



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
LANSING



LIESL EICHLER CLARK
DIRECTOR

February 11, 2022

VIA EMAIL

Mr. Brett Bonjernoor

[REDACTED]
Traverse City, Michigan 49684

Dear Mr. Bonjernoor:

**SUBJECT: Director's Decision Regarding Environmental Permit Review
Commission's Panel Recommendations on Brett Bonjernoor Petition,
File No. HPA-S1XK-R3EPR**

The Environmental Permit Review Commission convened a Panel to consider your petition submitted in September 2021 at a hearing on October 29, 2021, related to a permit application that has not been either approved or denied by the Michigan Department of Environment, Great Lakes, and Energy (EGLE). Michigan law allows for a Panel review prior to a permit being approved or denied, and such review results in a nonbinding Panel recommendation to the EGLE Director (MCL 324.1315(5)). The Panel issued the enclosed Meeting Summary and Recommendations on December 13, 2021. Consistent with the terms of MCL 324.1315, I have reviewed the Panel's recommendations within the 60 days provided, and my conclusion is that the violations of state law and regulations at your property are capable of resolution, but for the reasons set forth below, I do not agree with the recommendations of the Panel. MCL 324.1315(6).

Prior to issuing its Meeting Summary and Recommendations, the Panel received your petition and supporting documentation, as well as a position paper and supporting file materials submitted by EGLE's Water Resources Division (WRD), all of which were included in the record for this matter. The Panel documented the discussion at the October 29 hearing in its Meeting Summary and Recommendations.

The issues in dispute pertain to activities on your property (excavation, grading, and filling) that were undertaken without a permit in violation of Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.30301 *et seq.*, and how the outstanding violations can be resolved, whether under a permit or otherwise. The Petitioner, Brett Bonjernoor, and EGLE expressed differing opinions on the location and extent of wetlands impacted by the Petitioner's regulated activities (including excavation, grading, and filling activities related to efforts to direct storm water away from the Petitioner's house to prevent

flooding), but the record shows that both parties found that both wetlands and upland are present on the subject property and that a permit was needed to address the construction.

In its summary, the Panel described the WRD's positions almost verbatim from the WRD's three-part statement of the Department Position. The Panel recommended "reversal" on the three points, but the recommendations mischaracterize the statutory and legal basis for the WRD's statement of position, and therefore, I do not agree with the recommendations. However, I am in agreement with other statements by the Panel in its recommendations as to the resolution of the violations and a path forward to issuance of a permit. The specific rationale for my decision is explained in more detail below.

Panel Recommendation #1. "A reversal of the decision to withdraw the permit as that may not have been in EGLE's right nor do we believe the violation prohibits the application to proceed."

EGLE has the right to return an application if there is an underlying violation. To the extent the Panel infers EGLE does not have this right, the Panel's decision is reversed.

But compliance with Part 303 does not rule out seeking a resolution that addresses both the outstanding violations and the issuance of a permit to bring the subject property fully into compliance. The record reflects that a permit is the desired outcome for the Petitioner, Mr. Bonjernoor, and the end result sought by EGLE, and the Panel also urged finding a path forward to processing a permit. While EGLE is bound by statute to issue permits only for lawful activities, EGLE and the Petitioner can negotiate a settlement that includes any necessary restoration and mitigation and also puts the parties on a path toward issuance of a permit for a design that both addresses the Petitioner's flooding concerns and avoids unlawful impacts to regulated wetlands. EGLE is prepared to proceed with those negotiations. EGLE reserves the right to proceed with any enforcement action it deems appropriate during the process.

Panel Recommendation #2. "A reversal of the decision the application cannot be considered complete as all the information and payments were made relative to the application being submitted and believed to be applicable;" and

Panel Recommendation #3. "A reversal of the determination that the application cannot proceed until the violation is resolved. We disagree with each of these being handled separately and believe they can, in fact, run concurrently."

These two procedural determinations made by EGLE that the Panel seeks to "reverse" do not, if left standing, prevent the parties from negotiating a settlement to resolve both violations and permit issues. Part 303 and its administrative rules

that govern wetland permit applications set the criteria and requirements for consideration of applications, including completeness of applications and closure of a file based on action or inaction of an applicant. See MCL 324.30306(1)(a)-(f) and Mich. Admin. Code R 281.921-R 281.923. But the Panel and EGLE had different information in front of them when considering these rules and this matter. I decline to adopt the Panel's recommendations to reverse EGLE's past procedural determinations, first, because the Panel based its recommendations on information that may not have been available to EGLE, and second, because the Panel's procedural recommendations focusing on the status of a past application would conflict with the recommendation made in this decision – to pursue a negotiated settlement to resolve violations and address issuance of a permit.

This decision, rejecting the Environmental Permit Review Commission Panel's recommendations and instead recommending negotiation of a settlement of violation and permit issues, does not preclude the applicant from pursuing other applicable legal appeals processes afforded by law following a permitting decision made by EGLE.

If you have any questions regarding this matter, please contact Ms. Amy Epkey, Senior Deputy Director, at 517-242-7407 or EpkeyA@Michigan.gov.

Sincerely,



Liesl Eichler Clark
Director
517-284-6700

Enclosure

cc/enc: Mr. Matt Germane, Environmental Permit Review Commission
Mr. Dana Kirk, Environmental Permit Review Commission
Ms. Erin Gerber, Environmental Permit Review Commission
Mr. Robert Reichel, Michigan Department of Attorney General
Ms. Polly Synk, Michigan Department of Attorney General
Mr. Aaron B. Keatley, Chief Deputy Director, EGLE
Ms. Amy Epkey, Senior Deputy Director, EGLE
Mr. James Clift, Deputy Director, EGLE
Ms. Teresa Seidel, EGLE
Mr. Brad Pagratis, EGLE
Mr. Jerrod Sanders, EGLE
Mr. Luis Saldivia, EGLE
Mr. Christopher Conn, EGLE
Ms. Robyn Schmidt, EGLE
Ms. Dale Shaw, EGLE

ENVIRONMENTAL PERMIT PANEL
 Petition for Permit Application Review
 Meeting Summary and Recommendations

This information is required by Section 1315 of Part 13 (Permits) of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended.

1. MEETING DATE	
October 29, 2021	
2. MEETING LOCATION	
Michigan Department of Environment, Great Lakes, and Energy (EGLE), Constitution Hall, ConCon A and B Conference Room, Lansing.	
3. PETITIONERS	
Mr. Brett Bonjernoor	
4. ENVIRONMENTAL PERMIT PANEL MEMBERS	
Matt Germane (Chair) Dana Kirk Erin Gerber	
5. EGLE STAFF	
<p><u>Water Resources Division</u> Robyn Schmidt, Senior Environmental Quality Analyst Luis Saldivia – Field Operations Manager Christopher Conn – Environmental Quality Specialist</p> <p><u>Panel Staff:</u> Robert Reichel – Division Chief, Michigan Office of Attorney General Brad Pagratis – Information Management Division, Director, EGLE Dale Shaw – Regulatory Affairs Officer, EGLE Stephanie Fredline – Department Analyst, EGLE</p>	
6. DOCUMENTS SUBMITTED TO THE PANEL	
Submitter	Description
Water Resources Division, EGLE	1. 2021-10-26 Memo to EPRC 2. 2021-10-26 Petition for Permit Application Review- Bonjernoor 3. File Materials
Petitioner	<p><u>Attachments Titled:</u></p> 1. Bonjernoor EPRC FORM 2. Application 08 31 2021 3. 1-1-SD 480p(1)(1).mow 4. 2-1-SD 480p(1).mov 5. Bonjernoor 1954 6. Bonjernoor County Aerial

7. Bonjernoor NWI map
8. Conceptual Proposed
9. Mcl-324-1305 admin complete
10. NREPA Definitions
11. 1938 Leelanau
12. 1952 Leelanaw
13. 1.mov
14. 2.mov
15. Approved ATF Violation Alpena Marlow
16. Approved Marlow order to restore
17. Bonjernoor ATF Details Proposed
18. Bonjernoor County Aerail Overlay
19. Bonjernoor Legal Brief Attorney Kaufman
20. Bonjernoor Updated Issues and Facts
21. Culvert Drain on 913
22. FOIA request
23. FOIA Response Oct 22 21
24. Haas Sept 24 2021
25. Hydrological Aerial Report P1
26. Hydrological Aerial Report P2
27. Hydrological Aerial Report P3
28. Hydrological Aerial Report P4
29. Hydrological Aerial Report P5
30. Initial Email To Robyn Schmidt Sept 4 2020
31. Minor activity Wetland Pond
32. MSU Rain April to Aug 23 2020
33. Partial area calculation review
34. Robyn Schmidt Notice of Violation
35. Robyn Schmidt Restore letter with plan OCT 15 2021
36. Bonjernoor application Withdrew Statement
37. Bonjernoor sTatement Regarding Completeness
38. Brett Bonjernoor Statement

7. SUMMARY OF DISCUSSION

Panel discussed our role in this dispute with respect to the requests/statements made by the parties. The panel's responsibility was determined to be to review the Michigan Department of Environment, Great Lakes, and Energy (EGLE) position and advise the director about the specific issues related to this permit application. The panel determined EGLE's position to be as follows:

1. The Water Resource Division (WRD) returned the permit application as "withdrawn" due to an existing violation on-site.
2. The permit application was not considered complete by the WRD.
3. The WRD determined an application for this site could not be processed until the violation is resolved.

The panel discussed the validity of EGLE deciding to withdraw the permit application on behalf of the applicant. Two panel members indicated that, in their experience, withdrawal was an option used by EGLE to avoid denial of a permit, where EGLE advises the applicant of this option in advance, but that they had not experienced EGLE withdrawing the permit without the consent of the applicant). EGLE's right to withdraw a permit when they are not the applicant was discussed among the panel members and determined to be out of their right to do so and creates a situation where an applicant who is trying to comply is not able.

With regard to application completeness, the panel understood it, beyond the violation in question, to be sufficiently complete. The applicant paid two times the standard permit fee for

the permit applied for (minor permit), as required. EGLE then believed that the applicant needed to apply for the "individual" permit instead, which came with a higher permit fee. The panel did not agree with EGLE's position that the permit was not complete, as the applicant had provided sufficient payment for the application submitted and no information was indicated to have been missing from the application. In addition, EGLE did not provide any justification as to why the applicant needed an individual permit.

Lastly, the panel discussed EGLE's position that the existing violation be resolved before a permit application could be processed. The panel disagreed with this position, noting the small area of the project and notable gaps in the timeline of correspondence and correction. The panel members noted that EGLE allowed an entire year to pass without correspondence or follow-up. This has remained an open ditch for the duration of this process, instead of being swiftly remedied to satisfy all parties. If this were truly an environmental issue, the panel believes that swift action would have been in the interest of all parties, including the environment. The panel's discussion indicated that the panel members see no reason why the violation cannot be resolved concurrent to the permit process, so that the repairs/restoration can be made at the same time as the final solution is implemented. EGLE's request/requirement that the applicant restore the area, when the alleged environmental damage was already done and sat unattended for one year, then return to install a final solution was believed to be unnecessary, inefficient, and no more protective of the environment than it would be to require restoration as part of the final permit. The panel did not agree that the violation needed to be resolved separately and believe they should be done concurrently.

8. PANEL RECOMMENDATIONS TO RESOLVE PERMIT APPLICATION CONCERNS

The panel recommends the following:

1. A reversal of the decision to withdraw the permit as that may not have been in EGLE's right nor do we believe the violation prohibits the application to proceed.
2. A reversal of the decision the application cannot be considered complete as all the information and payments were made relative to the application being submitted and believed to be applicable.
3. A reversal of the determination that the application cannot proceed until the violation is resolved. We disagree with each of these being handled separately and believe they can, in fact, run concurrently.

9. ADDITIONAL PANEL RECOMMENDATIONS *(Not required)*