

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

IN THE MATTER OF:

Docket No.: 20-017472

Petition of Henry Perez

Agency No.: HNZ-RZE6-DC500

**Part(s): 301, Inland Lakes & Streams
303, Wetlands Protection**

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

Case Type: Water Resources Division

**Issued and entered
this 24th day of June 2021
by Daniel L. Pulter
Administrative Law Judge**

FINAL DECISION AND ORDER

This contested case concerns an Application dated June 10, 2020, submitted by Henry Perez 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 September 4, 2020. That agency action was challenged by Mr. Perez by filing a Petition for Contested Case Hearing on September 9, 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. Perez claims he was aggrieved by the denial of his Application on September 4, 2020. Consistent with the foregoing authorities, a contested case hearing was conducted on April 7, 2021. 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. Perez appeared *in propria persona* via telephone and offered testimony on his own behalf, as well as the testimony of Scott Schlicht, the owner of Schlicht Excavating Inc., also known as Schlicht Ponds. Through these witnesses, Mr. Perez entered Exhibits P-1, P-2, and P-3.¹

The WRD, which administers Parts 301 and 303, offered the testimony of Keri Kent, an Environmental Quality Analyst, who is the employee who reviewed and processed the Application; Teresa Sherwood, an Environmental Quality Analyst, who conducted a site inspection of the project area along with Ms. Kent; and Joseph Haas, who is responsible for oversight and administration of Parts 301 and 303. Through these witnesses, the WRD entered Exhibits R-1, R-2 and R-3.

FINDINGS OF FACT

Mr. Perez is the owner of property in the city of Atlanta, Vienna Township, Montmorency County, Michigan. Exhibit R-2 at pp 33, 87. He owns property along the shoreline of Gaylanta Lake, on the northern edge of the southwest lobe. Exhibit R-2 at p 18; Tr 13. Gaylanta Lake is a 122-acre lake with 2.3 miles of shoreline. Tr 49. The lake is currently experiencing high water levels. Tr 43-44, 41; Exhibit P-3. On June 10, 2020, Mr. Perez filed an Application for a permit under Parts 301 and 303. Exhibit R-2 at pp 10, 81-92. The Application proposed to dredge approximately 245 cubic yards of material from the bottomlands of Gaylanta Lake. Exhibit R-2 at p 81. Specifically, the Application proposed to dredge an area 20 feet lakeward of the existing shoreline along 110 feet of Mr. Perez's property width to a depth of 3 feet. Tr 8; Exhibit R-2 at pp 81-82. The Application proposed to place the spoils from dredging in a 50-foot x 30-foot area on the uplands of Mr. Perez's property. Exhibit 2 at p 81. The stated purpose for the Application is "for ingress and egress to the lake and a swimming area." Exhibit R-2 at p 89.

The project was considered administratively complete on July 6, 2020. Tr 9. A site inspection on the property was conducted by the WRD on July 22, 2020. Tr 9. After the

¹ The Exhibits in this contested case were 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.

site inspection, an email was sent by the WRD to Schlicht Ponds on August 7, 2020, urging Mr. Perez to file a modified application due to wetland impacts from the activity proposed in the Application. Exhibit R-2 at p 44. A modified Application was filed on August 25, 2020. Exhibit R-2 at pp 29-43. The modified Application proposed to dredge approximately 222 cubic yards of material from the bottomlands of Gaylanta Lake. Exhibit R-2 at p 42. Specifically, the modified Application proposed to dredge a 20-foot-wide “canal” 100 feet lakeward of the existing shoreline to a depth of three feet. Tr 8; Exhibit R-2 at pp 42-43. The modified Application also proposed to place the spoils in a 50-foot x 30-foot area on the uplands of Mr. Perez’s property. Exhibit R-2 at p 42.

The site inspection disclosed that a large marsh feature was located between the upland property and the open water of Gaylanta Lake. Tr 9. This emergent marsh spans the entire width of Mr. Perez’s property and extends at least 130 feet from the toe of the upland slope to open water (as measured by Google Earth). Tr 9-10. Vegetation consists entirely of wetland obligate species. Tr 10. The project area is comprised of distinct vegetative zones, including open water with floating aquatic plants, dense emergent vegetation of cattails and sedges, and mossy vegetated hummocks. Tr 10. Water depth at the proposed location is approximately two and a half feet to an unconsolidated, loose, mucky bottom. Tr 10. The distance from the house retaining wall to the approximate edge of the wetland is 50 feet. Tr 10. Due to the size of the wetland, the dredging proposed in the modified Application will not reach open water. Tr 11.

Mr. Perez purchased his property on Gaylanta Lake in 2004 for \$250,000.00. Tr 19-20. At the time he purchased the property, there was access to and from the lake. Tr 20. By 2014 when he completed construction and moved into the residence, the lake frontage had become overgrown with plants and muck, making it impossible to gain access to the lake from his frontage. Tr 20. According to Mr. Perez, his property is now worth \$125,000.00 due to the presence of the wetlands. Tr 20. In 2020, Mr. Perez’s 18-year-old grandson ventured into the lake from his frontage and became stuck in the muck. Tr 20. He had to be extracted by the local fire department. Tr 20. Mr. Perez also noted that he is paying lake frontage taxes but is unable to enjoy it. Tr 20. Currently, he is required to use the lake’s public boating access site (BAS) for his boat. Tr 21.

The projected cost to dredge a 20-foot-wide “canal” from the shore 100 feet into the lake is \$18,010.00. Tr 47. The estimated cost of a floating dock is \$18,762.58, exclusive of the annual maintenance, installation, and removal costs. Exhibit P-1; Tr 47. Mr. Perez is concerned about the annual costs because he is retired. Tr 26.

PART 301, INLAND LAKES AND STREAMS

I. Jurisdiction

Under Part 301, the definition of “inland lake or stream” is construed to mean “[a] natural or artificial lake, pond, or impoundment...” MCL 324.30101(ii). Section 30102 provides that a permit is required when a party dredges or fills bottomland. MCL 324.30102(1)(a).

Bottomland is defined as “the land area of an inland lake or stream that lies below the ordinary high-water mark...” MCL 324.30101(a). The modified Application contemplates the dredging of bottomlands of Gaylanta Lake. Exhibit R-2. 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). Accordingly, the proposed project 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 *Moore v Sanborne*, 2 Mich 519 (1853), the Supreme Court adopted the log-flotation test for determining navigability, holding that the true test in determining the right of public use in fresh-water streams “is whether a stream is inherently, and in its nature, capable of being used for the purpose of commerce for the floating of vessels, boats, rafts, or logs.” In *Bott*, the Court affirmed the log-flotation test for determining navigability. 415 Mich at 61. Because the WRD treated Gaylanta Lake as being impressed with the public trust, this Tribunal will review the Application under this criterion.

There was no testimony that the modified Application would adversely affect navigation or fowling on Gaylanta Lake. On July 20, 2020, Tim Cwalinski of the Department of Natural Resources (DNR) provided the following public comment on the proposed project:

This appears to be excessive substrate removal for a swimming area or for lake access, especially with most of our lakes at high water level. This lake is known for its panfish and pike, both of which are reliant on nearshore aquatic vegetation.

Exhibit R-2 at p 58. Mr. Cwalinski also provided a copy of DNR Policy & Procedure No. 02.01.001 regarding Shoreline Modification, which was adopted on April 22, 2005. Exhibit

R-2 at pp 59-61. That Policy recites that “shoreline modification can have significant adverse effects on the fishery and the overall ecological integrity of a lake or stream.” *Id* at p 59. However, this evidence relates to fish habitat, not the ability to fish on Gaylanta Lake. The addition of a 20-foot “canal” on Mr. Perez’s property will actually add to the area of the lake which may be fished. This evidence was not rebutted in the record. Based on the record, I find, as a Matter of Fact, that the proposed project will not have an adverse effect on the fishing component of 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 use the water for bathing and domestic use, the right to wharf out to navigability, and the right of access to navigable waters. *Hilt v Weber*, 252 Mich 198, 225; 233 NW 159 (1930). A number of other uses fall under riparian rights. See *Stupak-Thrall v United States*, 89 F3d 1269, 1297 (6th Cir 1996). However, the rights of a riparian owner are limited by the public trust. *Collins v Gerhardt*, *supra*. See also R 281.811(2).

Ms. Kent testified that the WRD received one public comment on the proposed project, which was the comment of Mr. Cwalinski on behalf of the DNR, referenced *supra*. Tr 11. Therefore, no riparian owners objected to the proposed project, and there was no testimony regarding an objection or of an impact of the project on riparian rights. It should be noted that the proposed project was intended to improve Mr. Perez's riparian rights by providing him with access to boatable and swimmable waters. Based on the evidence, 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. It should be noted that the proposed project was intended to improve Mr. Perez's recreation on the lake by providing him with access to boatable and swimmable waters. From the record, I find, as a Matter of Fact, that it will not adversely affect uses of the resource for recreation.

D. Fish and Wildlife

With respect to fish and wildlife, Ms. Kent provided the following testimony:

I concluded that the dredging of a canal through the wetland would adversely impact both the wetland and the aquatic resources of Gaylanta Lake. Shoreline modification and wetland alteration is known to have adverse effects on the function and overall ecological integrity of the lake and wetland. Creation of a canal cut through the wetland has direct adverse impacts to ... aquatic wildlife and their habitat.

Tr 14. Based on this evidence, which was not rebutted in the record, I find, as a Matter of Fact, that the proposed project will adversely affect fish and wildlife.

E. Aesthetics

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.). The Project Review Report recites that the "creation of a dredge channel can adversely affect aesthetics visually, but also the smell of dredged organic material and disturbed bottomlands." Exhibit R-2 at p 15. Despite such evidence, this criterion is not dispositive due to subjective opinion and competing perceived values.

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. 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.

G. Environmental Impacts

With respect to environmental impacts, Ms. Kent testified as follows:

Ingress and egress within the canal by a vessel would ... result in probable erosion of the cut sides, disturbance of the bottomland substrate, and potential increase of turbidity within the water column. The fragmentation of the wetland could lead to changes in wetland type or the introduction of invasive species.

Tr 14-15. In addition, DNR Policy & Procedure No. 02.01.001 regarding Shoreline Modification recites that "shoreline modification can have significant adverse effects on the fishery and the overall ecological integrity of a lake or stream." Exhibit R-2 at p 59. The Policy further provides that even when shoreline modification is justified, dredging should be avoided. *Id.* Therefore, based on this evidence, which was not rebutted in the record, I find, as a Matter of Fact, that the proposed project which consists entirely of dredging will cause adverse environmental impacts.

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 suggested the alternative of “a permanent floating dock and/or boardwalk through the wetland to be able to access open water from your property, and the installation of a swim platform and/or boat dock for open water swimming.” Exhibit R-2 at p 11.

Mr. Perez has three objections to the WRD’s proposed alternative. First, he objects on cost grounds. Mr. Perez believes that the cost of a floating dock will be double the cost of the proposed dredging. Tr 21. However, the cost of a floating dock is comparable to the cost of the proposed dredging. Specifically, the price for dredging was \$18,010.00, while the floating dock is estimated at \$18,762.58, a difference of only \$752.58. Exhibit P-1; Tr 47. Mr. Perez is concerned about the annual installation and removal costs for the dock because he is retired. Tr 26. However, Mr. Perez did not supply an estimate of the costs of installation and removal for such a dock. Therefore, there was a lack of evidence in the record to support Mr. Perez’s concerns.²

This Tribunal also raised the concern that dredging could be more expensive due to the need to re-dredge the wetland. Mr. Schlicht testified that dredging should last 20 years before re-dredging may be needed. Tr 29. It was his testimony that a boat coming and going in the dredged channel will prevent the establishment of plant roots. Tr 37. On the other hand, Mr. Haas testified that based on the unconsolidated nature of the lake-bottom, the muck could fill in the dredge area very quickly, and then plants could establish as available. Tr 37. Mr. Haas’ testimony seems consistent with Mr. Perez’s, who stated that the lake frontage had become overgrown with plants and muck within ten years of his purchase of the property. Tr 20. Based on the foregoing, the proposed dredging may last 20 years, but more likely will need to be re-dredged sooner. Therefore, I find, as a Matter of Fact, that the cost of dredging the lake is not a less expensive alternative than a floating dock.

Second, Mr. Perez has safety concerns regarding the near-shore muck on the bottomlands of the lake. Specifically, he testified that, in 2020, his 18-year-old grandson ventured into the lake from his frontage and became stuck in the muck. Tr 20. He had to be extracted by the local fire department. Tr 20. Mr. Perez also submitted a newspaper article regarding a toddler being stuck up to her neck in a muddy pond in Missouri. Exhibit P-2. While safety is always foremost in projects authorized under Part 301, it is equally likely that an individual could wander off the dredged channel into the muck as it is a person could fall off the floating dock. This Tribunal is simply not required to make a

² However, Mr. Haas testified that “floating docks are usually more favorable for a permanent dock because they rise and fall with the lake levels and they’re less prone to ice damage. So typically a floating dock through a wetland area like that can ... actually have a pretty long life and not have to be taken in and out seasonally.” Tr 53.

permitting decision based on which of the alternatives is a safer alternative. Cf. R 281.922a (“An alternative is feasible and prudent if ... [t]he alternative would have less adverse impact on aquatic resources”).

Third, Mr. Perez noted that he is currently paying lake frontage taxes but is unable to enjoy it. Tr 20. However, Michigan law provides that two of the attributes of riparian ownership is the right to use the water for bathing, and the right to wharf out to navigability. *Hilt v Weber*, 252 Mich 198, 225; 233 NW 159 (1930). Note that the *Hilt* case provides the riparian owner the right to wharf out to navigability, not dredge out to it. Even so, the evidence in this case indicates that under present conditions, the proposed dredge will not reach open water. Tr 11. Therefore, it appears that the WRD’s alternative better satisfies Mr. Perez’s right to wharf out to navigable waters. Also, the *Hilt* case does not guarantee the right to bathe along the shoreline. Hence, a riparian owner may be obligated to also wharf out to batheable water. Again, dredging is not among the rights attributable to riparian ownership. *Stupak-Thrall*, 89 F3d at 1297.

Based on the foregoing, I find, as a Matter of Fact, that the WRD’s proposed alternative – of installing a floating dock and/or boardwalk through the wetland to be able to access open water from his property, and the installation of a swim platform and/or boat dock for open water swimming – is one that avoids or limits the impact to the resource. Therefore, I find, as a Matter of Fact, that the WRD’s alternative constitutes a feasible and prudent alternative to the project proposed in the Application.

IV. Summary

The proposed project will not have an adverse effect on the public trust. Nor will the project affect riparian rights, recreation, local government, agriculture, industry and commerce. However, the project will adversely affect fish and wildlife. In addition, the project which consists entirely of dredging will also cause adverse environmental impacts. Due to such findings and due to the existence of a feasible and prudent alternative, a permit cannot be issued in this case under MCL 324.30106 and 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 to dredge within a wetland. Exhibit R-2 at p 35. 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(b).

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. Perez proposes to dredge a 20-foot-wide canal through a wetland. Exhibit R-2 at p 35. Because the purpose of the Application is to provide Mr. Perez with access to navigable and swimmable waters, 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 concerns “[t]he relative extent of the public and private need for the proposed activity.” MCL 324.30311(2)(a). Ms. Kent testified that there is no demonstrated public need for the proposed activity. Tr 13. Due to the existence of the wetlands at his shoreline, there is a private need for the proposed activity since Mr. Perez may not reach boatable and swimmable waters. As a result of this evidence, I find, as a Matter of Fact, that there is a no public need for the project, but that 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.

The second criterion concerns “[t]he availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.” MCL 324.30311(2)(b). An alternative method for reaching boatable and swimmable waters was addressed, *supra*. That alternative was to reach boatable and swimmable waters by installation of a floating dock. 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 third criterion concerns “[t]he 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.” MCL 324.30311(2)(c). As to this criterion, Ms. Kent testified as follows:

[B]enefits from the proposed activity are going to be short-lived as maintenance dredging would need to occur over time to maintain private boat access; wetland values, including habitat availability and functionality, would be adversely impacted by fragmentation....

Tr 13. As noted *supra*, Mr. Schlicht testified that dredging should last 20 years before re-dredging may be needed. Tr 29. It was his testimony that a boat coming and going in the dredged channel will prevent the establishment of plant roots. Tr 37. On the other hand, Mr. Haas testified that, based on the unconsolidated nature of the lake-bottom, the muck could fill in the dredge area very quickly, and then plants could establish as available. Tr 37. Mr. Haas’ testimony seems consistent with Mr. Perez’s, who stated that

the lake frontage had become overgrown with plants and muck within ten years of his purchase of the property. Tr 20.

Based on the foregoing, the permanence of the beneficial effects of the proposed dredging may last 20 years, but more likely will need to be re-dredged sooner. Therefore, I find, as a Matter of Fact, that the benefits from the proposed activity are short-lived. As to the detrimental effects of the proposed dredging, the testimony was not rebutted. Accordingly, I find, as a Matter of Fact, that wetland values, including habitat availability and functionality, will be adversely impacted by fragmentation caused by the proposed dredging.

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

The fourth criterion concerns “[t]he probable effects of each proposal in relation to the cumulative effects created by other existing and anticipated activities in the watershed.” MCL 324.30311(2)(d). While Ms. Kent testified that “adverse cumulative impacts would likely occur if this and similar projects were permitted, leading to an increase in wetland impacts and degradation,” Tr 13, she did not testify with respect to existing and anticipated activities in the watershed. Therefore, I am unable to make a finding with respect to the probable effects of this proposal in relation to the cumulative effects created by other existing and anticipated activities in the watershed.

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

The fifth criterion concerns “[t]he probable effects on recognized historic, cultural, scenic, ecological, or recreational values and on the public health or fish or wildlife.” MCL 324.30311(2)(e). Ms. Kent testified that no probable impacts to historic, cultural, scenic, or recreational values were identified during the review. Tr 13. As noted in the Fish and Wildlife and Environmental Impacts sections, *supra*, the proposed project will adversely affect fish 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 wildlife, but will have adverse effects on fish and ecological values.

F. The size of the wetland being considered.

The sixth criterion concerns “[t]he size of the wetland being considered.” MCL 324.30311(2)(f). Ms. Kent testified that the proposed wetland impact is approximately 2,200 square feet or .045 acres. Tr. 13. Therefore, I find, as a Matter of Fact, that the project will cause .045 acres of impact.

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

The seventh criterion concerns “[t]he amount of remaining wetland in the general area.” MCL 324.30311(2)(g). There was no evidence in the record regarding the quantity of remaining wetland in the general area. Rather, Ms. Kent limited her testimony to the remaining wetland complex on Mr. Perez’s property, which is approximately 0.38 acres. Tr 13. Mr. Schlicht testified that the proposed project contemplated dredging only 20 feet of the 2.3-mile shoreline of Gaylanta Lake. Tr 49. However, there was no testimony regarding what percentage of that shoreline is wetland. Therefore, the record is inadequate to make a finding as to the remaining wetland in the general area.

H. Proximity to any waterway.

The eighth criterion concerns “[p]roximity to any waterway.” MCL 324.30311(2)(h). The site inspection disclosed that a large marsh feature was located between the upland property and the open water of Gaylanta Lake. Tr 9. Therefore, I find, as a Matter of Fact, that the impacted wetland has proximity to Gaylanta Lake.

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

The final criterion concerns “[e]conomic value, both public and private, of the proposed land change to the general area.” MCL 324.30311(2)(i). There was no evidence presented regarding the public economic value of the proposed land change. With respect to private economic value, Mr. Perez testified that after he constructed his home on Gaylanta Lake in 2004, his property was worth \$250,000.00. Tr 19-20. At the time he purchased the property, there was access to and from the lake. Tr 20. By 2014 after he completed construction and moved into the residence, the lake frontage had become overgrown with plants and muck making it impossible to gain access to the lake from his frontage. Tr 20. According to Mr. Perez, his property is now worth \$125,000.00 due to the presence of the wetlands. Tr 20. However, there was no evidence presented in the record that the value of his property would increase if the proposed land change were completed. Therefore, from the record, this Tribunal is unable to make a finding as to either the public or private value of the proposed land change.

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." *Id.* In this case, the only benefit is the private need of the activity. Six of the nine criteria weighed against public interest, while three criteria had no evidence presented. Therefore, I find, as a Matter of Fact, that the proposed project is not 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 only contemplates .045 acres of impact, the project area will most likely need to be re-dredged within the next 20 years, causing additional wetland impacts. Therefore, 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). The stated purpose for the Application is “for ingress and egress to the lake and a swimming area.” Exhibit R-2 at p 89. Access to boatable and swimmable waters is not a wetland dependent activity. 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*, an alternative method for reaching boatable and swimmable waters was the installation of a floating dock. Therefore, because the proposed project is not a wetland dependent activity, and due to 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).

VI. Summary

While a permit is necessary to realize the benefits derived from the activity, and although the activity is otherwise lawful, the proposed project is not in the public interest. The impacts to wetlands caused by the proposed project constitute an unacceptable disruption to aquatic resources. Because the proposed project is not wetland dependent, and due to the existence of a feasible and prudent alternative, a permit cannot be issued in this case.

CONCLUSIONS OF LAW

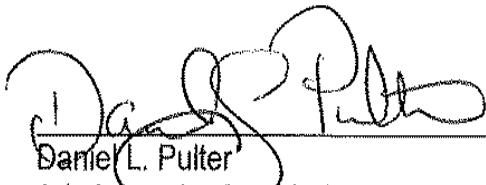
Based on the Findings of Fact, I conclude, as a Matter of Law:

1. Mr. Perez 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 proposed project will not adversely affect riparian rights. MCL 324.30106; R 281.811(2).
5. The proposed project will not adversely affect the uses of the resource for recreation, wildlife, local government, agriculture, commerce, and industry, but will adversely affect the uses of the resource for fish and will adversely affect the environment. MCL 324.30106.
6. Because a feasible and prudent alternative is available, a permit may not be issued under Part 301. R 281.814.
7. The Application contemplates dredging within a wetland, which is a regulated activity under Part 303. MCL 324.30304(b).
8. A permit is not necessary to realize the benefits derived from the activity. MCL 324.30311(1).
9. The proposed activity is otherwise lawful. MCL 324.30311(1).
10. The proposed activity is not in the public interest. MCL 324.30311(2).
11. The proposed activity will cause an unacceptable disruption to aquatic resources. MCL 324.30311(4).

12. 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 others, this 24th day of June 2021.



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