

EXHIBIT - A

STATE OF MICHIGAN
COURT OF APPEALS

TOM BALDWIN, HAROLD BANKS, DONALD
NUTTER, LORI NUTTER, PETER SEIBERT,
KATHRYN ANN SEIBERT and GERALDINE N.
VERSLUIS,

Plaintiffs,

and

MARVIN ANSON, RUFUS BOSMA, EUNICE
BOSMA, ROBERT CHAMBERLAIN, FRED
HINGA, a/k/a M.M. HINGA, WILLIAM C.
HOLLOWAY, HELEN A. HOLLOWAY, LARRY
KLERK, a/k/a LARRY CLERK, SUSAN KLERK,
a/k/a SUSAN CLERK, CLIFFORD LEONARD,
MARLENE LEONARD, MIKE MCGUIRE,
KAMRAN MOGHISSI, IDA-LAURA MOGHISSI,
LARRY NYBERG, PATSY NYBERG, ROBERT
PENCE, JUDY PENCE, JAMES H. SIMONDS,
RAY TIFFANY, MIKE WEYENBERG, JACK
WILSON, MAXINE WILSON, and PHILIP D.
WINELAND,

Plaintiffs-Appellants,

v

BARRY COUNTY DRAIN COMMISSIONER,
BARRY COUNTY, ALLEGAN COUNTY DRAIN
COMMISSIONER, ALLEGAN COUNTY and
MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Defendants-Appellees,

UNPUBLISHED
December 1, 1998

No. 201604
Barry Circuit Court
LC No. 92-000601 AW

and

PINE LAKE ASSOCIATION, ROSEMARY
DECKER, CONSTANCE HUBBELL, DANIEL
JAMIESON, LARRY MONTEI, WILLIAM
SCHMA, ROSS STANCATI and NANCY TROFF,

Intervenors-Appellees.

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order establishing the normal level of Pine Lake at 890.5 feet above sea level, subject to seasonal variations and precipitation. We affirm.

I

In 1969, the Barry Circuit Court, in response to a petition from the boards of supervisors of Barry and Allegan counties and pursuant to the Inland Lake Level Act ("ILLA"), MCL 281, 61 *et seq.*; MSA 11.300 (1) *et seq.*,¹ established the normal level of Pine Lake at 890.5 feet above sea level, and ordered that the maximum level of the lake not exceed 891 feet and the minimum level not fall below 890 feet. In 1992, plaintiffs filed an action against defendants Barry County and Barry County Drain Commissioner to enforce the 1969 judgment because plaintiffs experienced flooding due to a rise in the lake's level. The circuit court determined that the 1969 judgment was too old to be enforced. On appeal, this Court reversed the trial court and remanded to the trial court to determine whether the lake level set in 1969 remained beneficial to the public. *Anson v Barry Co Drain Comm'r*, 210 Mich App 322; 533 NW2d 19 (1995).²

On remand, the trial court concluded that the minimum lake level of 890.5 feet set in 1969 should remain as the lake's normal level, but amended the 1969 judgment by removing the minimum and maximum level requirements. Plaintiffs now appeal, insisting that the trial court erred by failing to establish a maximum lake level and by refusing to award them attorney fees.

II

Plaintiffs first argue that the ILLA requires a trial court set a normal lake level with both an upper and lower limit, and that the trial court erred in simply determining that the normal level of Pine Lake should remain at 890.5 feet, subject to seasonal variations and precipitation. After reviewing this issue of statutory construction *de novo*, *In re Ballard*, 219 Mich App 329, 331; 556 NW2d 196 (1996), we disagree.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first criterion in determining intent is the specific language of the statute itself, *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993), and the Legislature is presumed to have intended the meaning it plainly expressed. *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Barr v Mt Brighton Inc*, 215 Mich App 512, 517; 546 NW2d 273 (1996).

The ILLA defines “normal level” as follows:

“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. [MCL 324.307001(h); MSA 13A.30701(h).]

MCL 324.30707(5); MSA 13A.30707(5) allows for the court to determine seasonal variances to the “normal level”:

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.

The plain and ordinary meaning of the language contained in the ILLA does not define “normal level” to include a minimum and a maximum level. Rather, the ILLA permits trial courts to be flexible and provide for seasonal departures from the normal lake level as necessary to accomplish the purpose of the act, which is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public. *In re Van Ettan Lake*, 149 Mich App 517, 525; 386 NW2d 572 (1986). Accordingly, we find that the trial court was not required to set a maximum level for Pine Lake in addition to reaffirming the normal level of 890.5 feet above sea level.³

III

Plaintiffs also challenge the trial court’s denial of their motion for attorney fees. Specifically, plaintiffs argue that the ILLA mandates the award of such fees. We disagree.

Generally, a party may not recover attorney fees, either as costs or damages, unless such recovery is expressly authorized by statute or court rule. *Oscoda Chapter of PBB Action Committee, Inc v DNR*, 115 Mich App 356, 363; 320 NW2d 376 (1982). In the present case, plaintiffs contend that the trial court ignored the mandate in MCL 324.10711-30712; MSA 13A.30711-30712 that their

legal fees must be included within the costs assessed as part of a normal lake level project. To the contrary, these sections allowing for the payment of legal fees are restricted to special assessments to reimburse the county for all or part of the project's cost.⁴

The focus of the ILLA is on the public welfare, not individual riparian rights, and it "does not create a civil cause of action for individuals who are dissatisfied with the county's exercise of authority." *In re Matter of Van Ettan Lake, supra* at 526. To enable riparian owners to vindicate their personal property rights, and then charge their legal fees to the other members of the special assessment district, or the county, is not consistent with the public purpose of the ILLA. In short, nothing in the ILLA supports plaintiffs' contention that they, as individual lake residents, are entitled to an award of attorney fees.

Affirmed.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

¹ The Inland Lake Level Act of 1961, MCL 281.61 *et seq.*; MSA 11.300(1) *et seq.*, was repealed by 1994 PA 51, and reenacted as part of the Natural Resources and Environmental Protection Act, 1995 PA 59, without any substantive changes. Although the present case was commenced in 1992 under the former Act, we will use the current section numbers where applicable.

² On remand, the trial court ordered that Allegan County, Allegan County Drain Commissioner and the Michigan Department of Natural Resources (DNR) be added as defendants. The trial court also allowed two groups of landowners to intervene.

³ If the trial court had set a maximum level, then the county would have had to maintain it. MCL 324.307088(1); MSA 13A.307088(1). Our review of the record reveals that the proposed project to maintain the lake level would cost upwards of \$600,000 and could injure the environment, while at the same time benefiting only 4 ½ percent of the houses on the lake. We believe that the trial court properly refused to set a maximum lake level which could not be maintained or to approve a project which did not benefit the public welfare.

We further note that the trial court's order instructed the Barry County Drain Commission to operate the existing drain and leave it "open and unobstructed until further Order of the Court." Therefore, defendants are left with some ability to maintain the normal lake level reaffirmed by the trial court.

⁴ MCL 324.30711(1); MSA 13A.30711(1) provides:

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.

The following costs may be defrayed by a special assessment against the landowners benefited by the project:

- (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. [MCL 324.30712; MSA 13A.30712.]

EXHIBIT - B



JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
CADILLAC DISTRICT OFFICE

FILE COPY



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.

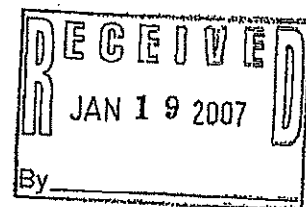
Any permit or structural design would not eliminate the need to manage the flows in accordance with the Circuit Court Order. This includes maintaining minimum flows to the Cut River that would be more then the one five foot bay capacity in many instances. Maximum flows should also be managed to allow 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





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

Notice of Authorization

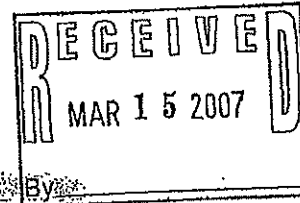
Permit Number 06-72-0056-P

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.



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, Genish Township

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

Steven E. Chester, Director
Department of Environmental Quality

A handwritten signature in black ink, appearing to read "Jeff Silagy". The signature is written over a horizontal line.

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

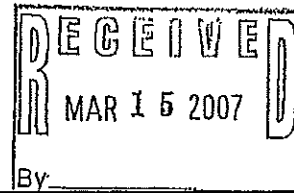
Permit No.	06-72-0056-P
Issued	March 12, 2007
Extended	
Revised	
Expires	December 31, 2008

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:

- | | |
|---|--|
| <input checked="" type="checkbox"/> Part 301 Inland Lakes and Streams | <input type="checkbox"/> Part 315 Dam Safety |
| <input type="checkbox"/> Part 325 Great Lakes Submerged Lands | <input type="checkbox"/> Part 323 Shorelands Protection and Management |
| <input type="checkbox"/> Part 303 Wetlands Protection | <input type="checkbox"/> Part 353 Sand Dune Protection and Management |
| <input checked="" type="checkbox"/> 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.



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:

- 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.
- 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.
- 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.
- All work shall be completed in accordance with the plans and the specifications submitted with the application and/or plans and specifications attached hereto.
- 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.
- 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.
- 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.
- 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.
- 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.
- This permit shall not be assigned or transferred without the written approval of the MDEQ.
- 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.
- Work to be done under authority of this permit is further subject to the following special instructions and specifications:

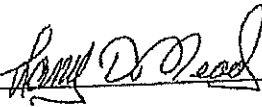
1. Riprap shall be clean fieldstone, and shall not extend out into the water more than three feet.
2. This permit does not eliminate managing Higgins Lake and the Cut River in accordance with the Court Ordered Lake Level. Minimum and maximum flows must be maintained in the Cut River as necessary to prevent 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.

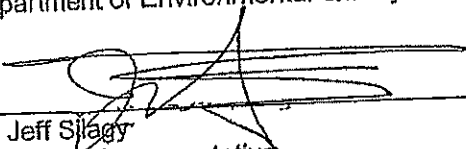
Roscommon County

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

 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

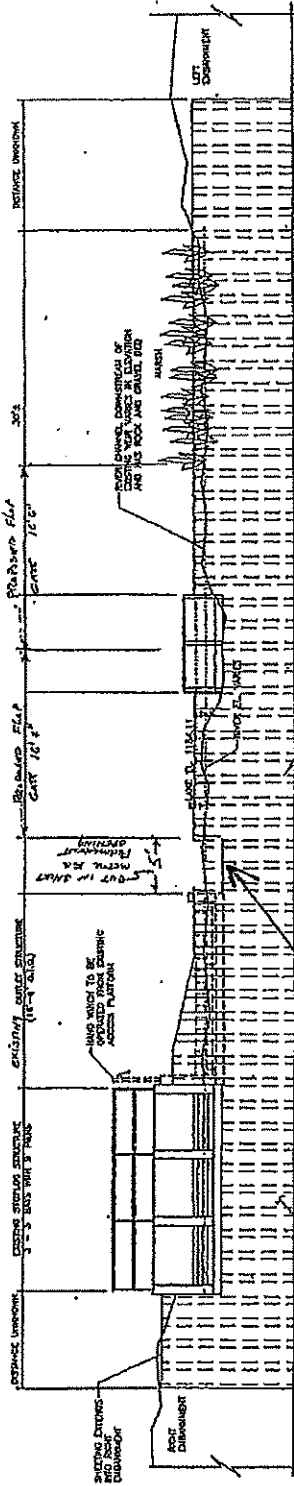
cc: Herb Weatherly
Rich O'Neal, DNR Fisheries
Roscommon CEA
Gerrish Township

DEC COPY

~~REVISIONS~~

MAR 12 2008

06-72-56-P
Kang



- NOTES
1. REFER TO FIELD DATA OBSERVATIONS AND FIELD MEASUREMENTS OF VERTICAL ALIGNMENT OF THE STRUCTURE. DO NOT SCALE THIS DRAWING.
 2. EXISTING STRUCTURE WAS APPROXIMATELY 27 FEET DEEP. CONSTRUCTION WITH A SHIELDING AREA GROUP WAS ASSUMED. IT IS ASSUMED THAT THE STRUCTURE WAS BUILT BELOW THE EXISTING STRUCTURE AS SHOWN.

RECEIVED
FEB 20 2007
DECALWIND-CADILLAC

Bottom elevation of apron at same level as stream bottom

REFERENCE DRAWING
NOT FOR CONSTRUCTION

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

ROSCOMMON COUNTY, MICHIGAN
PRUDENMILLE, MICHIGAN

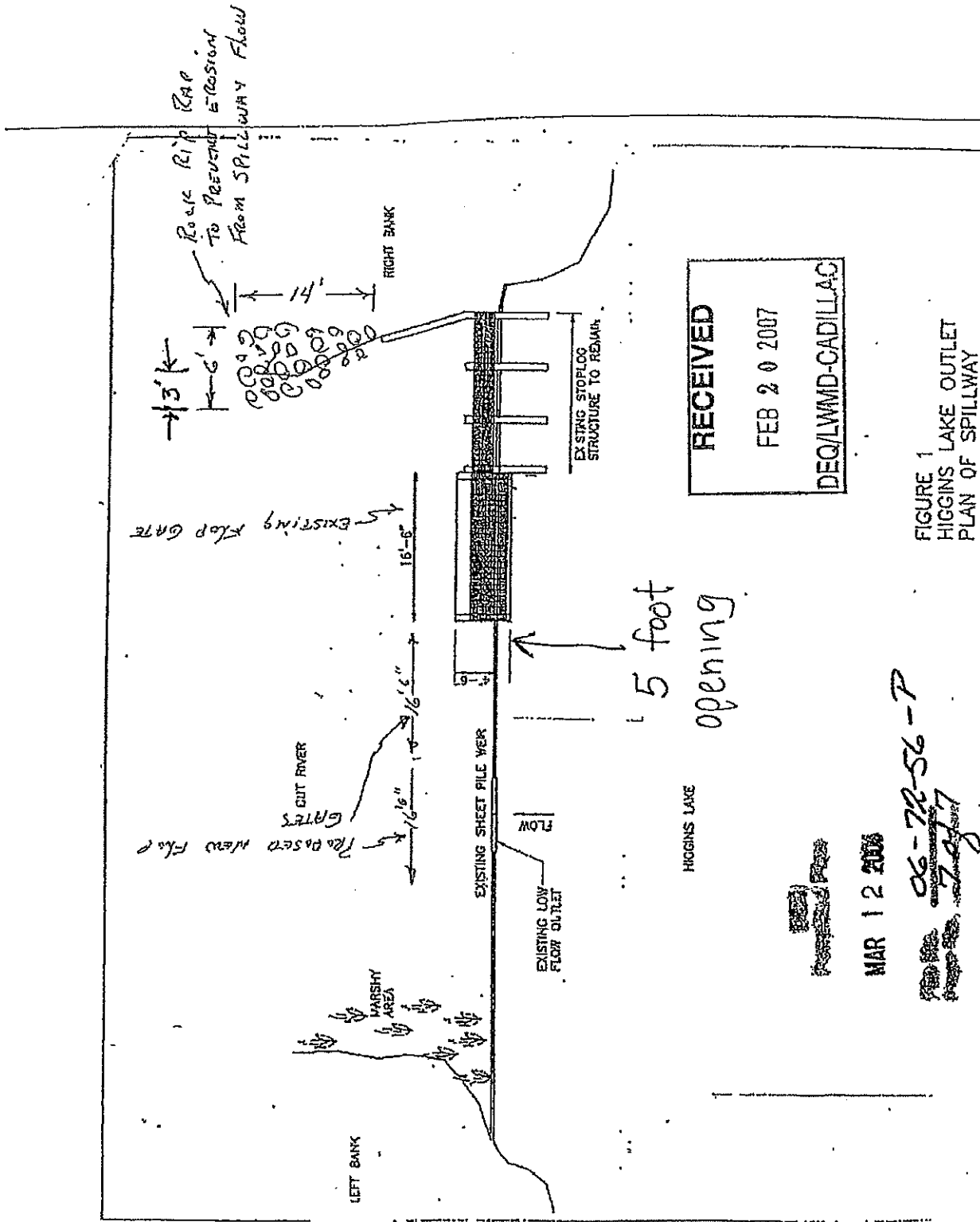
NO.	AS SHOWN	DATE	BY	CHKD	APP'D
1	AS SHOWN	10/11/04

Bart
Engineering Company
1000 ...
Prudenville, Michigan

DATE	REVISION
10/11/04	1

PROJECT NUMBER: ...
DATE OF DRAWING: ...
SCALE: ...

NO.	DATE	DESCRIPTION
1	10/11/04	...



RECEIVED
 FEB 20 2007
 DEQ/LWMD-CADILLAC

FIGURE 1
 HIGGINS LAKE OUTLET
 PLAN OF SPILLWAY

DEQ
 LANSING

MAR 12 2006

06-72-56-P
 7.8.07

EXHIBIT - C

STATE OF MICHIGAN
COURT OF APPEALS

TAWAS LAKE IMPROVEMENT
ASSOCIATION,

Plaintiff-Appellee,

v

IOSCO COUNTY BOARD OF
COMMISSIONERS,

Defendant-Appellee,

and

ATTORNEY GENERAL and DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Intervening Defendants-Appellants.

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Intervening defendants Michigan's Attorney General and Department of Environmental Quality (DEQ) appeal by leave granted the trial court's order that Defendant Iosco County Board of Commissioners (the County) were not required to obtain a DEQ permit before constructing a dam on Tawas Lake. We reverse.

In 1959, the Iosco County Circuit Court issued a decree setting the level of Tawas Lake at 582.5 feet above sea level. 1939 PA 194, which survives today as part of the Natural Resources and Environmental Protection Act (NREPA),¹ gave the court authority to set the level of the lake.² The order also stated that departures from the set level were permitted if the

¹ 1994 PA 451, MCL 324.101 *et seq.*

² Specifically, the court's authority to set inland lakes level is currently codified as Part 307, MCL 324.30701 *et seq.*, of the NREPA.

Department of Conservation deemed it necessary and if the parties petitioned the court to allow a departure. Despite the decree, no steps were taken to bring the lake to the level set by the court.

In 1994, plaintiff Tawas Lake Improvement Association petitioned the court for a writ of mandamus to order the County to take the necessary actions to establish and maintain the ordered lake level, which essentially would mean constructing a lake level control structure or dam. Plaintiff and the County then stipulated to hire an independent engineering firm to conduct a feasibility study and advise the parties whether establishing and maintaining the lake level was feasible. The parties agreed as follows:

11. Upon completion and submittal of the engineering study, the parties will determine if the engineering study provides a feasible means in which to establish the normal lake level as ordered by the 1959 Circuit Court for the County of Iosco.

12. If a feasible means by which to establish the lake level exists, Defendant will proceed with the necessary steps to maintain the Tawas Lake level at 582.0 feet above sea level. All necessary expense to maintain the Tawas Lake level at 582.0 feet above sea level, shall be special assessed through the Special Assessment District currently in existence.³

An engineering firm conducted the feasibility study and issued a report in May 1997. The firm concluded that the feasibility of establishing and maintaining the lake level at 582.5 feet above sea level was "favorable." However, the firm informed the parties that five permits were "likely to be required" before dam construction could proceed.⁴

Plaintiff then submitted a proposed consent judgment to order the County to proceed with construction of the dam. The court entered an order instructing the County to "proceed with the necessary steps to engineer, construct, and maintain [the dam] as is necessary to control the Tawas Lake level at 582.5 feet above sea level . . ." The County then applied to the DEQ for the necessary permits pursuant to the NREPA. The DEQ refused to issue the permit, reasoning that the benefits of the proposed dam project were significantly outweighed by the adverse effects the dam would have on the floodplains, wetlands, and lake and river levels of Tawas Lake and the surrounding areas.⁵

³ It is unclear as to why the parties stipulated to 582.0 feet instead of 582.5 feet, the court established lake level; though the 1959 court order did state that if a party appealed its judgment, the level could not be raised above 582.0 feet above sea level pending the appeal.

⁴ The required permits were to be obtained from the DEQ, Army Corp of Engineers, and Iosco County.

⁵ The County also applied to the Army Corps of Engineers for the required permit which was likewise denied.

Plaintiff filed a petition for contested case hearing with the DEQ's Office of Administrative Hearings. However, the DEQ held the internal appeal in abeyance pending the final outcome of the court case. After the permit denials, the County then moved to vacate the court's judgment on the ground that it could not continue with construction of the dam after having been denied the required permits. Plaintiff then filed a motion for an order to show cause as to why the County was not proceeding as ordered by the consent judgment. For the first time, plaintiff alleged that no permits were needed because the court had ordered the lake level. Before hearings were held, apparently as a result of plaintiff's new position, the Attorney General and the DEQ moved to intervene and was allowed to do so "for the limited purpose of briefing and arguing the issue of whether permits under the Natural Resources and Environmental Protection Act are required for the lake level project at issue." The court ordered the parties to submit briefs on this limited issue.

The court heard the matter on April 27, 2001, and decided that a DEQ permit was not required by the statute. Intervening defendants filed an appeal by right, which was rejected by this Court. This Court determined that the trial court's April 27, 2001 order was a post-judgment order, the final judgment having been entered on January 12, 1998. Thereafter, intervening defendants filed a delayed application for leave to appeal, which this Court granted. The County has adopted intervening defendants' position on appeal.

I

The main issue on appeal is whether the trial court erred in concluding that permits were not required under the NREPA for the Tawas lake level project, where decades before the court had ordered that the lake be maintained at a certain level. This Court reviews matters of statutory construction de novo. *Omelenchuk v City of Warren*, 466 Mich 524, 527; 647 NW2d 493 (2002).

This Court's primary concern in construing statutes is to give effect to the intent of the Legislature. *Id.* at 528. The first step in determining intent is to review the specific language of the statute. *Id.* Where the language of the statute is clear, judicial construction is neither necessary nor permitted. *Id.* An act must be "construe[d] as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). The construction should be reasonable and comport with the purpose of the act. *Id.* at 158. The Supreme Court has also instructed:

"Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other." [*State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998), quoting *Detroit v Michigan Bell*, 374 Mich 543, 558; 132 NW2d 660 (1965) (citations omitted).]

II

The Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*, was enacted to “protect the environment and natural resources of the state . . .” 1994 PA 451. The Act is a consolidation and recodification of the “laws relating to the environment and natural resources.” *Id.* A circuit court’s authority to set the level of lakes within its jurisdiction is set forth in Part 307 of the NREPA, inland lake levels, MCL 324.30701-MCL 324.30723. The specific section states:

(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. [MCL 324.30702.]

When the trial court held that a DEQ permit was not required in this case, it only considered Part 307 of the NREPA, and reasoned that the part did not “condition the Court’s authority to set and maintain lake levels upon the permission of the DEQ.” The court stated that “[n]owhere within said Act is there a requirement for a permit,” and that the only requirement involving the DEQ was the agency’s obligation to assist with plans and specifications for the dam, characterizing the DEQ’s role as one of “affirmative duty” rather than “final authority.” However, the court did not address or discuss the language of MCL 324.30723, the last provision in Part 307, that provides: “This part does not abrogate the requirements of other state statutes.”

We believe that the court’s failure to consider MCL 324.30723 was error. This provision clearly indicates the Legislature’s recognition that permits may be required under other parts of the NREPA, and, in fact, other parts of the act do require permits. In Part 301, MCL 324.30102 provides, in pertinent part, that a permit issued by the DEQ is required in order to engage in any of the following actions: (a) dredge or fill bottomland; (b) construct, enlarge, extend, remove, or place a structure on bottomland; (c) erect, maintain, or operate a marina; (d) create, enlarge, or diminish an inland lake or stream; and (e) structurally interfere with the natural flow of an inland lake or stream. Section 30104 further provides in part:

(1) Before a project that is subject to this part [Inland Lakes and Streams] is undertaken, a person shall file an application and receive a permit from the department. The application shall be on a form prescribed by the department and 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. [MCL 324.30104(1).]

In deciding whether to issue a permit, the act requires that:

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. [MCL 324.30106.]

Also, MCL 324.3104, which covers water resources protection, states that the DEQ “shall have control over the alterations of natural or present watercourses of all rivers and streams,” and that a person “shall submit an application for a permit to alter a floodplain.” Additionally, MCL 324.30311(1), which involves wetland protection, provides: “A permit for an activity listed in section 30304⁶ shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful.”

Plaintiff acknowledges that ordinarily permits would be required, but argue that, in this case, the County could maintain the level without obtaining a DEQ permit. Plaintiff asserts that if the Legislature intended for a permit to be required under Part 307, where the court sets the lake level, it would have included such a provision in Part 307. However, such a conclusion would ignore one of the tenets of statutory construction. Statutes that relate to the same subject or share a common purpose are in *pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Schuster, supra* at 417. The Legislature is presumed to be familiar with the rules of statutory construction. *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998). MCL 324.30723 specifically states that the provisions in Part 307 do not “abrogate the requirements of other state statutes.” Adopting plaintiff’s position would render MCL 324.30723 nugatory, a construction that we must avoid if at all possible. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999).

As noted above, many provisions in the NREPA give the DEQ authority to control changes to the state waters. Most notably, the NREPA provides that dams are under the jurisdiction of the DEQ, MCL 324.31506, and a permit is required for any new dam construction, MCL 324.31509. In fact, in Part 307, MCL 324.30722 provides for periodic inspections of dams constructed on inland lakes where a normal water level has been established, and subsection(2) confers approval of plans and specifications of a dam’s repair or replacement on the DEQ. The DEQ is required to confirm any report that “discloses a need for repairs or a change in condition of the dam that relates to the dam’s safety or danger to the natural resources.” MCL 324.30722(2). Additionally, MCL 324.31519(2) confers on the DEQ the

⁶ The activities included in this section are: depositing fill material, dredging or removing material, use or development, and draining surface water. MCL 324.30304.

authority to order the removal of a dam “[w]here significant damage to persons, property, or natural resources or the public trust in those natural resources occurs as a result of the condition or existence of a dam.” Therefore, it follows that, as in this case, where the dam was never constructed, the DEQ’s authority to require a permit for new dam construction is not abrogated by the court’s prior lake level determination.

Furthermore, the NREPA does delineate certain instances in which a permit is not required. See, e.g., MCL 324.30103; MCL 324.30305; MCL 324.31506(3). Yet, none of the exceptions are applicable in this case. Therefore, giving effect to MCL 324.30723, we hold that the trial court erred in concluding that the County was not required to obtain permits from the DEQ before constructing the dam.⁷

Plaintiff also argues that where a court has determined a lake level and ordered its maintenance pursuant to its authority in Part 307 of the NREPA, requiring a person to obtain a permit from the DEQ violates the separation of powers doctrine. We disagree.

The separation of powers doctrine exists “to preserve the independence of the three branches of government.” *Hopkins v Michigan Parole Bd*, 237 Mich App 629, 636; 604 NW2d 686 (1999). Some overlap in powers is contemplated. *Id.* Under the NREPA, the circuit courts can still determine inland lake levels, though their ultimate power to enforce their orders is curtailed by the DEQ’s power to protect natural resources. However, neither branch is prohibited from exercising their authority. “If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible.” *Id.* Here, the grant of power to determine lake levels is limited and specific (the power may be exercised in concert with the DEQ’s power to protect natural resources), and the grant does not encroach on or aggrandize the DEQ’s power or vice versa. Therefore, we find that there is no separation of powers violation.

Reversed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O’Connell

⁷ We do not decide the propriety of the DEQ’s refusal to issue a permit in this case, as that issue is not before us.

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 34TH JUDICIAL CIRCUIT
ROSCOMMON COUNTY

CITIZENS FOR HIGGINS LAKE LEGAL
LEVELS, ERIC OSTERGREN, STEVE
RICKETTS, THOMAS THOMSON, CAROL
THOMSON, GLENN R. FAUSZ, ROBERT
OBRYAN, DRU OBRYAN, THOMAS
THOMSON, CAROL THOMSON, and
JANICE JAMESON as trustee of the
JANICE JAMESON TRUST,

No. 19-724711-AW

HON. ROBERT W. BENNETT

Petitioners-Plaintiffs,

v

BOARD OF COMMISSIONERS OF THE
COUNTY OF ROSCOMMON,

Respondent-Defendant.

Philip L. Ellison (P74117)
Attorney for Petitioners-Plaintiffs
Outside Legal Counsel PLC
P.O. Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

Matthew J. Zalewski (P72207)
Attorney for Respondent-Defendant
Rosati Schultz Joppich &
Amtsbuechler, PC
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
mzalewski@rsjalaw.com

Daniel P. Bock (P71246)
Assistant Attorney General
Attorney for Intervenor-Defendant
Department of Environment, Great Lakes,
and Energy
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
bockd@michigan.gov

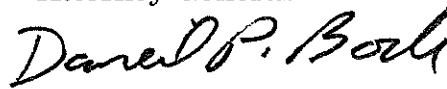
Christopher M. Bzdok (P53094)
Attorney for Intervenor-Defendants
Olson, Bzdok & Howard, P.C.
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
chris@envlaw.com

NOTICE OF HEARING

PLEASE TAKE NOTICE that the Intervenor-Defendant Michigan Department of Environment, Great Lakes, and Energy's Motion for Summary Disposition will be brought on for hearing before the Honorable Robert W. Bennett, in his courtroom at the Roscommon Circuit Court, 500 Lake Street, Roscommon, MI 48653-7690 on **Thursday, April 16, 2020 at 2:00 p.m.** or as soon thereafter as counsel may be heard.

Respectfully submitted,

Dana Nessel
Attorney General



Daniel P. Bock (P71246)
Assistant Attorney General
Attorneys for Intervenor-Defendant
Michigan Department of
Environment, Great Lakes, and
Energy
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664

Dated: March 20, 2020

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 34TH JUDICIAL CIRCUIT
ROSCOMMON COUNTY

CITIZENS FOR HIGGINS LAKE LEGAL
LEVELS, ERIC OSTERGREN, STEVE
RICKETTS, THOMAS THOMSON, CAROL
THOMSON, GLENN R. FAUSZ, ROBERT
OBRYAN, DRU OBRYAN, THOMAS
THOMSON, CAROL THOMSON, and
JANICE JAMESON as trustee of the
JANICE JAMESON TRUST,

No. 19-724711-AW

HON. ROBERT W. BENNETT

Petitioners-Plaintiffs,

v

BOARD OF COMMISSIONERS OF THE
COUNTY OF ROSCOMMON,

Respondent-Defendant.

Philip L. Ellison (P74117)
Attorney for Petitioners-Plaintiffs
Outside Legal Counsel PLC
P.O. Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

Matthew J. Zalewski (P72207)
Attorney for Respondent-Defendant
Rosati Schultz Joppich &
Amtsbuechler, PC
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
mzalewski@rsjalaw.com

Daniel P. Bock (P71246)
Assistant Attorney General
Attorney for Intervenor-Defendant
Department of Environment, Great Lakes,
and Energy
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
bockd@michigan.gov

Christopher M. Bzdok (P53094)
Attorney for Intervenor-Defendants
Olson, Bzdok & Howard, P.C.
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
chris@envlaw.com

PROOF OF SERVICE

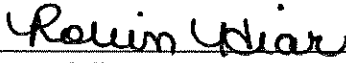
On March 20, 2020, I sent via first class mail, a copy of Intervenor-Defendant Michigan Department of Environment, Great Lakes, and Energy's Motion for Summary Disposition, including Brief in Support; Notice of Hearing; and this Proof of Service to:

Philip L. Ellison
Outside Legal Counsel PLC
P.O. Box 107
Hemlock, MI 48626

Christopher M. Bzdok
Olson, Bzdok & Howard, P.C.
420 East Front Street
Traverse City, MI 49686

Matthew J. Zalewski
Rosati Schultz Joppich &
Amtsbuechler, PC
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550

I declare that the statements above are true to the best of my information, knowledge, and belief.



Legal Secretary