last on cross-appeal, the city argues that the trial court erred when it refused to pierce the veils of BKDC, West Village, and Abbey Homes to reach Burton–Katzman Manager, B/K/G Investors, Burton, Katzman, and Goss (and their trusts), and Bentley. Again, because BKDC is not liable for duties of the Developer under the Development Agreement, its veil should not be pierced to hold other defendants liable for those duties. Moreover, even if the city could establish questions of fact regarding whether these defendants were mere instrumentalities of West Village or Abbey Homes, the city has failed to establish fraud, wrongdoing, or misuse of the corporate form that caused the city unjust injury or loss. The trial court properly denied the city's motion for summary disposition of the breach of contract claims against Burton–Katzman Manager, B/K/G Investors, Burton, Katzman, and Goss (and their trusts), and Bentley.

X

We reverse the trial court's orders granting summary disposition to the city on the breach of contract claim against BKDC and requiring BKDC to specifically perform the duties of the Developer under the Development Agreement, and we remand for entry of an order granting summary disposition of that claim to BKDC. We vacate the orders finding BKDC in contempt for failing to specifically perform.

We reverse the trial court's order denying BKDC's motion for summary disposition of the silent fraud claim, and remand for entry of an order granting summary disposition of that claim to BKDC.

We affirm the order denying the city's motion for summary disposition of the breach of contract claims against Burton–Katzman Manager, B/K/G Investors, Burton, Katzman, and Goss (and their trusts), and Bentley, and remand for entry of an order granting summary disposition of that claim to these parties. We reverse the trial court's order requiring Burton and Katzman to specifically perform the duties of the Developer under the Development Agreement.

***17** We reverse the trial court's orders granting the city's motion for summary disposition of the breach of contract claim against BSMC and requiring BSMC to specifically perform the duties of the Developer under the Development Agreement. On remand, the trial court should enter an order granting summary disposition of the breach of contract claim to BSMC.

We affirm the trial court's orders regarding the motions to amend the complaint, to strike, to refer the case back to case evaluation, and for discovery.

As the prevailing parties on appeal, BKDC, BSMC, Burton, Katzman, Goss (and their trusts), Bentley, B/K/G Investors, and Burton–Katzman Manager, may tax costs against the city. MCR 7.219.

All Citations

Not Reported in N.W.2d, 2014 WL 7212895

Footnotes

1 *City of Dearborn v. Burton–Katzman Development Company, Inc.*, unpublished order of the Court of Appeals, entered May 17, 2012 (309758).

2 *City of Dearborn v. Burton–Katzman Development Company, Inc.*, unpublished order of the Court of Appeals, entered November 28, 2012 (313213). In the same order, this Court consolidated docket numbers 309758 and 313213.

3 Burton, Katzman, and Goss were either officers or shareholders of BKDC.

4 B/K/G Investors paid $1,000 per month during the course of the PDA exploration period to keep the PDA open.

5 At that time, B/K/G Investors, LLC solely owned West Village. Burton, Katzman, and Goss were members of B/K/G Investors, LLC. In 2007, Westminster Properties acquired a membership interest in West Village. Burton, Katzman, and Goss were also members of Westminster Properties.

6 At his deposition, Share testified that the city requested a personal guarantee, and after his clients rejected that request, his resolution was to offer specific performance without the burden of proving irreparable harm or other elements.

7 Share testified at his deposition that Burton–Katzman Manager was an LLC created to manage the Burton–Katzman organization's LLCs and avoid entangling the manager or its creditors in future litigation that "was not related to its management activities." Share testified that, at the time of its dissolution, he was not aware of any pending or threatened litigation against BKDC.

8 DiMaggio testified that he works for Burton–Share Management Company (BSMC) and did not know that BKDC had dissolved.

9 Even after dissolution, BKDC could still sue and be sued while winding up its affairs. MCL 450.1834. BKDC has not argued that it could not be sued under MCL 450.1834 because its affairs had been wound up.

10 Share successfully moved for summary disposition, arguing he had no financial stake in the project as an attorney representing defendants and he owed no duty to the city.

11 West Village Square Condominium Association intervened with what it described to be "almost identical" complaints.

12 Bentley, Chief Financial Officer of BSMC, explained that BSMC, as manager of the Burton–Katzman entities, dispersed money on behalf of West Village and BKDC from its F660 account. Sometimes, the account balances for each entity would be in surplus or "run at a deficit."

13 The city cites *Herman v. Mobile Homes Corp.*, 317 Mich. 233, 244; 26 NW2d 757 (1947) for the proposition that only an alter-ego relationship is necessary, but *Herman* is distinguishable from this case and other cases requiring actual fraud because the parent company in *Herman* repeatedly recognized and acknowledged its responsibility to the plaintiffs (who had contracted with a subsidiary, not the parent company).

14 In light of this conclusion, we decline to address BKDC's argument that it could not be liable for the acts or obligations of West Village under MCL 450.4501(4), that a question of fact existed regarding whether it breached the Development Agreement or PDA, and that the defense of impossibility should have defeated the city's claim for specific performance.

15 Even if this silent fraud claim were not defeated by its relationship to the contract, the city could not establish that it actually relied on the failure to disclose to its detriment. The city claims that, if it had known BKDC dissolved, it would have filed suit earlier because it lost BKDC's good reputation on the project. But the interrelationship of the entities in the Burton–Katzman organization, as argued strenuously by the city, works against the city here. Even though the entity managing the project changed, the leaders with the good reputation—Burton, Katzman, and Goss—behind the new entity were the same.

16 In light of this conclusion, we decline to address Burton and Katzman's argument that the specific performance order violated ex post facto principles.

17 Decisions of lower federal court decisions are not binding on this Court. *Abela v. Gen. Motors. Corp.*, 469 Mich. 603, 607; 677 NW2d 325 (2004).

18 Because any order requiring BSMC to specifically perform the duties of the Developer under the Development Agreement should be reversed, we decline to address BSMC's argument that specific performance was impossible.

19 Any references to BKDC were not "material representations" because it was not the Developer.

20 The trial court granted defendants' motion to strike certain allegations in the complaint related to the fraud in the inducement claim. The city complains that those allegations were also relevant to its silent fraud claim, but we concluded earlier in this opinion that that claim could not survive summary disposition either. The city therefore cannot demonstrate an abuse of

discretion regarding the motion to strike. *Belle Isle Grill Corp. v. City of Detroit,* 256 Mich.App. 463, 470; 666 NW2d 271 (2003).

21 As BKDC argues, the city's claim regarding Bentley's deposition is not properly before this Court because it was not included in the Statement of Questions Presented. *Yono v. Dep't. of Transportation,* 299 Mich.App. 102, 114 n. 4; 829 NW2d 249 (2012). We therefore decline to address it.

End of Document

Exhibit 21

2013 WL 2494988
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

In re Determination of Lake Level for WATERS EAST LAKE.
Mackinac County Board of Commissioners,
Plaintiff–Appellee,
v.
Department of Natural Resources, Defendant,
and
Patricia Keech, Intervenor–Appellant.

Docket No. 308021.
|
June 11, 2013.

Mackinac Circuit Court; LC No.2007–006390–CZ.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

Opinion

PER CURIAM.

*1 Appellant Patricia Keech appeals as of right the trial court's order denying her motion to intervene and granting appellee's motion to rescind an order establishing a permanent lake level. The trial court properly granted the motion to rescind, and although the trial court should have formally permitted Keech to intervene, any error was harmless. Therefore, we affirm.

East Lake is a naturally-occurring inland lake located in Brevort Township, Mackinac County, with an outlet tributary to the northwest. At one time, beavers maintained a dam at the outlet, and at least for a time, some prior owners of property around East Lake reinforced that dam through their own individual efforts. Much of the waterfront, including the outlet area, is owned by the United States Forest Service (USFS); the surrounding homes are largely seasonal properties. The 1845 General Land Office survey, and subsequent surveys in 1941 and 1982, all consistently showed East Lake to be approximately 990 acres in size. At some point thereafter, the beavers abandoned the area and homeowners apparently ceased shoring the dam up, and water levels in East Lake began to fall.

In 2006, Keech submitted an agenda request form to the Mackinac County Board of Commissioners, requesting the establishment of a water level for East Lake on the basis of a petition signed by more than two-thirds of the abutting property owners, pursuant to MCL 324 .30702(1), part of the Inland Lake Level Act (ILLA).[1] The Board of Commissioners duly commenced the instant action by petition in 2007, pursuant to MCL 324.30704, seeking to establish a normal lake level for East Lake. The purpose of doing so, ultimately, was to construct a new dam at East Lake's outlet. The trial court entered an order setting the East Lake level at 4.9 feet according to a gauge in the lake.

Thereafter, a feasibility study was conducted. It was ultimately determined that a substantially more expensive kind of dam than anticipated would be required, and the USFS would contribute no funding to the project. As a consequence, the cost to install a dam and raise the water level in East Lake—which would be borne by a special assessment—was projected to be substantially higher. Many of the landowners lost interest in the project, and in 2011, the Board of Commissioners adopted a resolution to rescind the lake level.[2] The Board of Commissioners duly petitioned the trial court to rescind the established lake level.

Shortly thereafter, Keech filed an emergency motion to intervene, attempting to stop the court from rescinding the order setting the lake level. The trial court did not formally enter an order permitting her intervention. However, Keech was nonetheless permitted to file briefs, make oral argument at hearings, and call herself as a witness. After a hearing, the circuit court entered an order denying appellant's motion for intervention and additional relief and granting appellee's motion to rescind the lake level. This appeal followed.

*2 Initially, we conclude that although the trial court should have formally granted Keech's motion to intervene, its failure to do so was harmless. We review a trial court's decision on a motion to intervene for an abuse of discretion. *Vestevich v. West Bloomfield Twp.*, 245 Mich.App 759, 761; 630 NW2d 646 (2001).

Intervention may be had by right if, among other things, a statute or court rule confers a right to do so or the intervenor has an interest in the subject matter of the

action and no practical way to protect his or her interest if intervention is not granted. MCR 2.209(A). The ILLA does not create an individualized, private cause of action to establish a normal lake level. *Yee v. Shiawassee Co. Bd. of Comm'rs,* 251 Mich.App 379, 397–398; 651 NW2d 756 (2002). As an abutting homeowner, Keech clearly had an interest in the lake level, and an individual has standing to invoke the circuit court's continuing jurisdiction over a matter that is already covered by a previous lake level order. *Glen Lake–Crystal River Watershed Riparians v. Glen Lake Ass'n,* 264 Mich.App 523, 530–531; 695 NW2d 508 (2004). While the trial court correctly noted that Keech could spearhead another petition effort, we do not believe that satisfies her ability to protect her interest in enforcing the then-existing established lake level. Keech can certainly satisfy the "minimal" burden of showing that none of the other parties would represent her interests. See *D'Agostini v. City of Roseville,* 396 Mich. 185, 189; 240 NW2d 252 (1976). The trial court should have granted Keech's motion to intervene.

However, this Court generally does not reverse on the basis of harmless errors. MCR 2.613(A); *In re McBride,* 483 Mich. 1095, 1104; 766 NW2d 857 (2009). The trial court delayed the hearing on the motion to rescind to permit Keech to brief the issue, permitted Keech to make arguments and call a witness, and otherwise effectively treated Keech as if she was a party. The trial judge read and considered appellant's arguments, even commenting on the quality of the parties' briefs. Appellant filed both a brief in opposition to the motion to rescind and a rebuttal brief, both discussing issues pertaining to the motion to rescind. The trial court considered appellant's arguments on the motion to rescind and still concluded that it was proper. Even if the trial court improperly denied appellant's motion to intervene, the denial was harmless because Keech participated in the proceedings as if she had been permitted to intervene.

Keech next argues that she was not given proper notice of the hearing on the motion to rescind the lake level order, in violation of the requirements of the ILLA. Presuming this to be the case, again, any error was harmless.

We review the interpretation of statutes de novo. *In re Complaint of Rovas against SBC Mich,* 482 Mich. 90, 97; 754 NW2d 259 (2008). The goal of doing so is to discern the Legislature's intent. *Wexford Medical Group v. City of Cadillac,* 474 Mich. 192, 204; 713 NW2d 734 (2006). If the language is clear and its meaning is plain, then no judicial construction is necessary. *Alliance Obstetrics & Gynecology v. Dep't of Treasury,* 285 Mich.App 284, 286; 776 NW2d 160 (2009). We review a trial court's factual findings for clear error. *Herald Co., Inc. v. Eastern Mich. University Bd. of Regents,* 475 Mich. 463, 467; 719 NW2d 19 (2006).

***3** The ILLA explicitly provides for notice to be given to "interested persons" of a variety of possible occasions. It does not *explicitly* mandate notice requirements for continuing court actions. However, a fundamental right of due process is the opportunity to be heard, which includes reasonable notice to interested parties of a proceeding. *Dow v. State,* 396 Mich. 192, 205–206; 240 NW2d 450 (1976). The trial court properly concluded that Keech, a property owner along East Lake, was an interested person under the ILLA. See MCL 324.30701(g); *Glen Lake–Crystal River Watershed Riparians,* 264 Mich.App at 530–531. We extrapolate that, even in the absence of an explicit directive in the ILLA, the Legislature intended that "interested persons" would receive notice of any hearing that may affect their property rights.

However, whether or not Keech was formally issued proper notice, she actually became aware of the proceeding. She moved to intervene and appeared before the trial court for the original hearing on the motion to rescind. The parties were given more time, and the matter was reset for a later date. At a later hearing, the trial court considered both the motion to rescind and the motion to intervene. The trial court gave Keech an opportunity to brief and argue her position on the motion to rescind before the court made a decision. Despite any issues with notice, Keech had almost two months to prepare and was able to argue at a hearing regarding the motion to rescind. Therefore, any notice error was harmless.

Keech next argues that the Board does not have the authority to seek rescission of the lake level order and the trial court did not have the authority to grant it. We disagree.

The ILLA does not contain any language regarding rescission of a lake level order. See MCL 324.30701–.30723. While nothing in the statute or case law explicitly addresses this kind of rescission, a trial court may generally grant a party relief from a judgment or order if prospective application of the judgment or order is no longer equitable. MCR 2.612(C)(1)(e); *Sylvania Silica Co. v. Berlin Twp.,* 186 Mich.App 73, 76; 463 NW2d 129 (1990). Furthermore, trial courts have the inherent authority to revisit and reconsider their own orders or decisions while the proceedings remain pending and no appeal is presently pending. *Hill v. City of Warren,* 276 Mich.App 299, 307; 740 NW2d 706 (2007). In the event of an irreconcilable conflict between a court rule and a statute, the court rule prevails in matters involving

practice and procedure, because our Supreme Court has exclusive authority over practice and procedure. *Staff v. Johnson,* 242 Mich. 521, 530–531; 619 NW2d 57 (2000).

The statute does not limit the court's authority or expressly authorize the court to rescind a previous lake level order. See MCL 324.30701–.30723. However, MCR 2.612(C)(1)(e) does allow a court to vacate a previous judgment entered in its court. This court rule is not in conflict with the statute because the statute provides no guidance in this area. See *Staff,* 242 Mich. at 530–531. Therefore, the trial court had the power to provide appellee relief from its previous order pursuant to MCR 2.612(C)(1)(e) if it determined that prospective application of the judgment was no longer equitable. *Sylvania Silica,* 186 Mich.App at 76. The Board also had the authority to seek relief from the judgment under this provision. *Id.;* MCR 2.612(C)(1)(e).

*4 Keech relies on *Anson v. Barry Co. Drain Comm'r,* 210 Mich.App 322; 533 NW2d 19 (1995), in which this Court overturned a trial court's decision to void a lake level determination that had been ordered 23 years previously. *Anson* is significantly distinguishable and not on point. In *Anson,* the trial court simply determined, sua sponte and apparently without any analysis under any relevant statute, that the prior judgment was inexplicably "too old to be enforced." *Id.* at 325. This Court's reversal was not in any way based on the proposition that trial courts may not rescind lake level orders. Rather, such orders do not simply age out of operation and may not be revisited without considering the effect on the welfare and benefit of the public. *Id.* at 325–327; *In re Van Ettan Lake,* 149 Mich.App 517, 525–526; 386 NW2d 572 (1986). The trial court here did not grant rescission on the basis of an analysis divorced from proper considerations under the ILLA, so *Anson* is not relevant.

Keech finally argues that the rescission of the lake level order effectively set a new lake level without the requisite evidentiary support. We disagree.

The ILLA requires a trial court to consider certain factors when setting a normal lake level. MCL 324.30707(4). However, the order from which Keech appeals was not a determination of a new normal lake level. A trial court can vacate a judgment if its prospective application is no longer equitable. MCR 2.612(C)(1)(e). Therefore, at issue is not whether there was sufficient evidence to set a normal lake level, but whether there was sufficient evidence for the trial court to conclude that the order entering the normal lake level was no longer equitable.

As the trial court observed, courts should be hesitant to interfere with the discretionary actions of a legislative body. *Wayne County Sherif v. Wayne County Bd. of Comm'rs,* 148 Mich.App 702, 704–705; 385 NW2d 267 (1983). The resolution adopted by the Board of Commissioners set out most of the reasons for seeking to rescind the lake level, including the lack of support and significant cost. Numerous letters from property owners were also received, many of which no longer supported the lake level. Deferring to the decision of the legislative body, the trial court had sufficient reason to believe that the original order setting the lake level was no longer equitable. *Wayne County Sheriff,* 148 Mich.App at 704–705. Therefore, the trial court did not commit clear error when it found that the previous lake level order was no longer feasible or necessary. See *In re Bz,* 264 Mich.App 286, 296–297; 690 NW2d 505 (2004).

Affirmed.

All Citations

Not Reported in N.W.2d, 2013 WL 2494988

Footnotes

1 The Inland Lake Level Act, MCL 324.30701 *et seq,* is presently Part 307 of the Natural Resource Environmental Protection Act (NREPA), MCL 324.101 *et seq.* Formerly, the ILLA was embodied as MCL 281.61 *et seq.*

2 Consequently, the project apparently never moved beyond the stage of determining the lake level to the stage of actually seeking to improve the lake, and consequently no lake board was set up pursuant to MCL 324.30901 *et seq.*

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