

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

In the matter of:

Docket No.: 20-011750

Petition of James A. Ham

**Parts: 301, Inland Lakes and Streams
303, Wetlands Protection**

Agency No.: HNT-875Y-758D7

**Agency: Department of Environment,
Great Lakes, and Energy**

Case Type: Water Resources Division

**Issued and entered
this 10th day of May 2021
by Daniel L. Pulter
Administrative Law Judge**

FINAL DECISION AND ORDER

This contested case concerns an Application dated October 5, 2019, submitted by James A. Ham for a permit under Part 301, Inland Lakes and Streams, and Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.30101, *et seq.*; MCL 324.30301, *et seq.* The Water Resources Division (WRD) of the Department of Environment, Great Lakes, and Energy (EGLE) denied the Application by a letter dated June 18, 2020. That agency action was challenged by Mr. Ham by filing a Petition for Contested Case Hearing on July 15, 2020.

JURISDICTION

Parts 301 and 303 grant the right to a contested case hearing to a person “aggrieved by any action ... of the department...” MCL 324.30110(2); MCL 324.30319(2). Mr. Ham claims he was aggrieved by the denial of his Application on June 18, 2020. Consistent with the foregoing authorities, a contested case hearing was conducted on November 4, 2020. The hearing was conducted under the applicable provisions of the Administrative Procedures Act (APA), 1969 PA 306, as amended. MCL 24.201, *et seq.* Due to COVID-19, the hearing was conducted via videoconference. The record was closed at the conclusion of the hearing.

PROPERTY RIGHTS PRESERVATION ACT

Pursuant to the Property Rights Preservation Act, 1996 PA 101, MCL 24.421, *et seq.*, the undersigned, in formulating this Final Decision and Order, reviewed the Takings Assessment Guidelines and considered the issue of whether this governmental action equates to a constitutional taking of property. Const 1963, art 10 § 2.

PARTIES

Mr. Ham appeared *in propria persona* and offered testimony on his own behalf. Through this witness, Mr. Ham entered Exhibit P-1.¹

The WRD, which administers Parts 301 and 303, offered the testimony of Robin Schmidt, the employee who reviewed the Application; and Susan Conradson, the District Floodplain Engineer for the Cadillac Office. Through these witnesses, the WRD entered Exhibits R-1 to R-5.

FINDINGS OF FACT

Mr. Ham is the owner of property in the city of Northport, Leelanau South Township, Leelanau County, Michigan. Exhibit R-2 at pp 18, 28. On October 5, 2019, Mr. Ham filed an Application for a permit under Parts 301 and 303. Exhibit R-2 at pp 1, 27-36. The Application proposed to install a 20-foot-long 18-inch diameter culvert on an unnamed stream on Mr. Ham's property, along with the placement of fill in a 20-foot x 16-foot section of the stream and wetland to create a crossing. Tr 8. The Application also proposes to place a total of approximately 6 cubic yards of riprap along both edges of the fill to improve an existing plank stream crossing. Tr 8. The anticipated cost of the project contemplated in the Application is \$2,500 to \$3,000. Tr 38. The Application was considered administratively complete on November 4, 2019. Tr 8. A site inspection on the property was conducted by the WRD on November 20, 2019. Tr 8. Mr. Ham's contractor, Greg Fredrickson, was present for the site inspection. Tr 8-9.

The site inspection disclosed that the proposed stream crossing is located on the west of Mr. Ham's property. Exhibit R-2 at p 35. Currently, it consists of two pairs of 2-foot x 10-foot wooden planks that were cleated together and laid across the stream. Tr 26, 32. It is to allow Mr. Ham to cross the stream with his tractor. Tr 30. Mr. Ham utilizes this stream crossing only a few times each year. Tr 35. The stream channel is braided with multiple channels. Tr 9. According to Ms. Schmidt, there are two approximately 2-foot-

¹ The Exhibits in this contested case have been submitted electronically in portable document format (PDF). All references to exhibit page numbers are to the PDF page number of the electronic Exhibit, not the page number at the bottom of the exhibit.

wide channels at the crossing.² Tr 9. It is a primary stream, collecting natural inputs such as leaf matter and aquatic insects, then sending that material downstream. Tr 13. At this location, there is a 6-foot-wide wetland fringe on the west side of the stream, and a 3-foot-wide wetland fringe on the east side. Tr 9. The stream is less than 6-inches deep. Tr 9. The current plank crossing is creating a dam-like effect on the stream. Tr 26. Head-cutting was observed upstream of the planks, and there is a large deposit of sediment downstream of the planks. Tr 26. The stream does not restore itself until approximately 25 feet downstream of the planks. Tr 26.

At the site inspection, the “bankfull” of the stream was determined. Tr 10. The bankfull is the width of the stream channel that carries the flow of water before the flow overtops the banks into the floodplain. Tr 10. The WRD began using the bankfull to determine culvert size around 2011. Tr 10. By spanning bankfull, a culvert is able to pass flood flows without restriction, lessening the chances of a crossing failure. Tr 10. The proposed 18-inch culvert does not span bankfull. Tr 10. A proposed project that does not span bankfull cannot be processed as a minor project and needs to be publicly noticed as an individual permit. Tr 11.

A public notice was issued on December 12, 2019. Tr 11. On January 31, 2020, the WRD proposed to issue a permit providing for dredging approximately one cubic yard of material from the stream and wetland to recess a new 20-foot x 36-inch culvert 0.4 feet into the stream channel. Tr 11; Exhibit R-2 at pp 11-22. The proposed permit would also allow for the placement of 24 cubic yards of fill material to create a 20-foot x 16-foot x 3-foot-high driveway over the stream and through the wetland, and to place six cubic yards of riprap at the ends of the culvert along the driveway. *Id.* According to Mr. Ham, this proposed permit would yield a 16-foot-wide vehicle crossing which is 4.5 feet above grade. Tr 36. The anticipated cost of the project as outlined in the proposed permit is \$15,000. Tr 38. Mr. Ham was requested to respond to this proposed permit by March 1, 2020. *Id.* On April 28, 2020, the WRD was notified that Mr. Ham had filed a Petition for Contested Case Hearing. Tr 12. An application denial letter was issued by the WRD on June 18, 2020. Tr 12; Exhibit R-2 at pp 1-2.

PART 301, INLAND LAKES AND STREAMS

I. Jurisdiction

Under Part 301, the definition of “inland lake or stream” is construed to mean “a river, stream, or creek ... or any other body of water that has definite banks, a bed, and visible evidence of continued flow....” MCL 324.30101(ii). Section 30102 provides that a permit is required when a party places fill or a structure on bottomland. MCL 324.30102(1)(a) & (b). Bottomland is defined as “the land area of an inland lake or stream that lies below

² Mr. Ham testified that old planks at the crossing caused the stream to split into two smaller streams, but when these planks are removed after the crossing is completed, he believes that the stream should revert to a width of 30 inches. Tr 32.

the ordinary high-water mark....” MCL 324.30101(a). The revised application contemplates the dredging and filling of bottomlands and placing a structure in a stream. Tr 8. Therefore, I find, as a Matter of Fact, that the proposed project implicates activities covered by Part 301 which require a permit from EGLE. MCL 324.30102(1)(a) & (b). Accordingly, the proposed activity will be reviewed under the Part 301 permitting standards.

II. Section 30106

The issuance of a permit under Part 301 is governed by the strictures of § 30106. MCL 324.30106. Section 30106 first provides that the WRD shall issue a permit if it finds that the project will not adversely affect the public trust or riparian rights. *Id.* In making this determination, the WRD is also obligated to consider the possible effects of the proposed activity upon the resource, including uses of the resource for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. *Id.* Finally, the WRD is to consider the environmental impacts of the proposed project. *Id.*; R 281.811(1)(f). Each of these factors will be addressed *infra*.

A. Public Trust

Under the common law, the public trust ensures the public’s right to navigate, fish, and fowl on the waters of the State. *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926). The “public-trust doctrine applies only to *navigable* waters and not to all waters of the State.” *Bott v Natural Resources Comm’n*, 415 Mich 45, 71; 327 NW2d 838 (1982) (emphasis in original). In her testimony, Ms. Schmidt opined that the proposed project would adversely affect the public trust. Tr 13. However, Ms. Schmidt testified that the stream is less than 6-inches deep. Tr 9. There was no testimony in the record that this stream is navigable. From the photographs contained in the record, it does not appear that this stream is navigable. See, e.g., Exhibit R-2 at pp 48-52. Based on the record, I am unable to find that this stream is impressed with the public trust. Therefore, I find, as a Matter of Fact, that the proposed project will not adversely affect the public trust.

1. R 281.811(1)(f)

The Administrative Rules promulgated under Part 301 define “public trust” as follows:

- (i) The paramount right of the public to navigate and fish in all lakes and streams that are navigable.
- (ii) The perpetual duty of a 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 the air, water, and other natural resources of this state against pollution, impairment, and destruction.
- (iv) The duty of the state to protect the air, water, and other natural resources of this state against pollution, impairment, or destruction.

R 281.811(1)(f). Items (i) and (ii) of this Administrative Rule track the public trust standards under common law, as discussed *supra*, while the last two items implicate environmental considerations, which are addressed under the applicable criterion of § 30106 and R 281.814, addressed *infra*.

B. Riparian Rights

The second criterion to be considered under § 30106 is a determination that the project will not adversely affect riparian rights. MCL 324.30106. The phrase “riparian rights” is defined in Part 301 as “those rights which are associated with the ownership of the bank or shore of an inland lake or stream.” MCL 324.30101(s). Under common law, riparian rights include the right to take water for domestic use and agricultural use. *Stupak-Thrall v United States*, 89 F3d 1269, 1297 (6th Cir 1996). The rights of a riparian owner are also limited by the public trust. *Collins v Gerhardt*, *supra*. See also R 281.811(2).

There was no evidence presented in this case that the proposed project will adversely affect a downstream owner’s riparian rights. But see *Aesthetics*, *infra*. Therefore, I find, as a Matter of Fact, that the proposed project will not adversely affect riparian rights.

C. Recreation

There was no evidence offered that the proposed project will adversely affect recreation. Therefore, I find, as a Matter of Fact, that it will not adversely affect uses of the resource for recreation.

D. Fish and Wildlife

Initially, Ms. Schmidt testified that the proposed project would have no adverse impacts to fish. Tr 13. Therefore, I find, as a Matter of Fact, that the proposed project will not adversely affect fish. However, Ms. Schmidt’s primary concern with the project is that it will adversely affect wildlife and the environment. Tr 13. Specifically, she testified that

the stream is a primary stream³ that collects natural inputs such as leaf matter and aquatic insects, then sends that material downstream. Tr 13. The current plank crossing allows for the stream flow through two main channels, approximately a total of 4-foot-wide (2-foot-wide each), and over the planks and into the wetland during high flow periods, a width of approximately 15 feet. Tr 14. The project proposed in the Application contemplates reducing the flow area to 18 inches, which would result in a reduction of 62% of the stream flow width. Tr 14. The reduction in stream flow will cause changes to stream habitat by scouring the downstream channel and blocking the transfer of natural inputs downstream of the crossing due to the restriction of flow. Tr 13. The loss of this stream process will impair the stream function and habitat downstream of the crossing for wildlife, including aquatic insects, birds, and mammals. Tr 13. Mr. Ham's only challenge to such testimony is that he contends that the stream width is 30 inches at the proposed crossing. Tr 41. Based on this assertion, the admitted reduction in flow of the stream would be 40% (flow reduced from 30 inches to 18 inches). Because the deleterious effects of reducing flow would occur based on Mr. Ham's testimony, I find, as a Matter of Fact, that the proposed project will adversely affect wildlife and will adversely affect the environment.

E. Aesthetics

Ms. Schmidt testified that the proposed project would adversely affect aesthetics. Tr 13. As a general principal under Part 301, "[a]esthetics is inherently a subjective criterion." *Petition of Clifford T. Riordan, Jr.*, 2011 WL 983190, at *7 (Mich.Dept.Nat.Res.). However, Ms. Schmidt testified that the stream on Mr. Ham's property continues downstream to the northwest. Tr 13. She further stated that these neighboring properties benefit from the unimpacted stream flows allowing for the aesthetic of the stream to continue on their properties. Tr 13. The implication here is that the impacted stream flow caused by the proposed 18-inch culvert would adversely affect the aesthetic of the stream on the downstream properties. This testimony was not disputed in the record. Therefore, I find, as a Matter of Fact, the placement of an 18-inch culvert within the stream will adversely affect the aesthetics of the stream on the downstream neighbors.

F. Local Government, Agriculture, Industry and Commerce

There is no contention that the proposed project will cause any impact, adverse or otherwise, on local government, agriculture, industry and commerce. Tr 13. Therefore, I find, as a Matter of Fact, that the proposed project will not cause any impact on uses of the resource for local government, agriculture, industry and commerce.

³ On cross-examination, Ms. Schmidt defined a primary stream as the first stream that forms in a system in the watershed near the headwaters, and it is the one that collects inputs from surrounding habitat such as leaf matter and aquatic insects to transport that matter downstream. Tr 20.

G. Environmental Impacts

See the Fish and Wildlife section, *supra*.

III. R 281.814

In addition to the statutory standards addressed *supra*, Rule 4 of the Administrative Rules also provides the following:

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.

R 281.814. The effects on the public trust, riparian rights and the environment have been discussed, *supra*. R 281.814(a).

With respect to feasible and prudent alternatives, the Court of Appeals has defined a “feasible” alternative as one that is “capable of being put into effect or accomplished...” *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 466; 554 NW2d 328 (1996). On the other hand, a “prudent” alternative is one that is “exercising sound judgment.” *Id.* In undertaking the alternatives analysis, it must be noted that “an examination of alternatives that avoid or limit the impact to a resource is a hallmark of Michigan environmental law.” *Petition of Dune Harbor Estates, LLC*, 2005 WL 3451406, at *5 n 8 (Mich.Dept.Nat.Res.). In this case, the WRD proposed to issue a permit with a 36-inch culvert as a feasible and prudent alternative. Exhibit R-2 at pp 11-22. According to Ms. Schmidt, this culvert size would cause only a 25% reduction in stream flow at the stream crossing. Tr 14. This reduction is to be compared to a reduction of 62% caused by the Application’s proposed 18-inch culvert. Tr 14. As a result, the adverse impacts to the environment would be lessened by the proffered 36-inch culvert. Mr. Ham suggested three reasons for his rejection of this proposed alternative.

First, Mr. Ham was concerned with the increased cost of installing the 36-inch culvert. His estimate for installing an 18-inch culvert was in the range of \$2,500 to \$3,000. Tr 38. He also estimated that it would cost \$15,000 to install a 36-inch culvert. Tr 38. Hence, Mr. Ham is contending that it is not prudent to install a 36-inch culvert that is 5 times more expensive. However, the 36-inch culvert will only cause a 25% reduction in stream flow, while the 18-inch culvert would cause a 62% reduction in flow. Even assuming, *arguendo*, that the stream width is 30 inches at the proposed crossing, as suggested by Mr. Ham, the reduction in stream flow from an 18-inch culvert is 40% (flow reduced from 30 inches

to 18 inches). Under these facts, and despite the increased cost, the 36-inch culvert is both a feasible and prudent alternative.

Mr. Ham's second objection to the 36-inch culvert is that it would cause the road on his property to be 4.5 feet above grade at the crossing. Tr 46. In essence, Mr. Ham is contending that the proposed 36-inch culvert is not a feasible alternative. However, Ms. Conradson testified that the 36-inch culvert would be recessed 6 inches into the stream and would have only one foot of fill over its top. Tr 46. Also, the WRD contemplated that the 36-inch culvert would be "squished" when installed (or flattened at the top). Tr 45. See Exhibit R-2 at p 20. Thirty inches of culvert (without flattening) and 12 inches of fill over the top would make the drive 3.5 feet above grade instead of the 4.5 feet claimed by Mr. Ham. While Mr. Ham finds no objection to a roadway that is two feet above grade (*i.e.*, the height of the crossing proposed in his Application), he apparently objects to the additional 1.5 feet. Under these facts, and despite the additional 1.5 feet in height, the 36-inch culvert is both a feasible and prudent alternative.

The third ground for objecting to the 36-inch culvert is that he has an 18-inch culvert elsewhere on his property (permit issued in 1987), and that two neighboring properties downstream also have 18-inch culverts. Tr 30, 35. Mr. Ham testified that, "I fail to see why I am required to install a 36-inch diameter culvert over a stream when downstream there are two 18-inch culverts." Tr 35. However, this Tribunal explained during the hearing that laws change, and the requirements of the law change over time. Tr 52. As a point in fact, Ms. Schmidt testified that the WRD's requirement for bankfull width culverts occurred in 2011 as a result of numerous stream crossing failures. Tr 10. Ms. Schmidt testified that prior to the 2011 revision, the WRD would have required a 24-inch culvert on Mr. Ham's property. Tr 48. A 24-inch culvert in a 48-inch stream would cause a 50% reduction in flow, or a 24-inch culvert in a 30-inch stream (as suggested by Mr. Ham) would cause a 20% reduction in flow. As a result, this Tribunal proffered to Mr. Ham the feasible and prudent alternative of a 24-inch culvert in this case. Tr 52. In response, Mr. Ham stated, "I would like to have an 18-inch culvert approved or my appeal denied." Tr 53.

Based on the foregoing testimony in this case, I find, as a Matter of Fact, that there is a feasible and prudent alternative to the 18-inch culvert requested in the Application and that the existence of such a feasible and prudent alternative – *i.e.*, either the 36-inch or the 24-inch culvert – mandates the denial of Mr. Ham's application under Part 301. R 281.814.

PART 303, WETLANDS PROTECTION

I. Jurisdiction

Part 303 is implicated if a jurisdictional activity occurs in the proposed project. MCL 324.30304. The jurisdictional activities identified in Part 303 are (a) placing fill material in a wetland, (b) dredging or removing soil from a wetland, (c) constructing or operating a use in a wetland, and (d) draining surface water from a wetland. *Id.* In this case, the Application proposes placing fill material, dredging and construction within a wetland. Tr 8. Therefore, I find, as a Matter of Fact, that the proposed project implicates activities covered by Part 303 which require a permit from EGLE. MCL 324.30304 (a), (b) & (c).

II. Section 30311(1)

The first inquiry in determining what project, if any, can be permitted are the following requirements in § 30311(1):

A permit for an activity listed in section 30304 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.

MCL 324.30311(1). Hence, under § 30311(1) analysis, there are three requirements necessary for approval of the permit: (a) “the issuance of a permit is in the public interest;” (b) “the permit is necessary to realize the benefits derived from the activity;” and (c) “the activity is otherwise lawful.” MCL 324.30311(1). The first requirement necessitates a finding that “the issuance of a permit is in the public interest....” MCL 324.30311(1). Because the general criteria for determining whether the proposed activity is in the public interest are contained in § 30311(2), this requirement will be addressed *infra*.

The second requirement compels a finding that “the permit is necessary to realize the benefits derived from the activity....” MCL 324.30311(1). In this case, Mr. Ham is utilizing a plank stream crossing and is concerned about a failure of the crossing, such as getting his tractor stuck halfway through the crossing. Tr 26, 32. Because the proposed culvert would eliminate this risk, I find, as a Matter of Fact, that a permit is necessary to realize the benefits derived from the activity.

The third requirement necessitates a finding that “the activity is otherwise lawful.” MCL 324.30311(1). This standard asks whether the proposed activity is, assuming all requisite approval is obtained, lawful. Since no evidence was presented that the activity proposed in the wetland is unlawful, this criterion does not require the denial of the Application.

III. Section 30311(2)

Determining whether the proposed activity is in the public interest requires a balancing of the benefit against the foreseeable detriments, keeping in mind the national and state concern with protecting wetlands from impairment. MCL 324.30311(2). Section 30311(2) sets forth nine general criteria, each of which go to the benefit/detriment balancing test that must be considered. The following is a recitation of the evidence submitted as it applies to each statutory criterion of the balancing test:

A. The relative extent of the public and private need for the proposed activity.

The first criterion is “[t]he relative extent of the public and private need for the proposed activity.” MCL 324.30311(2)(a). Ms. Schmidt testified that there is no demonstrated public need for the proposed activity, but that there is only a private need for the project since it will allow him access to his property. Tr 15. As a result of this evidence, I find, as a Matter of Fact, that there is a no public need for the project, but there is a private need for the project.

B. The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

Feasible and prudent alternatives were addressed, *supra*. However, the feasible and prudent alternatives addressed above relate to alternatives under Part 301. The Administrative Rules to Part 303 provide that a feasible and prudent alternative is one that has “less adverse impact on aquatic resources.” R 281.922a(6). With respect to adverse impact on aquatic resources, Ms. Schmidt testified as follows:

Third point, feasible and prudent alternatives exist to accomplish the basic project purpose of creating a driveway across the wetland for access. While the direct wetland impacts to improve the crossing are minimal at this existing location, there are adverse secondary impacts from the proposed culvert. Specifically, the installation of a small diameter culvert would result in changes to stream flow, creating probable erosion and deposition in the wetland, and flooding of the wetland causing changes in wetland habitat and type. An alternative is readily available, which is to install a 36-inch diameter culvert to provide additional flow through the crossing, lessening, or eliminating the adverse secondary impacts to the wetland.

Tr 15-16. This evidence was not controverted in the record. As a result, I find, as a Matter of Fact, that there are feasible and prudent alternative methods to accomplish the expected benefits from the activity.

- C. The extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.**

The stream crossing proposed in the Application will permanently affect 144 square feet (or .003 acres) of wetland. Tr 16. The beneficial effects of the stream crossing will also be permanent. Based on this record, I find, as a Matter of Fact, that the detrimental effects are less than the beneficial effects that the proposed activity will have on the public and private uses to which the area is suited, including the benefits the wetland provides.

- D. The probable effects of each proposal in relation to the cumulative effects created by other existing and anticipated activities in the watershed.**

There was no testimony contained in the record with respect to the probable effects of this proposal in relation to the cumulative effects created by other and anticipated activities in the watershed. Nevertheless, since this project involves only an impact to .003 acres of wetland, I find, as a Matter of Fact, that the proposed project will cause *de minimus* cumulative effects to the remaining wetland within the watershed.

- E. The probable effects on recognized historic, cultural, scenic, ecological, or recreational values and on the public health or fish or wildlife.**

Ms. Schmidt testified that the proposed project will have no effect on recognized historic, cultural, scenic, or recreational values, or public health or fish. Tr 15-16. As noted in the Fish and Wildlife section, *supra*, the proposed project will adversely affect wildlife and ecological values. Therefore, I find, as a Matter of Fact, that the proposed project will have no probable negative effects on recognized historic, cultural, scenic, or recreational values, or public health or fish, but will have adverse effects on wildlife and ecological values.

- F. The size of the wetland being considered.**

The stream crossing proposed in the Application will permanently affect 144 square feet (or .003 acres) of wetland. Tr 16. In response to questioning from the Tribunal, Ms. Schmidt admitted that this is a *de minimus* wetland impact. Tr 48. Therefore, I find, as a Matter of Fact, that the project will cause a *de minimus* amount of impact.

G. The amount of remaining wetland in the general area.

Ms. Schmidt testified that the affected wetland is part of a larger complex with a mix of forested, scrub-shrub and emergent wetlands that extends along the stream to the north and south and joins another stream with a larger area of emergent and scrub-shrub wetlands extending east and west. Tr 16. Ms. Schmidt testified that, in total, the wetland appears to be a total of approximately 41 acres in size. *Id.* Because this project will impact only .003 acres, I find, as a Matter of Fact, that the remaining wetland in the general area will be unimpacted from the proposed project.

H. Proximity to any waterway.

The 144 square feet of impacted wetland in this case is adjacent to the unnamed stream. Tr 16. Therefore, I find, as a Matter of Fact, that the impacted wetland is adjacent to the unnamed stream.

I. Economic value, both public and private, of the proposed land change to the general area.

Ms. Schmidt testified that the economic value, both private and public, of the proposed project is negligible, except for the monies provided to the contractor to complete the work. Tr 16. The anticipated cost of the project contemplated in the Application is \$2,500 to \$3,000. Tr 38. I agree that the public economic value of the proposed project is negligible based on the anticipated \$3,000 construction costs. However, if the alternative involving the 36-inch culvert were employed, the economic value of the proposed project would yield an economic value to the public of \$15,000, which provides some public economic value. Tr 38. Nevertheless, I find, as a Matter of Fact, that the economic value, both public and private, of the proposed land change to the general area, as contemplated in the Application, is negligible.

Weighing § 30311(2) Criteria

Part 303's "public interest" test requires a balancing of the proposed activity's benefits against its detriments. MCL 324.30311(2). Along with consideration of the general criteria addressed above, § 30311(2) mandates that "[t]he decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction." In this case, factors weighing in favor of public interest include: (a) there is a private need for the project; (b) the detrimental effects are less than the beneficial effects that the proposed activity will have on the public and private uses to which the area is suited, including the benefits the wetland provides; (c) the proposed project will cause *de minimus* cumulative effects to the remaining wetland within the

watershed; (d) the proposed project will have no probable negative effects on recognized historic, cultural, scenic, or recreational values, or public health or fish; (e) the project will cause a *de minimus* amount of impact; and (f) the remaining wetland in the general area will be unimpacted from the proposed project. Factors weighing against public interest include: (i) there is a no public need for the project; (ii) there are feasible and prudent alternative methods to accomplish the expected benefits from the activity; (iii) the proposed project will have adverse effects on wildlife and ecological values; (iv) the impacted wetland is adjacent to the unnamed stream; and (v) the economic value, both public and private, of the proposed land change to the general area, as contemplated in the Application, is negligible. Providing equal weight to each of these factors, the evidence indicates that there are more factors in favor of public interest than against. Therefore, I find, as a Matter of Fact, that the proposed project is in the public interest.

IV. Section 30311(3)

Section 30311(3) requires that, “[i]n considering a permit application, the department shall give serious consideration to findings of necessity for the proposed activity which have been made by other state agencies.” MCL 324.30311(3). There have been no such findings for the proposed activity.

V. Section 30311(4)

Section 30311(4) contains the final criteria, as follows:

A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether the disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following:

- (a) The proposed activity is primarily dependent upon being located in the wetland.
- (b) A feasible and prudent alternative does not exist.

MCL 324.30311(4). Hence, the three main factors for analysis under this statutory provision include a determination of whether (a) there is an unacceptable disruption to aquatic resources; (b) the proposed activity is wetland dependent; and (c) a feasible and prudent alternative does not exist.

A. Disruption to Aquatic Resources

Section 30311(4) first focuses on the disruption to aquatic resources caused by the proposed activity. To determine if the disruption is unacceptable, the provision requires a consideration of the Legislative findings set forth in §30302, which provides that “[a] loss of a wetland may deprive the people of the state of some or all of the following benefits to be derived from the wetland: ... (ii) Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or engendered wildlife species.” MCL 324.30302(1)(b)(ii).

While the proposed project contemplates .003 acres of direct impact, the project includes secondary impacts of changes to stream flow, creating probable erosion and deposition in the wetland, and flooding of the wetland causing changes in wetland habitat and type. Tr 15-16. While the direct impacts from the project are *de minimus*, it appears that the secondary impacts to wetlands caused by the proposed project constitute an unacceptable disruption to aquatic resources, which I so find.

B. Wetland Dependent

Section § 30311(4) prohibits the issuance of a permit unless the applicant shows the proposed activity is either wetland dependent or a feasible and prudent alternative does not exist. MCL 324.30311(4). With respect to the determination of whether the proposed activity is wetland dependent, the Administrative Rules provide guidance in this determination. Specifically, the Administrative Rules provide:

The department shall consider a proposed activity as primarily dependent upon being located in the wetland only if the activity is the type that requires a location within the wetland and wetland conditions to fulfill its basic purpose; that is, it is wetland-dependent. Any activity that can be undertaken in a non-wetland location is not primarily dependent upon being located in the wetland.

R 281.922a(5). Typically, a stream crossing is not a wetland-dependent activity. Nevertheless, there was no testimony in the record whether the stream crossing could be moved to a location where there are no associated wetlands. Therefore, from the record in this case, I am unable to find that the proposed activity is wetland dependent.

C. Feasible and Prudent Alternatives

As noted *supra*, there are feasible and prudent alternatives that would lessen secondary impacts to the wetlands on Mr. Ham’s property. As a result, I find, as a Matter of Fact, that a feasible and prudent alternative exists.

Because the propose project is not a wetland-dependent activity and because of the existence of a feasible and prudent alternative, § 30311(4) mandates that a permit under Part 303 “shall not be issued.” MCL 324.30311(4).

CONCLUSIONS OF LAW

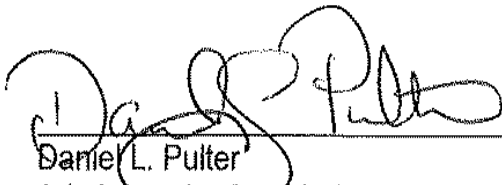
Based on the Findings of Fact, I conclude, as a Matter of Law:

1. Mr. Ham is the proper applicant for a permit, and the application for a permit was properly processed.
2. The proposed activity is regulated under Parts 301 and 303. MCL 324.30101, *et seq.*; MCL 324.30301, *et seq.*
3. The WRD has jurisdiction over this matter. MCL 324.30106; MCL 324.30311(1).
4. The unnamed stream on Mr. Ham’s property is not navigable, so it is not impressed with the public trust. *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926); *Bott v Natural Resources Comm’n*, 415 Mich 45, 71; 327 NW2d 838 (1982).
5. The proposed project will not adversely affect riparian rights. MCL 324.30106; R 281.811(2).
6. The proposed project will not adversely affect the uses of the resource for recreation, fish, local government, agriculture, commerce, and industry, but will adversely affect the uses of the resource for aesthetics and wildlife, and will adversely affect the environment. MCL 324.30106.
7. Because a feasible and prudent alternative is available, a permit may not be issued under Part 301. R 281.814.
8. The Application contemplates placing fill material, dredging and construction within a wetland, which is a regulated activity. MCL 324.30304 (a), (b) & (c).
9. A permit is necessary to realize the benefits derived from the activity. MCL 324.30311(1).
10. The proposed activity is otherwise lawful. MCL 324.30311(1).
11. The proposed activity is in the public interest. MCL 324.30311(2).

12. The proposed activity will cause an unacceptable disruption to aquatic resources. MCL 324.30311(4).
13. Because the proposed activity is not dependent on being located in a wetland, and due to the existence of a feasible and prudent alternative, a permit may not be issued under Part 303. MCL 324.30311(4); R 281.922a(5).

FINAL DECISION AND ORDER

The Application for a permit under Parts 301 and 303 (as contained in Exhibit R-2) is **DENIED**.



Daniel L. Pulter
Administrative Law Judge

PETITION FOR REVIEW

Consistent with § 1317 of the NREPA, this is a Final Decision and Order (FDO) for EGLE. MCL 324.1317(1). The Parties have the right to file a Petition for Review of this FDO with the EGLE Director within 21 days of receiving this FDO. Upon the timely and proper filing of a Petition for Review, the EGLE Director will convene a panel of the Environmental Permit Review Commission.

A Petition for Review must be filed with the EGLE Director in one of two manners, either by mail to Department of Environment, Great Lakes, and Energy at Executive Office, Attn: Director Clark, 525 West Allegan Street, P.O. Box 30473, Lansing, Michigan 48909-7973, or electronically at EGLE-PermitAppeal@michigan.gov. (See form at www.michigan.gov/egle website). A copy of the Petition for Review must also be sent to the Michigan Office of Administrative Hearings and Rules (MOAHR) either by mail to: 611 West Ottawa Street, P.O. Box 30723, Lansing, Michigan 48909-7973, or electronically at MOAHR-EGLE-PermitPanel@michigan.gov.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, by electronic delivery, unless indicated otherwise, this 10th day of May 2021.



Elaine Cussans

**Michigan Office of Administrative Hearings
and Rules**

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