

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

IN THE MATTER OF:

Docket No.: 20-019287

Petition of Jerry Coleman

Agency No.: HNZ-WVW6-9MEPK

Part(s): 301, Inland Lakes & Streams

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

Case Type: Water Resources Division

**Issued and entered
this 13th day of October 2021
by: Paul Smith
Administrative Law Judge**

FINAL DECISION AND ORDER

This contested case concerns an application submitted by Jerry Coleman for a permit submitted 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.* The Water Resources Division (WRD) of the Department of Environment, Great Lakes, and Energy (EGLE) denied the permit application on August 26, 2020. That agency action was challenged through a Petition for Contested Case Hearing filed by Mr. Coleman on September 21, 2020.

JURISDICTION

Part 301 grants the right to a contested case hearing to a person “aggrieved by any action ... of the department...” MCL 324.30110(2). Mr. Coleman claims he was aggrieved by the denial of his application. Consistent with §30110(2), the contested case hearing on June 21, 2021, was conducted under the applicable provisions of the Administrative Procedures Act (APA), 1969 PA 306, as amended. MCL 24.201, *et seq.*

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. Coleman appeared *in propria persona* and testified on his own behalf. Mr. Coleman also offered the testimony of Aaron Wallace. Mr. Coleman did not offer any exhibits for admission. The exhibits presented by Mr. Coleman in advance of the Contested Case Hearing (photographs, maps, and a drawing) were also contained within Exhibit R-2, which was offered and admitted by WRD.

The WRD, which administers Part 301, offered the testimony of Jeff Pierce, an Environmental Quality Analyst for the WRD. Through this witness, the WRD entered Exhibits R-1, R-2, R-3, and R-4, without objection.

FINDINGS OF FACT

On May 28, 2020, Mr. Coleman filed an application with WRD seeking to build a new seawall on his property on Bennett Lake in Fenton, Michigan. The application was assigned number HNZ-WVW6-9MEPK. In Mr. Coleman's application, he proposed to (1) install 68 linear feet of steel seawall at the OHWM, (2) place approximately 3 cubic yards of clean backfill landward of the new seawall, and (3) place approximately 5 cubic yards of toe stone along the waterward toe of the new seawall. WRD reviewed the application under Part 301 of the NREPA. It was considered administratively complete on June 27, 2020. (Tr., p 6; Ex. R-4.)

Public notice of Mr. Coleman's application was issued on July 15, 2021. The 20-day public notice comment period ended on August 4, 2020. No comments from the public were received. (Tr., p 7; Ex. R-4.)

Jeff Pierce, an Environmental Quality Analyst for WRD, held a site meeting with Mr. Coleman on August 11, 2020. At the time of the site meeting, there was evidence of an old, failed concrete seawall on bottomland along the shoreline of Mr. Coleman's property, along with some wood timbers. The remaining shoreline was vegetated to the water's edge. During the site meeting, Mr. Pierce discussed with Mr. Coleman his concerns regarding the proposed new vertical seawall and the potential impacts to the environment, lake bottomlands and adjacent shorelines that can occur from construction of vertical seawalls. (Tr., pp 5, 7; Ex. R-4.)

A year before Mr. Coleman applied to build the new seawall on his property, Mr. Coleman had filed an application to place riprap rock along his shoreline for erosion control. On June 28, 2019, WRD issued Permit No. WRP016939 allowing the

placement of the riprap. At the August 11, 2020, site meeting, Mr. Pierce and Mr. Coleman discussed erosion issues occurring along his shoreline and wake boats that emit large wakes. Mr. Pierce suggested to Mr. Coleman that the placement of riprap rock, covered by Permit No. WRP016939, would be a prudent and feasible alternative to the new seawall for the purpose of providing erosion control. Permit No. WRP016939 remains in effect until June 28, 2024. (Tr., pp 7-8; Ex. R-3; Ex. R-4.)

There are already some seawalls present on Bennett Lake, for which WRD has permitted replacement seawalls to be constructed. The stretch along the northwestern shore of the lake where Mr. Coleman's property is located is mostly natural, with riprap in some spots but no new seawalls have been permitted. (Tr., p 22.) Bennet Lake is a small lake with less than a half mile fetch. There are extensive wetlands on the southern area of the lake across from Mr. Coleman's property.

Wave energy reflecting from a seawall on Mr. Coleman's side of the lake would reflect across the lake and cause some erosion on the opposite shoreline, mitigated to some degree by the wetland vegetation. (Tr., p 23.) On August 24, 2020, Mr. Pierce completed the Michigan Shoreline Erosion Energy Calculator for the project site. This is a tool used to calculate the approximate wave height caused by natural forces that will hit the shoreline and erosion energy category that the site would fall under. According to Mr. Pierce's calculations, the approximate wave height the shoreline would experience from natural forces, on average, would be 0.81 feet. WRD categorizes shorelines experiencing less than 1 foot wave height as "low energy" sites and does not consider heavy armoring of the shoreline, such as a vertical steel seawall, to be necessary for stabilization of low energy sites against erosion. (Tr., p 7; Ex. R-2, pp 20-38; Ex. R-4.)

WRD denied Mr. Coleman's application on August 26, 2021, by an application denial letter. The application file was closed as denied on September 3, 2020.

PART 301 – INLAND LAKES AND STREAMS

I. Jurisdiction

A permit is required under Section 30102(1)(a) & (b) of Part 301, because Mr. Coleman's proposal involves filling of bottomlands and placing of a structure on lake bottomland. MCL 324.30102(1)(a) & (b). Under Part 301, the definition of "inland lake or stream" means "a natural or artificial lake, pond, or impoundment...." MCL 324.30101(i). "Bottomland" means "the land area of an inland lake or stream that lies below the ordinary high-water mark...." MCL 324.30101(a). Here, the record is clear that the proposed seawall is to be constructed on the bottomland below the ordinary high-water mark (OHWM). (Tr., p 6; Exhibit R-2; Exhibit R-4). Because the Permittee proposed to construct a seawall on the bottomland of Bennett Lake, the proposed activity will be reviewed under the Part 301 permitting standards. MCL 324.30102(1)(b).

II. Section 30106

The issuance of a permit under Part 301 is governed by § 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.* The WRD must also 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. MCL 324.30106. Finally, the WRD must consider the environmental impacts of the proposed project. *Id.* Each of these factors is addressed below.

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. See *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). Here, both parties treated Bennett Lake as being public trust waters. Accordingly, for purposes of this proceeding I will assume that Bennett Lake is impressed with the public trust. However, because WRD presented no evidence that Mr. Coleman's proposed project will preclude the public's right to navigate, fish, or fowl of the waters of Bennett Lake, I find, as a Matter of Fact, that the proposed project will not adversely affect the public trust under the common law standard described in *Collins, supra*.

That is not the end of the public trust inquiry, however. 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.

Mich Admin Code, 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 Mich Admin Code, R 281.814, addressed *infra*.

B. Riparian Rights

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). See also Mich Admin Code, R 281.811(2). In reviewing Mr. Coleman’s permit application for WRD, Jeff Pierce did not find any adverse impacts to riparian rights. Accordingly, WRD did not assert at the hearing that the project would adversely affect any person’s riparian rights. I find, as a Matter of Fact, that the proposed project will not adversely affect riparian rights.

C. Recreation

WRD did not assert at the hearing the Mr. Coleman’s proposed project would adversely affect recreation. In reviewing Mr. Coleman’s application, Jeff Pierce concluded that it would not (Exhibit 2, p 18). Therefore, I find, as a Matter of Fact, that the proposed project would not have a negative impact on the public’s recreational use of Bennett Lake.

D. Fish and Wildlife

Jeff Pierce testified credibly at the hearing that vertical seawalls reflect and intensify wave energy causing scouring of bottomland and re-suspension of sediments in the near shore, or littoral zone, of the lake which can negatively impact fish spawning and degrades habitat and water quality. (Tr., p 9). Mr. Pierce further testified credibly that the redirection of wave energy caused by seawalls can increase erosion on shorelines of adjacent and cross-lake properties and that seawalls prevent movement of wildlife and aquatic organisms from nearshore aquatic habitat to the land. (*Id.*) This testimony was not rebutted in the record. Therefore, I find, as a Matter of Fact, that the proposed seawall will adversely affect uses of the resource for 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.) None of

the Parties have contended that the proposed seawall will be aesthetically displeasing. I find, as a Matter of Fact, that the proposed seawall is not aesthetically displeasing.

F. Local Government, Agriculture, Industry and Commerce

There is no contention that the proposed activity would cause any impact, adverse or otherwise, on local government, agriculture, industry and commerce. Therefore, I find, as a Matter of Fact, that the proposed seawall does not cause any impact on local government, agriculture, industry and commerce.

G. Environmental Impacts

Under Section 30106, 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.” As noted, *supra*, Jeff Pierce testified that the seawall would degrade the water quality by causing sediments to be re-suspended. He also testified credibly that the redirection of wave energy caused by seawalls could increase erosion on shorelines of adjacent and cross-lake properties. (Tr., p 9). Therefore, I find, as a Matter of Fact, that the proposed activity will impair the waters and other natural resources of the state.

III. Mich Admin Code, R 281.814

In addition to the statutory standards addressed above, 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.

Mich Admin Code, R 281.814. The effects on the public trust, riparian rights and the environment have been discussed, and those findings apply equally under this Rule. Jeff Pierce testified credibly for the WRD that the effects on the environment would not be minimal. (Tr., p 9.)

With respect to the existence of feasible and prudent alternatives, Mr. Pierce testified that the placement of riprap rock on a slope along the shoreline, as authorized by Permit No. WRP016939, would address Mr. Coleman's concerns about erosion. Mr. Pierce also testified that local watercraft ordinances which limit wake emitting boat traffic are a reasonable alternative for addressing shoreline erosion caused by boats. At present, however, no such ordinances are in place. (Tr., pp 10-11; Ex. R-4.) Both Mr. Coleman and Aaron Wallace (the owner of Seaside Seawalls, who Mr. Coleman hired to build his proposed seawall) testified credibly that "wake boats" are commonly used on Bennett Lake. (Tr., pp 13-14, 19-20.) Mr. Coleman is concerned that only using riprap rocks for erosion control will not be sufficient because of the boat wakes, which are becoming more prevalent and, in Mr. Coleman's words, have "destroyed" his shoreline. (Tr., pp 19-21). But Mr. Coleman did not offer any persuasive evidence to counter the WRD's argument that the riprap shoreline protection would provide adequate erosion control. Therefore, based on this record, I find, as a Matter of Fact, that feasible and prudent alternatives exist to address Mr. Coleman's concerns about shoreline erosion without the need to construct a steel seawall.

IV. Summary

To summarize the Finding of Facts under Part 301, the activity proposed in the application will not adversely affect the public trust under the common law. Mr. Coleman's project will cause adverse effects upon uses of the resource for fish and wildlife but will not cause adverse effects on upon uses of the resource for recreation, aesthetics, local government, agriculture, commerce, and industry. The proposed activity will impair the waters and natural resources of the state. Finally, there is a feasible and prudent alternative to the proposed activity.

CONCLUSIONS OF LAW

Based on the Findings of Fact, I conclude as a matter of law:

1. Jerry Coleman is the proper applicant for the permit, and the application for a permit was property processed.
2. Because the proposed project involves the construction of steel seawall on the bottomland of Bennett Lake, the proposed project is regulated under Part 301, and a permit is required. MCL 324.30102(1)(b).
3. The WRD has jurisdiction over projects regulated under Part 301.
4. The proposed project will not preclude the public's right to navigate, fish, or fowl on public trust waters. *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926).

5. The proposed project will not adversely affect riparian rights. MCL 324.30106; Mich Admin Code, R 281.811(2).
6. The proposed project will cause adverse effects upon the uses of the resource for fish and wildlife. MCL 324.30106.
7. The proposed project will not cause adverse effects upon uses of the resource for recreation, aesthetics, local government, agriculture, or industry and commerce. MCL 324.30106.
8. The proposed project will adversely affect the waters and natural resources of this state. MCL 324.30106.
9. There are feasible and prudent alternatives to the proposed project. Mich Admin Code, Mich Admin Code, R 281.814(b).

FINAL DECISION AND ORDER

Based on the Findings of Fact and Conclusions of Law, it is **DETERMINED** that the application for a permit submitted by Jerry Coleman is **DENIED** under the permitting criteria of Part 301 of the NREPA.

This is a final order that resolves the last pending matter and closes the contested case.



Paul Smith
Administrative Law Judge

REVIEW OF THIS DECISION

In light of the 2018 amendments to the Natural Resources and Environmental Protection Act (NREPA), MCL 324.1301, *et seq.*, the right to seek review of this decision may vary based on the particular Part of the NREPA under which this contested case was brought. To ascertain the correct manner to seek review of this decision, and the correct time frame for review, the parties and/or their legal counsel should examine the applicable statutes and administrative rules. See, Section 1317 of the NREPA, being MCL 324.1317; Sections 88 and 301-306 of the APA, being MCL 24.288 and MCL 24.301-306; and the Department of EGLE website information regarding petitions for review at: www.michigan.gov/egle.

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 13th day of October 2021.



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