

WESTRATE & THOMAS
Attorneys at Law

MARK A. WESTRATE
ROOSEVELT THOMAS*

204 Commercial Street
P.O. Box 359
Dowagiac, Michigan 49047-0359

Telephone 269/782-5144
269/782-6086
Fax 269/782-5833

*Licensed to practice
in Michigan and Illinois

September 24, 2010

(Via email stneary@sisterlakescable.com)

Dear Tom:

Per phone conversation, attached please find a copy of Judge Patterson's **wonderful** decision. I would be interested in receiving your thoughts and comments.

Very truly yours

WESTRATE & THOMAS



Mark A. Westrate

MAW/sb

enclosures

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of	File No.:	07-80-0001-P
Van Buren County Drain Commissioner <hr/>	Part:	301, Inland Lakes and Streams
	Agency:	Department of Natural Resources and Environment
	Case Type:	Land and Water Management Division

PROPOSAL FOR DECISION

This contested case was instituted by Joseph Parman in his capacity as the Van Buren County Drain Commissioner (VBCDC). The petition followed the denial of an application for permit by the Department of Environmental Quality (DEQ)¹, Land and Water Management Division (LWMD). The application sought a permit to utilize an existing agricultural well to maintain the legal level of Big and Little Crooked Lakes in Van Buren and Cass Counties. The parties do not contest the LWMD's position that such an activity is regulated under Part 301, Inland Lakes and Streams, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, MCL 324.30101, et seq.; MSA 13A. 30101, et seq., as a permit is required to:

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

As detailed in the introduction below, during the pendency of this contested case, through further study and the imposition of limitations, a revised permit was ultimately issued. Upon that occurring, a petition for intervention was filed by a number riparians on both Crooked Lakes and Magician Lake which was granted by order dated March 11, 2009. Again, as detailed below, the Intervenors contend there is no need for the permitted

¹ The DEQ and the Department of Natural Resources have subsequently been combined into a single agency effective January 17, 2010. That combined agency is now known as the Department and Natural Resources and Environment.

project; it will not perform as anticipated, and; will cause a number of adverse consequences to the lakes, adjacent wetlands, and the water table of the surrounding area.

In response the VBCDC contends the project is necessary to allow it to fulfill its legal duty to maintain the lakes at their established legal levels.²

JURISDICTION

The initial petition for a contested case hearing was filed by the VBCDC under the provisions of Part 301, as an "aggrieved party" under section 30110 (2) of Part 301, MCL 324.30110; MSA 13A.30110. Intervenors are similarly aggrieved by the ultimate issuance of the subject permit. As such, and having standing as riparian owners on the affected lakes, they may maintain this action in their own right. The hearing, as required, was conducted pursuant to the provisions of the Michigan Administrative Procedures Act., MCL 24.201; MSA 3.560 (101), et seq., and this Tribunal's administrative rules, R 324.1 et seq. The parties stipulated that the Permittee is a proper applicant. The Petitioners did not stipulate that the application was processed correctly and argue it was not as discussed later in this Proposal for Decision.

PARTIES

Intervenors are represented by Steven Stapleton, Esq. The following testified in support of the Intervenors' case; George Haley, Intervenor and riparian on Little Crooked Lake; Stephen Nosich, riparian on Big Crooked Lake; James Wright, riparian on Big Crooked Lake; Edward McKernin, Intervenor and riparian on Big Crooked Lake; Timothy McKernin, Intervenor and riparian on Big Crooked Lake; Ronald Mathia, Intervenor and riparian on Magician Lake; Dennis Stites, Intervenor and riparian on Big Crooked Lake;

² Since a portion of Little Crooked Lake is in Cass County, the Cass County Drain Commissioner, is also represented by counsel for the VBCDC, although he did not actively participate in the hearing.

and, Lon Cooper, Geologic Engineer with Lakeshore Environmental in Grand Haven.

Permittee the VBCDC is represented by Mark A. Westrate, Esq. In addition to Mr. Parman, it presented the testimony of Todd Feenstra, Expert in Hydrogeology.

The Respondent LWMD is represented by Daniel P. Bock, Assistant Attorney General. The following testified on behalf of the division: Kate Lederle, Environmental Quality Analyst (EQA) with the Permit Consolidation Unit, LWMD; Martin Jannereth, Chief, Lakes, Steams and Shoreline Section, LWMD; Kameron Jordan, District Supervisor, LWMD, Kalamazoo District Office; Kim Fish, Assistant Division Chief, LWMD; Ben Zimont, EQA, formerly with the LWMD, Kalamazoo District Office, and Marlio Lesmez, Hydrogeologist with the Hydraulic Studies Unit, LWMD.

There were numerous exhibits presented by stipulation or without objection. They are marked Intervenor 1 through 90, Respondent 1 through 18, and Petitioner 1 through 15. There is a list and description of those exhibits at the beginning of each volume of the transcript.

The hearing was held March 22, April 12, April 14, May 11, and 12, 2010.

Written briefs or closing arguments and responses or relies were filed by counsel, culminating on July 22, 2010.

INTRODUCTION

The VBCDC was approached by the Crooked Lakes Association to investigate the potential for a lake augmentation to serve Big and Little Crooked Lakes. These lakes, together with Round Lake, are part of a group of lakes, commonly known as the "Sister Lakes" located along the border of Van Buren and Cass Counties in southwestern Michigan. The three lakes are physically connected by a buried culvert, and an outflow weir is located along the southwestern shoreline of Round Lake. The weir is designed to prevent the lakes from exceeding the legal level. Three other lakes comprising the so

called Sister Lakes, Magician, Dewey, and Cable are located within approximately one mile of the three affected lakes.

An existing irrigation well, located east of Big Crooked Lake, was made available for use as what is known as an augmentation well. The well currently services a seep or drip line irrigation system which irrigates a cherry orchard.

On January 10, 2007, the VBCDC, applied for a permit to artificially supplement the water volume of the Crooked Lakes by means of pumping water from the existing well into Big Crooked Lake through a pipeline. As stated, the avowed purpose of the project is to allow the VBCDC to fulfill his legal duty to maintain the legally set lake levels established by the Van Buren County Circuit Court in 1952 at 766 NGV. Such was done under the procedures established under the predecessor of what is now Part 307, Inland Lake Levels, of the NREPA.

The original permit application was denied December 14, 2007, by the LWMD citing numerous reasons, including damage to area wetlands, shoreline erosion and impairment of riparian interests. (Exhibit R-3). The VBCDC then filed a petition for contested case on January 28, 2008. The case was held in abeyance for an extended period of time to allow exploration of a voluntary resolution. That occurred on February 2, 2009, when the LWMD issued a draft revised permit that contained limitations, including a maximum pumping rate of 800 gallons per minute and cessation of the discharge when the lake level reaches an elevation of 765.5 NGV. The draft permit was released for a 30-day public comment period on the same date.

As a result of those developments, Intervenor moved for and were granted the right to intervene on March 1, 2009. The revised permit was ultimately issued June 29, 2009. Specifically, Intervenor contend that the permitted activity, even as revised, will not be effective and will have negative impacts on their riparian interests as well as theirs and other area owners' water wells by shifting or disturbing the water table in the area. Further, the lakes will be negatively impacted by the introduction of potentially contaminated, iron

rich, and oxygen depleted water. Lastly, their riparian and property interests will be adversely impacted by increased shoreline erosion and loss of area wetlands and wildlife habitat.

The VBCDC and the LWMD respond that additional studies indicated means by which these concerns could be alleviated which were embodied in the revised permit issued.

That permit (Exhibit R-14) specifically allowed the VBCDC, conditioned on the limitations recited above to:

Discharge water from an existing irrigation well into Big Crooked Lake to help maintain the Legal Lake Level (Normal Level) of 766 NGV Datum 29. Place staff gauges as necessary to monitor the lake level. All work shall be completed in accordance with attached modified plans dated June 18, 2009.

As stated, the VBCRC applied for the subject permit to fulfill its obligation to maintain the legal lake level of Big and Little Crooked Lakes. That duty is imposed under Part 307, section 30708(1) which states:

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. MCL 324.30709(1).

Intervenors argue that because the legal lake level was established previous to the enactment of Part 307 by which the duty was imposed, that VBCDC is not duty bound to maintain the level. However, while the effective date of Part 307 is March 30, 1995, Part 307 is merely a re-codification of the Inland Lake Levels Act, which has existed in one form or another for decades. That regulatory scheme, together with a number of other environmental statutes were consolidated and embodied in the NREPA.

The procedure to establish a legal lake level has existed since the enactment of Act 377 of 1921 and the authority of the Drain Commissioner to maintain a legally set level was established in Public Act 39 of 1937, stating:

The drain commissioner of the several counties of this state in which the water of any inland lake is situated may, for the protection of the public health and safety and the conservation of the natural resources of this state, and for the best interest of land owners abutting on the lake, provide for the establishment and maintenance of the water of any such lake at a certain height above sea level, and construct and maintain sufficient dams or embankments upon and along the shores of any such lake to keep and maintain the water in such lake at a certain height above sea level, or do anything necessary to provide for the lowering or raising of the water in such lake, depending on the requirement in the particular situation.

Admittedly, Drain Commissioners were allowed to maintain lake levels under the predecessor act in that it provided they “may” do so, as opposed to having a “duty” to do so under Part 307. However, authority to establish and maintain legal lake levels has been long standing. Whether the VBCDC applied to, in its perception, protect the public health and safety or conserve resources or because it considered it its duty is immaterial to the issue of whether or not it is entitled to the revised permit issued to carry out its desire or duty under the criteria of Par 301.

The VBCDC does not claim that the mandate above preempts it from regulation or alleviates the necessity of obtaining permits applicable to the means by which it carries it out.

THE PROCESSING OF THE APPLICATION

Intervenors raise an issue with the processing of the application based on the following timeline (Exhibit R-2(A)):

1. Application received in Permit Consolidation Unit and entered into COASTAL AND Inland Waters Permit Information System January 10, 2007.
2. Assigned to Lansing reviewer Kate Lederle January 11, 2007.
3. First Application Correction Request (ACR) sent to applicant February 2, 2007.
4. Applicant's response to above received February 27, 2007.
5. Application file closed per the LWMD policy on March 4, 2007.
6. Response received from Applicant and adjacent riparians March 6, 2007.

7. Second ACR sent March 13, 2007.
8. Response to above from Applicant on April 4, 2007.
9. Additional response received from Applicant on May 17, 2007.
10. Status review by the LWMD on June 19, 2007.
11. Conference with Assistant Attorney General concluding authorizations from all riparians unnecessary to considered application administratively complete on July 23, 2007.
12. Additional response received from Applicant on July 30, 2007.
13. Third ACR sent to Applicant July 31, 2007.
14. File permanently closed August 1, 2007.
15. Signed version of letter received on July 30, 2007, received on August 2, 2007.
16. Status review by the LWMD, 180-day closure letter sent to Applicant on August 3, 2007. Later rescinded the same day and third ACR sent to Applicant.
17. Response received from Applicant August 13, 2007.
18. File public noticed and sent to Kalamazoo District office for field review August 31, 2007.

Based on this scenario they contend the permit ultimately issued is improper in that the file should have remained closed and a permit issued, if at all, subsequent to the filing and processing of a second application.

Ms. Lederle testified regarding her processing the application. She is an EQA with the Permit Consolidation Unit and reiterated the scenario outlined above. She explained an applicant has thirty days to respond to an ACR under R 281.812(5). If a timely response is not provided, the application is deemed withdrawn. However, if a response is received within 180 days from the date of the ACR the file will be reopened and processed. In essence, the rule provides a thirty day time period to respond to each ACR, but the policy allows 180 days overall to render the application administratively complete. The latter time constraint is not sanctioned by statute or rule, but is merely an internal policy of the Department. Staff is not required to close the file, however. Although the file had been closed pursuant to this internal procedure, a decision was made by her supervisor Mr. Jannereth to rescind the closure based on continual correspondence and colloquy over an extended period. A response to the fourth ACR was received and the file was then

deemed administratively complete and set for public notice. In Ms. Lederle's opinion, the file was processed according to the administrative rules and the decision to extend the 180-day deadline was discretionary and entirely appropriate.

In determining what information was necessary for the application to be administratively complete she worked with Ms. Fish and Messrs. Hass and Jannereth pursuant to the guidance policy formulated regarding the processing of applications for augmentation wells. (Exhibit R-2(U)). Lastly, she acknowledged, in the event the file had not been reopened, the sole consequence to the applicant would be a requirement of paying another fee.

Mr. Jannereth is Chief of the Lakes, Streams, and Shoreline Section of the LWMD. He acknowledges asking Ms. Lederle to rescind the closure letter. He did so, in that there had been considerable effort and continual activity on the file within every thirty day period between ACRs and that the application was close to being administratively complete. In fact, the application was deemed administratively complete ten days later. In his opinion, this was an occasion where the activity and good faith effort was sufficient to merit setting aside the general policy. Further, if the applicant had been required to pay an additional fee, the application being set for public notice would only have been delayed a few days. He considered this method of proceeding as providing good customer service.

Based on the above, the sole legally binding requirement of the applicant is to respond to an ACR within the 30-day period pursuant to R 281.812 (5) which Permittee did in each instance. Beyond that, the closing of the file or continuing to process it beyond the 180-day period is a discretionary matter of policy within the Permit Consolidation Unit. As indicated, the only consequence in the event of a permanent closing of the file would have been the requirement of an additional application fee and a delay of only a few days. Therefore, in the scheme of things, the manner of processing the application was appropriate and I so find, as a Matter of Fact.

TESTIMONY REGARDING THE EFFICACY OF THE PROJECT PERMITTED

Mr. Parman has been the Drain Commissioner for Van Buren County since April 2006. Shortly after he took office he was approached by the Crooked Lake Association and the Cass County Drain Commissioner regarding interest in an augmentation well due to low lake levels. A petition process was undertaken and signatures of 70 percent of riparians were presented to him in October 2006. Mr. Parman testified the petition is not required, but demonstrated to him that a number of people were interested in the project being pursued. The association had paid some upfront costs and informed him it had set up a special fund for future costs. At that point, he commenced working with Wightman & Associates which had experience with the application process. He also approached the Van Burn County Commission and obtained a resolution supporting the project. Having that, as well as a similar resolution provided by the Cass County Commission, Mr. Parman contacted Peerless-Midwest, an engineering firm that had previously performed a feasibility study for the Round Lake Association and commissioned them to perform a 24 hour pump test on the well to be used.

The application for permit was initially denied, processed through informal review, and ultimately granted during the pendency of the contested case for the reasons detailed and with the limitations outlined below.

Thomas Deneau is a Civil and Environmental Engineer, and President of Wightman & Associates. He has a Bachelor's and Master's degree from Michigan State University and has been in practice for 36 years. His resume was entered as Exhibit P-6. Previous to this project he had been involved in engineering one other augmentation project at Barron Lake near Niles. His firm had also performed a feasibility study for the Round Lake Association and had constructed a sewer system to service all six of the Sister Lakes. Thus, he has considerable familiarity with the area.

Regarding the subject project, his firm was retained to prepare plans and specifications for the physical construction of necessary improvements to connect the augmentation well to the Crooked Lake system, and to prepare and process the application for permit. Initially, it was believed, based on the Barron Lake project, that only the discharge area at the lake needed to be permitted as that was the only activity below the ordinary high water mark. However, pursuant to a guidance document recently formulated (Exhibit I-11) the LWMD considered the entire project, including the well itself, subject to regulation under section 30102(d) as it would enlarge an inland lake. As part of the review process Wightman & Associates was requested to modify the discharge site by moving it farther back from the shore and redesigning it to avoid a wetland in the area. After completion of the project the pump was run for approximately 30 minutes, shut off and winterized.

Mr. Zimont, then an EQA with the LWMD in the Kalamazoo District Office, was assigned to review the application for the LWMD.³ He described his primary duties at the time as reviewing applications for regulated activity on Inland Lakes and Streams, Wetlands, and Great Lakes, as well as responding to complaints of violations.

Specific to this application he was initially concerned with a discrepancy in the legal lake level and, not being a Hydrogeologist, whether the 24 hour pump test and the reports of Peerless-Midwest provided by the applicant were sufficient. From his previous involvement in the Dowagiac River watershed, he questioned whether an accurate ground water divide was being considered. Therefore, he requested a review by the Hydrologic Studies Unit (Exhibit I-34).

Mr. Lesmez's of that unit responded, but failed to assuage Mr. Zimont's concerns over potential adverse impacts to groundwater aquifers in the area as well as Magician Lake. As a consequence, Mr. Zimont conducted a public hearing as well as an

³ Subsequent to his review of this application, he accepted a position with the Department and Natural Resources and Environment, Remediation and Redevelopment Division.

extensive reconnaissance of the involved area in general and the area of the well and discharge. In addition, he observed both Big and Little Crooked Lakes from a kayak and by driving around them. From this he generated an extremely detailed briefing memo (Exhibit I-39). He explained that the length and breadth of his study and documentation was due to the fact Van Buren County was recently added to his area and that the impact was widespread, effecting potentially hundreds of people. He differentiated this from a more typical or routine application of a single homeowner or entity effecting only a single parcel of property. He was impressed with the fact that, although the shorelines were built up, there were few seawalls and that the lakefronts appeared to be meticulously maintained. He also informally discussed the proposal with riparians, and in particular Messrs. Stites and McKernin, who opposed the proposal. In the end he denied the application having determined that the adverse impacts to the public trust and riparian rights would not be minimal and there were feasible and prudent alternatives.

Couching the reasons for denial in terms of the benefits the Association and the VBCDC anticipated from the project he stated in the denial letter.

1. There is a definitional problem with addressing the concern over the loss of swimming beaches absent augmentation. That being whether one considers that to be the area landward of the waters reach or that area where one would wade and swim. In that he considered it to be the former, lower water levels would actually enhance the beach.
2. Concerns over boating hazards. They foresaw greater potential for boating accidents with a lower water level, by their being less surface area and more exposed hazards. Mr. Zimont discounted this in that he considered it to be the responsibility of the boaters to exercise caution under any circumstances.
3. Lower water necessitates longer docks creating an increased hazard. Mr. Zimont considered that to actually be a feasible and prudent alternative as common in inland lakes. In addition, as another alternative dredging could be performed to provide deeper water closer to shore.
4. Lower lake levels were adversely impacting wetlands in the area. He considers fluctuation in lake levels to be beneficial to wetlands.

5. Augmentation resulting in a steady level will decrease shoreline erosion as opposed to fluctuating levels. He did not agree with the proposition as he has observed over the years that where the waters edge is farther from shore wave action is actually dissipated farther from shore resulting in less shoreline erosion.
6. The increase in exposed bottomland will result in an increase in silt or muck, and debris that is aesthetically displeasing. Mr. Zimont considers aesthetics to be subjective and non-dispositive. At any rate, the presence of silt and debris can be handled by removal if one desires to do so.

In addition, Mr. Zimont expressed other concerns militating against approval of the project outlined by bullet points in the denial letter.

1. Potential ground water impacts. There was not sufficient data from the testing performed to ascertain with certainty whether there would be adverse impacts to other lakes in the area such a Magician Lake or wetlands in the area.
2. The Department of Natural Resources (DNR), Fisheries Division expressing its general objection over lake augmentation, preferring to let nature take its course. The division considers variations in lake levels beneficial to fisheries.
3. Riparian rights and feasible and prudent alternatives were also reiterated here. Expanding on the latter, Mr. Zimont expressed that he considered doing nothing as such in addition to those expressed above. He did acknowledge that none of the alternatives suggested would directly address the VBCDC's expressed need to maintain the legal lake level, however.

Regarding events occurring after the denial, Mr. Zimont and others met with the applicant on January 18, 2008, from which he generated a memo entered as Exhibit I-41. There was general discussion over attempting to resolve the fisheries issues and exploring feasible and prudent alternatives. The consensus at that time was that a 72 hour aquifer performance test and installation of additional monitoring wells should be performed to address the groundwater issues.

Mr. Zimont's direct involvement after he transferred to the Remediation and Redevelopment Division was limited to addressing a permit condition assuring that the water from the well was not contaminated, as that fell within his new job function regarding environmental remediation. Beyond that, his only involvement was an occasional conversation with Mr. Jordan regarding the status. He was made aware that the further

groundwater study had been performed, but deferred any analysis or testimony regarding that to Mr. Jordan who took over the file after his departure. He acknowledged that his opinions expressed above could possibly change with submission of additional reports addressing the groundwater drawdown and water quality concerns and if the Fisheries Division withdrew their objection. This is especially true based on the fact his opinions were based, in part, on a lack of information.

A number of Intervenors testified in opposition to issuance of the permit and in support of the initial denial.

Mr. Haley is a riparian on the west end of Little Crooked Lake with 100 feet of frontage. He has resided there since 1990, but has a long standing familiarity with the lake and the area, since his grandparents owned a large farm across the street where he lived for some period of time. During this time of approximately fifty years he has observed the varying level of the lake. When he first bought his current home the water level was what he described as "quite high" and many other riparians were complaining of problems with flooding. However, in time the level receded. Even though he has now lost his sight, he is able to keep track of the level by measuring the level at a fence he has on the shore and by the location of the dock installed each year. He has never had a problem with the fluctuations. When the level is low there is a wider beach allowing youngsters to play volleyball on the sandy beach. When it is up they move to the grass. They merely adjust to the current conditions. He summed up his assessment as basically feeling that "if it ain't broke, don't fix it". To him, the perseverance of the proponents was a needlessly expensive endeavor, the cost of which will be spread to those like him who are on fixed incomes and would be hard pressed to incur it.

Mr. Nosich is a riparian and year-round resident on Big Crooked Lake. He originally owned 110 feet of frontage consisting of two lots which he purchased in 1971. He has since sold one lot to his mother-in-law, leaving him with 55 feet. He has observed a number of lake front owners on the area lakes having to install seawalls in response to the

fluctuating lake levels. He has experienced some loss of grassland over the 40 years he has been there, but has been able to do what is necessary to maintain his property and beach. He too is concerned with the anticipated costs involved in the project and is critical of those such as Tom Neary who has expressed displeasure with the emergence of muck at low levels. He considers exercising due diligence at purchase would have indicated that potential. He feels the project is being foisted upon the entire population due to the desire and benefit of a few. Mr. Nosich communicated his concerns in writing to Mr. Jordan and copied the Cass County Health Department and the Department of Attorney General. These concerns included: potential contamination of his well; liability concerns, impacts on the ecosystem of the lake; and, again, the costs involved.

Mr. Wright is also a riparian on Big Crooked Lake with 68 feet of frontage. He has lived there since 1984. His property is on the northeast shore in the proximity to the existing access site where the well discharge to the lake would occur. When he moved there in 1984 the water level was high and on the rise. In 1987 it had reached a height to the point that water had come into his crawl space under the house. From that high point it began to recede. From conversations with other long standing residents he understands that the lake cycles from high to low in approximate twenty one years, rising for seven, staying high for seven, and then receding for seven. He has experienced no harm to his property as a result of this process. He has a sandy beach with no weeds. As to the muck, while that may occasionally be present it is disbursed by activity on the beach. He has observed muck in areas where no activity occurs. He was asked to sign a petition and indicate whether he was in favor of the project. He indicated he was not, but testified that was changed by someone after the fact. He is concerned with the fact that the discharge may "ruin" the channel through which it would flow. He is also concerned that if the level is raised and there is a major precipitation event, he may experience flooding again.

Edward McKernin is riparian on the northeast shore of Big Crooked Lake, having lived there for thirty one years. As with the others, he has observed the high and low

cycles of the lake. His 130 feet of frontage is protected by a concrete seawall and the water has been over that for about a year and a half. This has resulted in damage to his landscaping from the wave action over the lakeward 10 to 15 feet of his property. His first involvement with the augmentation proposal coincided with his review of the Peerless-Midwest 2005 feasibility study which he interpreted to indicate it would not work. He thought that would be the end of it, but then found out it was still being pursued by the association and the Drain Commissioner. After attending a meeting conducted by the association, he, his son Timothy and Dennis Stites formulated a letter outlining what they perceived were inaccuracies and inconsistencies in the proposal. Basically, the letter reiterated concerns that the project would not work and that all residents would be paying for a useless endeavor. Previous to the denial he and Mr. Stites met twice with Mr. Zimont who provided copies of some of the material from the department file. Mr. McKernan testified he was pleased that the application for permit was denied. When he became aware that a revised permit had been issued he sent a number of e-mails to Mr. Jordan and discussed the matter with Mr. Parman. He and Mr. Stites also met with Mr. Zimont.

Timothy McKernin is a riparian on the north shore of Big Crooked Lake and has lived there since 2004. Previously, he had frequented the area because his parents lived on the lake. He described the lake as unique in that it has contours and elevations. He considers the lake level variations beneficial to the shore and aquatic life. He sees no need for the augmentation. To him, it makes no sense to do so on what is already a healthy system. The expressed purposes of the project recited in the petition circulated eluded him. The public health and welfare, preservation of natural resources, and maintaining property values were already occurring. He was also concerned with the language of the petition that stated that the lake level had varied some three to four feet when his observations indicated a maximum variance of some twenty two inches or less than two feet. He also pointed out that a letter from the association incorrectly stated the legal level is 768 feet. He was led to believe that the lake was drying up, which he does

not believe is the case. His observations indicated that the lake has been at or near its legal level for years. As to the concerns over boating safety and potential damage to props from low water, he attributes any problems to the introduction of high speed ski boats and lack of common sense as opposed to a physical problem with the lake itself. He also agrees that there is no muck problem that cannot be solved by activity. The only area on the lake that consistently has a muck bottom is at the east end near the wetland area. The muck is confined there by a prevailing west wind. He also asserted that there are more wetlands in that area than considered in the application process. Lastly, he is concerned by the fact he has never been given a reliable estimate of the cost of the project.

Mr. Mathia has resided on the northwest shore of Magician Lake which he described as being close to the proposed augmentation well for five years. He became concerned when he learned of the proposed pumping of what he termed "a huge amount" of water from the well impacting both Magician Lake and his residential well. He is of the understanding that both the lake and his well are in the same aquifer as the augmentation well. Mr. Mathia has a degree in physics with a minor in geology from Indiana State University. Therefore, he testified he understands watertables, wells, precipitation and how water moves through the ground. Based on this knowledge, he performed basic calculations factoring the amount of water pumped from the well and the amount of groundwater needed to provide that at the surface to ascertain what affect that that would have on the watertable. First he calculated the total amount of water to be pumped of 225 million gallons into acre feet (the amount of water it takes to cover one acre one foot deep). An acre foot is comprised of 325,000 gallons. Therefore, 225 million gallons computes to 690 acre feet. That water will come from the ground and would need to be replenished. Therefore, one next needs to determine the replenish rate for the area. The average rainfall for southwest Michigan is 42 inches a year. As much as 70 percent of that will not be absorbed, but will run off or be used by plants. Therefore, about 30 percent will soak into the ground, which would mean about 12 inches would go into the ground and

percolate down through the soil. The soil in the area is about 80 percent solids and 20 percent open space. Near the well the table will drop 10 to 20 feet in his estimate and less so as you move away from that immediate area. But the effect will spread, albeit to a lesser extent, approximately a mile. That effect will be created in a three month period, but it will take a year to replenish. Therefore, in his opinion, there will be an effect on Magician Lake since it is near the well site and, as are most lakes, at the water table. In his estimate, if the lake level dropped as much as a foot it would dry up Silver Creek which runs out of it. He testified he relayed this information to Mr. Zimont at the public hearing who was responsive, and later to Lansing, but received no response.

On cross examination, Mr. Mathia admitted his assessment assumed the watertable would be replenished solely by precipitation and that he did not consider recharge from a leaky confined aquifer or from the surrounding subterranean area. He also did not consider the possible existence of a clay barrier between the water table and the aquifer from which the water would be drawn. Lastly, he admitted that the pumping rate and duration would affect the drawdown, but remained concerned relative to a potential prolonged drought reducing or eliminating precipitation recharge which could be further exacerbated by continued or increased agricultural use of the well.

Mr. Stites resides on Big Crooked Lake in the immediate area where it meets Little Crooked Lake and where the eight foot culvert connecting the two exists. The property has been in his family since 1952, and he and his wife have resided there year-around since 2005. He, as the other riparians, has observed the varying lake levels over the years, stating it was never the same from year to year. He relayed the fact that a weir was put in place in 1993 or 1994 to help prevent high water levels. About a year and a half ago, due to high water the weir was lowered to 767 feet due to complaints from some residents of flooding on their property. Mr. Stites testified that at the time of the hearing the level of Big Crooked Lake was up to 768.3 feet or 2.3 feet higher than the set legal level of 766. Therefore, at this point, the level would have to go down some

32 inches before pumping from the augmentation well could be commenced.

In sum, Mr. Stites is against the project because it is not necessary and recirculation will occur. That is, assuming there is not a continuous clay barrier between the upper and lower aquifers, drawing water from the lower will result in the upper leaking down into the lower, thereby lowering the upper aquifer which includes the impacted lakes. He believes the initial feasibility study performed at the behest of the Magician Lake Association militates against the project even though it was general in nature and addressed a proposed well in a different area. In this assessment, he assumes that soil conditions would be uniform throughout the general area. He also is of the opinion that a higher maintained lake level will result in larger boats on the lake which will increase wave action resulting in increased erosion to the point that he may have to install a seawall.

Lastly, he is concerned with the quality of the Tritium studies performed leading up to the issuance of the revised permit in that they contain what he perceives as inconsistencies. In addition they did not fully comply with promised modalities, such as only performing two as opposed to three planned cross sections.

Lon Cooper provided expert testimony on Intervenors' behalf. He is a licensed professional engineer in multiple states and is employed as a geologic engineer and senior project manager with Lakeshore Environmental in Grand Haven. His resume was entered as Exhibit I-83. Most of Mr. Cooper's work involves consulting with food producers relative to their groundwater discharge permits and wastewater treatment systems. He has a BS in geology from the University of Cincinnati and a MS in geologic engineering from the Colorado School of Mines. He is currently completing a PhD in geology at Michigan State University. He was qualified as an expert in the field of professional engineering and hydrology.

Initially, he was asked to review the 24 hour pump test performed by Peerless-Midwest in 2006 and the Tritium hydrogeologic study from 2008. He was specifically asked to look for discrepancies. He also reviewed numerous other documents

and obtained over 100 additional well logs from the Department and Natural Resources and Environment website. From his review of the numerous well logs, he noticed vast differences in the materials recorded, even in wells drilled in close proximity to each other. This led him to the conclusion that the geology of the area was not harmonious and that there was little likelihood of a continuous clay barrier throughout the area. He also determined that Big and Little Crooked Lakes were connected by a culvert and that Round Lake was close enough to be hydraulically connected through the ground. He also reviewed well logs in the area of Magician, Dewey, and Cable Lakes. He did this due to the fact the Tritium report stated there were two aquifers separated by a clay barrier, while his review of well logs indicated the presence of discontinuous clay lenses. He also generated his own cross sections. From this and his review of some 400 well logs, he concluded there were intermittent clay layers or lenses which vary in depth, size, and thickness which are typical of the geology of southern Michigan and glacial deposition in general. Therefore, he concluded the aquifer from which the water would be drawn by the augmentation well was unconfined. This means that the upper aquifer would leach down into the lower and recharge that reducing the effectiveness of the plan in that some of that water would come from the lakes involved. His next step was to perform a groundwater flow model or a mathematical estimate of what the flow would be when certain things are performed, such as activating the augmentation well. He used the Feenstra/Tritium numbers and ran them through a computer model including an expanded area of approximately 16 square miles, which he agreed could be characterized as a regional model.

Having come to the conclusion that there was an unconfined aquifer from which the augmentation well would draw, Mr. Cooper then reviewed data from both the 24 and 72 hour pump tests. Utilizing a methodology developed by two U.S.G.S. Hydrogeologists, Cooper and Jacob he calculated the recharge boundary to be some 1200 feet which would put Big Crooked Lake within it. That being the case, the effectiveness of the augmentation

plan is put in question due to the fact the lake may be drawn down to some extent to recharge the aquifer, resulting in less net augmentation. He estimated that as much as 25 percent of the water to recharge the aquifer might come from Crooked Lakes. Therefore, the augmentation well would be 25 percent less efficient. His model indicated that would draw out the period it would take to raise the level of Big Crooked Lake one-foot from 30 to 60 days to 90 to 120 days. In his opinion there may also be some draw down from Magician Lake to the possible extent of one quarter of an inch, even given the fact he attributed a leakage rate some 17 times higher than the other surrounding lakes.

Mr. Feenstra provided expert testimony in support of the project. He is the owner of Tritium, Incorporated, a hydrogeologic consulting firm. He has a bachelor's degree in geology from Grand Valley State University and has completed master's studies at the University of Wisconsin-Milwaukee. Previous to his current position he was employed by Peerless-Midwest which he described as primarily a water well contractor, typically working with high capacity wells. While there he was involved in the feasibility study entered as Exhibit I-6 performed for the Round Lake Association. After describing the methods used and the components of the report, he recited the conclusion that, based on the work done addressing the general area, the proposed augmentation well in the Round Lake area did not appear to be feasible, although more site specific studies could alter that assessment. Mr. Feenstra was not involved in the 24 hour pump test later performed by Peerless-Midwest as he was no longer employed there. He was subsequently asked to aid in further testing through his firm Tritium. Working in conjunction with the DEQ they installed two observation wells in proximity to the proposed augmentation well in order to obtain a better picture of drawdown, observation wells were not utilized in the 24 hour test. Mr. Feenstra indicated that such wells are usually placed a distance from two to four times the thickness of the aquifer, in this case 400 feet from the irrigation well. Although the actual drilling of the wells was subcontracted, Mr. Feenstra was present and personally observed the sediment samples. These indicated clay layers in both the observation wells

and the irrigation well with similar lithology otherwise. This indicated to him that the aquifer was confined as being below a consistent clay barrier above it, preventing downward movement of any groundwater from above.

They next installed staff gauges in the wetland areas and Big Crooked Lake. They also installed equipment to monitor six existing residential wells in the area. After waiting out a major precipitation event which would skew the test, they commenced pumping using the existing equipment at the irrigation well. Although referred to as a 72 hour test, it actually lasted some five days in order to monitor both the drawdown and recovery periods. Considering the amount of drawdown in the immediate area of the irrigation well as well as the static level of the aquifer, the drawdown did not reach the clay barrier at 70 feet, indicating to him conclusively that they were dealing with a confined aquifer.

Mr. Feenstra also reviewed the modeling performed by Mr. Cooper. Initially, in performing a sensitivity analysis, he discovered an error in scaling the 16 square mile study area. Mr. Cooper later acknowledged this error. Mr. Feenstra then created a new model properly scaled from coordinates on an aerial photograph leaving lake boundaries and other elements as they were in Mr. Cooper's model.

Secondly, Mr. Feenstra pointed out that the Cooper model limited recharge to that water coming from Dewey Lake and underestimated the recharge from precipitation. Most importantly, the Cooper model was performed assuming an unconfined aquifer rising to the level of the bottoms of the Crooked Lakes. Third, he reconfigured the extent of the recharge boundary to be approximately 900 feet as opposed to 1200 found by Mr. Cooper. In that Big Crooked Lake is some 1200 feet from the augmentation well, Mr. Feenstra's calculation would place the recharge boundary 300 feet from the lake.

In sum, Mr. Feenstra was critical of Mr. Cooper's work in a number of respects. The acknowledged scaling error cascades into a number of other problems. First the groundwater flux (rate of flow) calculations based on the model would also be incorrect. For example, Mr. Cooper's estimate of a quarter inch drop in Magician Lake would be

reduced when a proper scale is employed as the lake would be farther from the well. He also noted a lack of calibration to known water levels and the fact that obvious sources of recharge were ignored. Lastly, Mr. Feenstra does not consider the Cooper study adequate to rule out a confined aquifer.

Mr. Jordan is the LWMD District Supervisor for the Kalamazoo District and is the individual that made the ultimate decision to issue the permit. After the initial denial, he became involved in an informal appeal. Previous to that time, his involvement was limited to some discussion with Mr. Zimont and reviewing the denial letter which he testified he generally agreed with at the time. He described the informal review as a process where the denied applicant may appeal to the appropriate district supervisor to explore a resolution. After conducting the informal review and then having essentially taken over the file from Mr. Zimont, who had left the division, Mr. Jordan ultimately concluded the project would be compliant with Part 301. In particular, he found no adverse impacts to the public trust or riparian rights and opined those considerations would, in fact, be enhanced. Nor did he perceive any adverse impacts to the enumerated uses of the waters of the lake or those that flow from or into it. He also did not believe a feasible and prudent alternative was available. As to the latter, none proposed, i.e. doing nothing and letting the lake level fluctuate, longer docks or dredging, would not meet the project purpose of maintaining the established legal lake level. So far as the existing dam, Mr. Jordan testified that was effective in maintaining a lake level as opposed to enhancing the level since not much surface water normally enters the lake. These determinations were made despite the fact that Mr. Zimont had denied the application based on four basic considerations: groundwater impacts; objection from the Fisheries Division; adverse impacts on riparian rights, and the existence of feasible and prudent alternatives.

Mr. Jordan's determinations were based on considerable additional information submitted by the applicant. First, he requested and the VBCDC provided a wetland delineation in the area of the discharge point (Exhibit R-7). From that it was determined

that if the area delineated as wetland was avoided (which the plans indicated would be), there would be no wetland impacts and, therefore, no need for a Part 303, Wetlands Protection, of the NREPA permit.

Regarding groundwater impacts, the third hydrogeological study in the nature of a 72 hour pump test testified to by Mr. Feenstra was submitted and referred to the hydrologic studies unit for review. The result of that review was conveyed to Mr. Jordan (Exhibit R-8). That report recommended that if the permit were issued a pump rate not greater than 800 gallons per minute be made a condition. This would avoid extending the cone of depression further into Big Crooked Lake which would increase the water being recirculated. That limit would also serve to protect any wetlands. Therefore, any significant adverse impacts to adjacent lakes and wetlands would be avoided.

The Fisheries Division objections were also addressed by further testing suggested by that division as well as the Water Bureau which determined that water from the well would have no adverse impact to the Lakes' water quality or temperature. Even though some parameters were higher in the well water than the water of Big Crooked Lake, they were still well within published surface water quality standards. Specific to concerns over phosphorus and mercury, testing showed very low levels of phosphorus and mercury to be at a non-detect level (Exhibit R-11 and 12). As to potential lowering of dissolved oxygen, the Water Bureau suggested the outfall be constructed to employ a common method of cascading the discharge water over rock rip rap to aerate it previous to it being introduced into the lake. This was made a permit condition and Mr. Jordan observed it in place after the outlet was constructed. Although it was thought that the amount of water as limited to 800 gallons per minute would not stir up and move sediment in the discharge channel an additional permit condition was imposed requiring that if it did, the problem would have to be corrected.

Although Mr. Jordan is aware that the Fisheries Division is philosophically opposed to augmentation or artificial control of lake levels, he had been informed that, in the

absence of specific adverse impacts, such as were addressed here, it no longer opposed such in principle. In essence, they now recognize the reality of legal lake levels and the obligations imposed with them. Lastly, Mr. Cooper's assessment of a potential lowering of Magician Lake by one quarter of an inch would not change Mr. Jordan's decision to issue the permit as he considers that a minimal impact.

Mr. Lesmez has been employed as a hydrologist by the Hydraulic Studies Unit, of the LWMD for some 20 years and reviewed the hydrogeo reports prepared by Peerless and Tritium. His resume was entered as Exhibit R-16. He holds a bachelor's degree from Andes University in Columbia and masters and PhD in civil engineering from Michigan State University. He was qualified as an expert in hydrogeology.

Mr. Lesmez recommended that the 72 hour pump test be conducted, as he did not feel a 24 hour test was sufficient. While that was performed by Tritium in October 2008 still had some concerns with that study which he expressed to Mr. Jordan in an interoffice communication entered as Exhibit 62. Although he could not recall the specific response to each of the eight concerns by Tritium, he considered the concerns satisfied by its responses. His recommendation that pumping be limited to 800 gallons a minute was based on the fact that was the rate at which the test was performed and showed no effects on the aquifer or the surrounding lakes. Mr. Lesmez is also of the opinion that the pump test is a better way to evaluate potential impacts than modeling as performed by Mr. Cooper.

Intervenors rely heavily on the initial assessment of Mr. Zimont and contend that there is no evidence on the record to refute his findings. They are also critical of Mr. Jordan for, as they put it, "caving in" in issuing the revised permit. However, the record as recited above belies those assertions. First, considerable additional testing was performed which addressed most, if not all of Mr. Zimont's concerns. While there appears to have been no written retraction of the Fisheries Division concerns, Mr. Jordan testified he was advised orally that its concerns were satisfactorily resolved. The issue relative to

the temperature of the water to be introduced was attributable to a simple error of reporting it in Celsius as opposed to Fahrenheit. The potential of introduction of chemical constituents in the well water was also resolved through testing. Mr. Jordan also testified that he considered the fact that many of the issues related to maintaining the lake levels would have been addressed in the Circuit Court hearing at the time the legal level was set.

In addition, Mr. Lesmez testified that the subsequent testing satisfied his initial concerns and, although he could not recall the specific response to his secondary concerns regarding the lack of some anticipated modalities, he was ultimately satisfied the project would not adversely affect any of the lakes or aquifers.

SUMMARY AND FINDINGS

Two experts testified in support of Intervenor's position. The first was Mr. Mathia whose analysis was limited to factoring the amount of water to be pumped from the well with the amount of recharge that would occur through precipitation recharge. He frankly admitted that he did not consider groundwater recharge over and above precipitation and that a different rate of or shorter duration would and duration would effect his analysis. Similarly, Mr. Cooper's analysis, although more thorough, involving a review of literally hundreds of well logs, was admittedly not calibrated and based on a scaling error which resulted in a cascade of skewed data, putting into question, among other things, his assessment that the recharge boundary may be some 1200 feet from the augmentation well and that, therefore, as much as twenty five percent of the recharge water might come from the Crooked Lakes. Mr. Cooper also admitted that his study could be properly characterized as regional as it encompassed an area of some 16 square miles. This renders is conclusion that the aquifer in the immediate area of the project is unconfined questionable as well.

On the other hand, Mr. Feenstra conducted the so called 72 hour pump test, including the installation and monitoring of close-by observation wells in reaching his conclusion that the recharge boundary would be some 25 percent smaller (900 as opposed to 1200 feet) resulting in much less or no impact to the effected lakes. His analysis also credibly concluded that a confined aquifer is present. Therefore, based on these considerations, I find, as a Matter of Fact, that the permitted augmentation procedure will be effective in accomplishing the goal of maintaining the lake levels as mandated. It is also important to remember that the augmentation well will only be used it becomes necessary. That, in conjunction with the existing weir or dam used to reduce the level at times of high water will serve to enable the VBCDC to fulfill its legal obligation to maintain the legal lake level, and I so find as a Matter of Fact.

The testimony of the Intervenors has been summarized above. They would prefer that the lakes be left to natures course and have experienced no problems with lake fluctuations that they could not deal with. There was also concern expressed over costs and the perception that the project was instituted by and would benefit less than all the riparian owners. However, the record indicates that some seventy percent of the effected owners signed a petition in support of the project. Intervenors argue that a number of those who signed the petition later regretted doing so and that much of the information disseminated at the time of the petition drive was erroneous or misleading. As a consequence, they contend the project was not supported as heartily as indicated. While, obviously, the decision to permit the project is not dictated by a majority vote as is an election, this would indicate that more than "a few" of the owners are in favor as expressed by some of the Intervenors. Mr. Parman also correctly pointed out that the petition was not necessary or controlling of his fulfilling his duty to maintain the lake level under the Circuit Court order.

Intervenors have also testified that the project may have impacts on water wells and wetlands. As previously found, further studies performed after the initial denial alleviated

those concerns. Regarding concerns over cost, that consideration is not a criterion addressed under the regulatory scheme of Part 301. As to concerns of erosion, it is hard to accept the proposition that a steady lake level would be more likely to potentiate erosion, then a dynamic rise and fall of the lake level.

Intervenors characterize the LWMD's ultimate decision to issue the modified permits as "caving in to pressure" without proper consideration of the adverse effects or alternatives. However, the record belies this. Mr. Jordon addressed the concerns initially expressed by Mr. Zimont and sister agencies in a thorough and professional manner, consulting other experts when he felt their input was needed.

PART 301 ANALYSIS

Section 30106 of Part 301, MCL 324.30106; MSA 13A.30106 provides the prerequisites to issuing a permit.

The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights.

The public trust is defined under R 281.811 (g) as meaning all of the following:

- (i) The paramount right of the public to navigate and fish in all inland lakes and streams that are navigable.
- (ii) The perpetual duty of the state to preserve and protect the public's right to navigate and fish in all inland lakes and streams that are navigable.
- (iii) The paramount concern of the public and the protection of air, water, and other natural resources of this state against pollution, impairment, and destruction.

Due to the size of the lakes involved and the uses alluded to in the testimony recited above, it may be fairly assumed that the affected lakes are navigable under the test enunciated in *Bott v. Natural Resources Commission*, 415 Mich 45; 327 NW2d 838 (1982). Therefore, they are impressed with the public trust. However, under the holding in *Illinois Central Railroad Company v. Illinois*, 146 US 387, 13 S Ct 110 (1892), there must be a substantial impact to the public trust to deny a permit on that basis alone. Based on

this record, I find, as a Matter of Fact, there is no evidence that there will be a substantial adverse impact to the public trust as defined in R 281.811(g) (i) and (ii); that is, navigation and fishing will not be affected. There may, in fact, be an enhancement of those aspects by maintaining the legal level. I further find, as a Matter of Fact, that there will be no pollution, impairment, or destruction of natural resources in fulfillment of the mandate of R 281.811 (g)(iii). This finding is based credible evidence that there will be no significant draw down or recirculation from the lakes or any appreciable adverse effects on the water table.

Generally speaking, riparian owners on any natural water body have the right to access boatable waters, to moor there, and to use the water for domestic purposes. *Hilt v Weber*, 252 Mich 198, 233 NW2d 159 (1930). This common law doctrine is reflected in the rules promulgated under Part 301 under R 281.811 (2) which states:

“Riparian rights” as defined in the act, means all the rights accruing to the owners of riparian property, including the following rights, subject to the public trust:

- (a) Access to navigable waters.
- (b) Dockage to boatable waters, known as wharfage.
- (c) Use of water for general purposes, such as bathing and domestic use.
- (d) Title to natural accretions.

Again, as with the public trust, maintaining or controlling the water level will not adversely impact access to navigable waters or dockage and may well render those rights more dependable. Use of the water for domestic purposes would be unaffected as well.

The next analysis involves the specific effects of the permitted activity on the criteria contained in section 30106:

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.

There is no contention or evidence on this record as to any possible effects on uses of local government, agriculture, or commerce and industry. Therefore, I find there will be none, as a Matter of Fact.

Recreation so far as boating is concerned closely parallels navigation which has been discussed above. Other recreational uses such as swimming would be unaffected or even enhanced by a maintained level. Regarding fish, while the Fisheries Division initially expressed concerns having a preference to allowing natural fluctuations, in the absence of any specific adverse impacts it withdrew its objection. Mr. Jordan testified the LWMD did not receive any comments regarding wildlife from the DNR other than the fact there were be no impacts to threatened or endangered species. Intervenors presented no evidence to the contrary. Therefore, I find, as a Matter of Fact, there will be no adverse effects on fish or wildlife.

Aesthetics is a subjective criterion. The disparity between those desiring to maintain the legal lake level and those who would prefer to let nature take its course exemplifies this. Obviously, the VBCDC by obtaining the subject permit to facilitate raising the level, if necessary, to maintain the legal level is predicated upon its duty to do so and not for aesthetic reasons. Therefore, aesthetics, in addition to being inherently subjective, is non-dispositive of this case, in and of itself.

Finally, section 30106 prohibits the Department from issuing a permit, "if the proposed project or structure will unlawfully impair or destroy any of the water of other natural resources of the state." MCL 324.30106; MSA.30106. To implement this Part of section 30106, the Department promulgated Administrative Rule 4, 2000 MR 8, R 281.814.

In each application for a permit, all existing and potential adverse environmental effects shall be determined and the department shall not issue a permit unless the department determines both of the following:

- (a) That the adverse impacts to the public trust, riparian rights, and the environment will be minimal.

(b) That a feasible and prudent alternative is not available.

Subsection (a) of the Rule requires adverse impacts of the proposed project to the public trust, riparian rights, and the environment must be minimal. It has been found above that neither the public trust, riparian rights, nor the environment will be substantially adversely affected. Therefore, ipso facto, impacts, if any, are minimal.

Subsection (b) requires a finding that no feasible and prudent alternative exists. Feasible alternative analysis typically involves exploration of methods or locations that may lessen impacts, while considering the basic project purpose. None of the proposed alternatives fulfill the project purpose of maintaining the legal level. Doing nothing and allowing the lakes to rise and fall as dictated by nature, dredging or longer docks obviously will not fulfill that purpose. Therefore, I find, as a Matter of Fact, there are no feasible and prudent alternatives.

CONCLUSIONS OF LAW

Based on the Findings of Fact, I conclude, as a Matter of Law:

1. I conclude, as a Matter of Law, that the permitted activity is regulated under Part 301 for the reasons stated in the Findings of Fact. Therefore, a permit is required for the activity.
2. I conclude, as a Matter of Law, the application for a permit was filed and processed correctly and in compliance with Part 13, of the NREPA; MCL 324.1301, *et seq.*
3. I conclude, as a Matter of Law, Intervenor's are aggrieved parties and proper Petitioners in this matter. MCL 324.30110(2).
4. I conclude, as a Matter of Law, that the permitted activity will not adversely affect the public trust or riparian rights or the enumerated uses under the criteria of § 30106 of Part 301.
5. I conclude, as a Matter of Law, the permitted activity is consistent with the criteria contained in 2000 MR 8, R281.814.

PROPOSAL FOR DECISION

Based on the above Findings of Fact and Conclusions of Law, it is proposed that a Final Determination and Order be issued determining that the Van Buren County Drain Commission is entitled to the permit as issued.

EXCEPTIONS

The parties have until **October 8, 2010**, to file written Exceptions to this Proposal for Decision. MCL 24.281(1). Director Rebecca Humphries will issue the Final Determination and Order in this case after the filing date. The filings shall be sent to: Richard A. Patterson, State Office of Administrative Hearings and Rules, Constitution Hall, South Tower Atrium, 525 West Allegan Street, P.O. Box 30473, Lansing, Michigan 48909-7973.

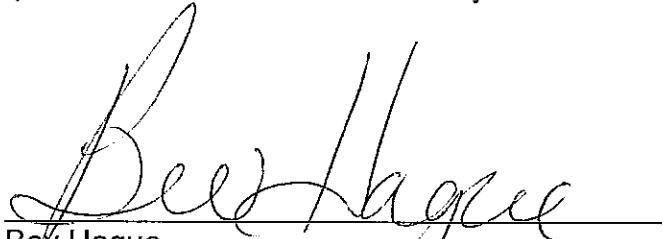
Dated: September 14, 2010



Richard A. Patterson
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by first class mail and/or certified mail, at their respective addresses as disclosed by the file on the 14th day of September, 2010.



Bev Hague
State Office of Administrative Hearings and Rules

Mr. Mark A. Westrate
Westrate & Thomas
P.O. Box 359
Dowagiac, Michigan 49047-0359

Mr. Daniel Bock
Department of Attorney General
P.O. Box 30755
Lansing, Michigan 48909

Mr. Steven F. Stapleton
Mr. Clifford H. Bloom
Law, Weathers & Richardson
800 Bridgewater Place
333 Bridge Street
Grand Rapids, Michigan 49504-5320

Dr. William C. Larsen
Department of Natural Resources
and Environment
Land and Water Management Division
P.O. Box 30458
Lansing, Michigan 48909-7958