



Ensuring the Waters of the Great Lakes Basin Are Healthy, Public, and Protected for All

November 11, 2023

Michigan Department of Environment, Great Lakes and Energy
ERPC Contested Case Review Panel
c/o Wendy Wisniewski
525 West Allegan Street
Lansing, Michigan

RE: Matter of Petition of Carrie C. Barnes Trust
Docket No.: 21-030710
Petitioner Agency No.: HP6-WPNI-PHWPX

To: Environmental Permit Review Commission Contested Case Review Panel

FLOW (For Love of Water), a Great Lakes law and policy center, submits the following comments and concerns regarding the application for the proposed construction of a boathouse, boat basin, and dredged entrance channel on the 3-acre lakefront property located at 121 N. Long Lake Road, Traverse City, Michigan.

The construction of the proposed boat basin and entrance channel pier appears to be unreasonable as it requires substantial, periodic, and permanent alterations of bottomlands of Long Lake. The project is, on its face, violative of the public trust doctrine, a well-established set of principles delineating public and private rights regarding the ownership and use of Great Lakes coastal shorelines, Part 301 of NREPA, and the Michigan Environmental Protection Act (MEPA).

Site Conditions – Unreasonable Impacts

The proposed project would entail dredging 292 cubic yards of bottomland materials to create an entrance channel 88 feet long and 33.75 feet wide by 2.65-feet deep. The dredged channel would provide connecting access to an inland boat basin requiring the excavation of an additional 3,234 cubic yards of material landward of the ordinary high water mark (OHWM). In addition, the proposed project would include a 40-foot-long by 5-foot-wide boardwalk, supported by helical piers, to be constructed across 200 feet of wetland.

As established in the Final Decision and Order, the impacted bottomlands of Long Lake consist of hard packed bottom substrate sand “containing nice vegetative growth which provides good feeding and living habitat for small fish.” The impacted area has been documented as habitat for successfully reproducing Walleye in Long Lake and where Yellow Perch, White Sucker, and Northern Pike regularly feed. Expert testimony established that the predominant plant in the proposed dredged lakebed area was “Isoetes, a

rooted, grass-like plant that provides nice cover and nesting habitat for small egg-laying fish... and Chara, a stemmed algae in which fish hide and which also attracts plankton and zooplankton.” Expert testimony further established the proposed dredging would result in an “immediate depth and temperature change” that would be detrimental to the feeding and reproduction of fish and aquatic organisms on which they feed. In addition to destroying habitat, the dredging would affect “littoral currents and flow and could therefore impact fisheries and habitat in other areas of Long Lake.” Expert testimony also established that in order to maintain the depth of the entrance channel, additional dredging would be required “in perpetuity, usually every five years” creating “a permanent and regular adverse impact to the nearshore environment, thereby adversely impacting the fishing component of the public trust.”

Application of the Public Trust Doctrine

The public trust doctrine is the “lodestar” set of jurisprudential principles that establish the public’s ownership and rights to use and enjoy the navigable waters of the Great Lakes and the bottomlands beneath them. Under the public trust doctrine, the navigable waters of the Great Lakes, their tributary rivers and streams, and navigable inland lakes constitute a legally enforceable “public trust.” Michigan citizens are the beneficiaries of the trust, and the government, as the fiduciary, has the legal responsibility to protect the trust from impairment. The Michigan Department of Environment, Great Lakes, and Energy’s explanation of the public trust doctrine is clear and concise:

“Michigan courts have determined that private uses of the bottomlands and waters, including the riparian rights of waterfront property owners, are subject to the public trust. In other words, if a proposed private use would adversely impact the public trust, the State of Michigan’s regulatory authority requires that the proposal be modified or denied altogether in order to minimize those impacts.”¹

The state’s fiduciary obligation to protect public trust resources from impairment is, in the words of the Michigan Supreme Court, a “high, solemn and perpetual” duty.² The public trust doctrine must be observed by the state in decision-making regarding proposed uses of navigable waters and bottomlands and also can be used to invalidate governmental and private actions that violate the doctrine.³

Given its dimensions and configuration, the proposed project will unquestionably impair public trust resources. The evidence clearly establishes that the impairments will be permanent and deleteriously affect other areas of Long Lake. The findings also establish that proposed activities will also diminish fishing in Long Lake, a primary protected right under the public trust doctrine.

¹ Department of Environment, Great Lakes, and Energy, Great Lakes Bottomland Conveyances <https://www.michigan.gov/egle/about/organization/water-resources/shipwrecks/great-lakes-bottomland-conveyances>

² *Collins v. Gerhardt*, 211 N.W. 115 (Mich. 1926).

³ See, Kilbert, K., The Public Trust Doctrine and the Great Lakes Shores, Cleveland State L. Rev., 2010 <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1065&context=clevstlrev>

Determination of Feasible and Prudent Alternatives

The petitioner has the burden of establishing that there are no feasible and prudent alternatives to the proposed project. This the petitioner failed to do. The petitioner's right to use and enjoy the waters of Long Lake, including the rights to boat and wharf, can be accommodated by a more reasonable dock design and one congruous with the docks utilized by neighboring property owners.

Mich Admin Code, R 281.814 under Part 301 of NREPA provides:

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.⁴

In conformity with Rule 281.814, the joint permit application requires an analysis of feasible and prudent alternatives. The joint permit application asks the applicant for an:

"Alternatives Analysis detailing all options considered and why this is the least impactful feasible and prudent proposal. The depth of this analysis is typically commensurate with the size and purpose of the project and at minimum should include variables such as alternate locations (including other properties), configurations and sizes (layout and design), and methods (construction technologies), and other constraints (local regulations, resource issues). Discussion should also include why the do nothing alternative is not feasible or prudent."⁵

The Administrative Law Judge (ALJ) found that the Petitioner did not address whether a permanent dock is a feasible and prudent alternative to its request to "dredge out to navigable waters." The petitioner's noncompliance with the mandatory requirement to conduct a feasible and prudent alternative analysis should be fatal to this appeal.⁶ Moreover, the ALJ found that the Water Resource Division of EGLE "produced evidence that a seasonal dock is one feasible and prudent alternative because this option affords Petitioner both access and wharfage to navigable waters while minimizing the potential adverse impacts to the resource."

"The Tribunal believes that a permanent dock is also a feasible and prudent alternative to dredging out to navigable water. As stated in footnote 73, however, that alternative was not explored by Petitioner in this contested case."

⁴ Michigan Administrative [Rule 281.814](#), Environmental assessment.

⁵ Digital EGLE/USACE Joint Permit Application (JPA) for Inland Lakes and Streams, Great Lakes, Wetlands, Floodplains, Dams, Environmental Areas, High Risk Erosion Areas and Critical Dune Areas, page 3.

⁶ Failure to address this clear and distinct requirement of the permit application would support a finding that the permit application was administratively incomplete.

The Michigan Environmental Protection Act (MEPA), imposes a duty on government agencies, commissions and private entities to prevent and minimize environmental degradation or impairment of air, water, or natural resources or the public trust in those resources.⁷ MEPA prevents an agency from issuing a permit for an activity that is likely to result in pollution, impairment or destruction of the air, water or other natural resources, or the public trust in those resources, if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.⁸

Michigan courts have consistently recognized that MEPA imposes additional environmental review requirements that are supplemental to existing administrative and statutory requirements. "It is most important to note that [M]EPA does not, as both parties imply, merely provide a separate *procedural* route for protection of environmental quality, it also is a source of supplementary *substantive* environmental law." *In State Highway Commission v Vanderkloot*, 392 Mich. 159 (1974) (emphasis in original).

Interpreting MEPA, the *Vanderkloot* court found that the statute "is designed to accomplish two distinct results:"

- (a) to provide a *procedural* cause of action for protection of Michigan's natural resources; and
- (b) to prescribe the *substantive* environmental rights, duties, and functions of subject entities. (court's emphasis).

MEPA also requires a state agency or commission to undertake a two-part inquiry:

- 1) determine whether the project proponent has demonstrated that "there is no feasible and prudent alternative to [the polluting, impairing, or destroying entity's] conduct"; and
- 2) whether "such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction" (court's emphasis).

Clearly, the record establishes that the proposed activities will permanently impair healthy and vibrant aquatic life in Long Lake.

Finally, the constitutional mandate of Article IV, Section 52 of the Michigan Constitution – which MEPA implements - creates a magisterial and administrative mandate compelling the state to protect our natural resources:

⁷ *Ray v. Mason Cty Drain Com'r*, 393 Mich 294, 304; 224 NW 2d 883 (1975).

⁸ MEPA, [MCL 324.1705\(2\)](#)

“The conservation and development of the natural resources of the state are hereby declared to be *of paramount public concern* in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.”

In summary, the detailed findings and determinations of the ALJ in its Final Decision and Order overwhelmingly establish a clear basis for the denial of the permit. The proposed activities would impair the waters of Long Lake, impact fish and aquatic organisms, and impair the biome of the area in perpetuity. The petitioner clearly has feasible and prudent alternatives for dockage that would not impair and permanent damage public trust waters. Therefore, the ALJ’s Final Decision and Order must be upheld.

Sincerely,



Liz Kirkwood
Executive Director
FLOW (For Love of Water)

cc: Senator Damoose
Representative Coffia