



GRETCHEN WHITMER
GOVERNOR

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



LIESL EICHLER CLARK
DIRECTOR

February 15, 2022

VIA EMAIL

Mr. Chuck Canestraight
Damfino Development LLC
560 Mart Street
Muskegon, Michigan 49440

Dear Mr. Canestraight:

SUBJECT: Director's Decision Regarding Environmental Permit Review
Commission's Recommendations on Damfino Development LLC Petition,
File No. HP2-SN9T-RC8V2

The Environmental Permit Review Commission convened a Panel to consider your petition submitted in September 2021 at a review panel on November 3, 2021. Your petition identified disputed issues 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 17, 2021. I have reviewed the Panel's recommendations within the 60 days provided under MCL 324.1315, and my conclusions are that:

- (1) The Panel made no recommendation on the issue of the applicability of the statutory exemption set forth at MCL 324.30305(4)(a) of Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, to wetlands on the subject property, so while there is no position to agree or disagree with, my position on this question is that the exemption does not apply and the wetlands are regulated; and
- (2) The Panel made a conditional recommendation that EGLE should take steps in the permitting process if the petitioner includes certain elements in a revised application; I agree that more information is needed from the petitioner for EGLE to move ahead in the permitting process, and I support progress toward a decision, but the Panel's recommendation requires more detail regarding the information necessary to complete the application, go to public notice, and move to a decision on issuance of a permit.

The explanation of this decision and an identification of the additional detail needed in order for the application to proceed to public notice are provided below:

With regard to the petitioner's request for a determination of whether the exemption for wetlands incidentally created by sand mining applies, per MCL 324.30305(4)(a), the Panel in this case acknowledged the importance of answering the question of whether wetlands on the subject property are regulated, but the Panel did not feel it had sufficient background to make a recommendation. After reviewing the positions and materials submitted by the petitioner and by EGLE, I agree with the position asserted by EGLE's Water Resources Division, specifically that the wetlands on the property in question are not exempt from regulation under the terms of MCL 324.30305(4)(a). The language of the statute is clear that the exemption does not apply if a property is no longer used for mining and is being used for another purpose unrelated to excavation as part of commercial mining. [The record makes clear that the property is no longer used for mining and it is not now used for purposes related to excavation as part of commercial mining, nor are such uses allowed under the property's current zoning; further, such uses are not part of current land use plans or proposals, nor the wetland permit application itself.] The exemption does not apply to these wetlands, and they are regulated under Part 303.

Next, the Panel recommended that the petitioner submit a revised application and that EGLE move forward in the permit process. My decision encompasses those broad recommendations, but adds the following details to ensure that these next steps in the process clearly identify what is regulated and what is being proposed to the applicant and the public:

EGLE can public notice the project if the applicant submits a revised application that includes the following information:

- Identification of wetlands on the property that includes the 6.70 acres of regulated wetland on the property, consisting of:
 - 5.91 acres of Rare and Imperiled Interdunal Wetland (requiring a 5:1 mitigation ratio);
 - 0.79 acres of emergent/scrub-shrub wetland located within 500 feet of an inland lake (standard 1.5:1 ratio); and
 - 0.631 acres of non-regulated wetland on-site (no mitigation required).
- An updated alternatives analysis, mitigation plan, and other elements identified as necessary in the application.

This decision determines that the subject property is not exempt from regulation under Part 303 and also incorporates the portions of the Environmental Permit Review Commission Panel's recommendations that recommend a revised application and EGLE consideration of that revised application. This decision also provides more detail as to what will make the application complete. This decision does not preclude the applicant from pursuing other applicable legal appeals processes afforded by law following a permitting decision made by EGLE.

Mr. Chuck Canestraight

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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: Ms. Lori Myott, Environmental Permit Review Commission
Mr. Dana Kirk, Environmental Permit Review Commission
Mr. Jeff King, Environmental Permit Review Commission
Mr. Robert Reichel, Michigan Department of Attorney General
Ms. Polly Synk, Michigan Department of Attorney General
Mr. Dan Bock, 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
Ms. Nancy Cuncannan, EGLE
Ms. Anne Garwood, 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	
November 3, 2021	
2. MEETING LOCATION	
Michigan Department of Environment, Great Lakes, and Energy (EGLE), Constitution Hall, Lee Walker Conference Room, Lansing.	
3. PETITIONERS	
Mr. Chuck Canestraight – Damfino Development LLC	
4. ENVIRONMENTAL PERMIT PANEL MEMBERS	
Lori Myott – Chair Dana Kirk Jeff King	
5. EGLE STAFF	
<u>Water Resources Division</u> Don Bock, Assistant Attorney General, Michigan Office of Attorney General Nancy Cuncannan, Senior Environmental Quality Analyst Anne Garwood, Wetlands, Lakes and Streams Unit Supervisor	
<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	
6. DOCUMENTS SUBMITTED TO THE PANEL	
Submitter	Description
Petitioner	1. EPRC Petition 1a. Attachment A B C D E F G H 1b. Appendix A B C D 2. SPC 1951 Elevation Survey 3. Switch Grand Rapids EGLE Permit and Plans 4. Senate Bill No. 163 5. Substitute for Senate Bill No. 163
Water Resources Division, EGLE	1. Memo to EPRC 2. Permit Review Panel – WRD Summary

3. Damfino EGLE Response Rare and Imperiled Natural Community Interdunal Wetland
4. Submission Dwonload Correction Requests
5. Damfino EGLE 301 jPkg 061821
6. PUD Application May 2020
7. 20181011 Muskegon Damfino PUDapproval
8. Preliminary PUD Appliation 9.20.2018
9. City of Muskegon Zoning May 7-14-2017
10. Interdunal wetland

7. SUMMARY OF DISCUSSION

To begin the discussion, both the Peitioner, their consultants, and EGLE provided a brief summary of their interpretation of the permit application and application status.

The panel discussed the applicability of the wetland regulations (Part 303) and the regulatory process (Part 13) for a project that will disturb nearly 7.25 acres of wetland that was incidentally created by sand mining and if regulated and if permitted for impact by EGLE, whether those wetlands are considered rare and imperiled (being “interdunal”) and therefore subject to a higher mitigation ratio than non-rare and imperiled wetlands. The panel noted that the first issue was most critical (i.e., if it is determined that the 7.25 acres is exempt from Part 303, the subject wetlands would not be subject to regulation and therefore the issue of rare and imperiled mitigation requirements would be moot), and focused the discussion on the meaning of the Part 303 exemption.

Mr. Dana Kirk asked Mr. Robert Reichel, EGLE, to clarify the process for a panel reviewing a permit application that has not been acted on (i.e., a final decision has not been made). Mr. Reichel clarified that the panel’s role in this case would be to provide a recommendation to the EGLE Director to approve, modify or reject the permit application and the Director may or may not implement the recommendation.

Mr. Jeff King went through the history and his understanding of the applicability of the rule and asked the petitioner and EGLE for their interpretations (i.e., when do you think the exemption would apply?).

The panel spent significant time discussing Part 303 and the language regarding excavation as part of sand mining and the exemptions. Due to the history of the site and the ability to interpret the statute to support the point of both parties, the panel did not feel it had sufficient background to make a definitive statement regarding the interpretation of the Sand and Gravel Mining Exemption in Part 303.

The panel discussed the concept of administratively complete in terms of whether or not EGLE has enough information to move forward with public comment. Chair Myott asked if the term “administratively complete” is defined or whether there is a process/procedure in place for making administrative complete determinations and Mr. King explained that in his experience EGLE exercises varying degrees of discretion in making that determination on a case-by-case basis while applying the process/procedures as required by Part 13 .

It was recommended that EGLE make a timely decision on the application and move forward with public comment or deny the application if EGLE believes there is not enough information to continue the process.

8. PANEL RECOMMENDATIONS TO RESOLVE PERMIT APPLICATION CONCERNS

The panel recommends that the department move forward with public notice for the current project if the applicant is willing to submit a revised application that includes seven acres of wetland impact, understanding that seven acres are not necessarily conceded by the applicant to be regulated. We also recommend that the department move through the public noticing process and engage in further clarification prior to making a decision on the application.

9. ADDITIONAL PANEL RECOMMENDATIONS *(Not required)*