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February 1, 2021

Four Lakes Task Force
Board of Directors
233 E. Larkin St.
Midland, MI 48640

Attn: David Kepler, President

Re: Part 307 Legal Levels for Secord, Smallwood, Wixom and Sanford Lakes; and the Four Lakes Special Assessment District

Dear Mr. Kepler:

We understand that there is a considerable amount of misinformation being conveyed using social media in connection with establishment of the normal (i.e. legal) levels for Secord, Smallwood, Wixom and Sanford Lakes (“Four Lakes”) and the Four Lakes Special Assessment District. You have requested a letter that provides information to assist the members of the Four Lakes Task Force Board of Directors in responding to questions or concerns that are raised by the Four Lakes community, and in particular property owners that may be subject to special assessments in connection with the administration, design, construction, operation, maintenance, repairs and improvements of the lake level facilities.

All procedures set forth in Part 307 “Inland Lake Levels” of the Michigan Natural Resources and Environmental Protection Act (“Part 307”)¹, including mailing of notices to property owners and municipalities, for establishing the normal levels for all Four Lakes were followed. Affidavits of mailing and publication were submitted to the circuit court. On May 3, 2019, information and testimony in connection with the lake levels and special assessment district were presented to the Circuit Court. At that time, there was no objection to the normal levels proposed by the Four Lakes Task Force (which was based on the levels set forth in the licenses issued to Boyce Hydro Power, LLC by the Federal Energy Regulatory Commission). However, several property owners objected to being included or sought clarification as to the basis for inclusion in the special assessment district. The circuit court carefully considered the testimony, and in some cases, removed properties from the special assessment district. On May 28, 2019 the circuit court entered an order confirming the lake levels and special assessment district. The order includes a map of the special assessment district and lists all properties in the confirmed district. Anyone aggrieved, had 21 days to file an appeal in the Michigan Court of Appeals. That did not take place, and the

¹ MCL 324.30701 et seq., formally known as the Inland Lake Level Act.

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order is final. Nonetheless, the circuit court has “continuing jurisdiction”, meaning, there is a process for seeking clarification in connection with the court’s order.

No special assessment has been imposed at this time. The Four Lakes Task Force cannot without proper notice and opportunity for property owners to object, impose special assessments. Moreover, the final project costs and special assessment roll must be approved by the Gladwin and Midland county board of commissioners.

The Four Lakes Task Force was appointed by the Midland and Gladwin County Board of Commissioners as the “delegated authority” as provided in Part 307. The responsibilities and duties of the Part 307 Delegated Authority are set forth in the statute. Moreover, there is an agreement between the Four Lakes Task Force and the Counties.² The agreement establishes protocols between the Four Lakes Task Force and the counties, including, the terms and conditions in connection with the acquisition of the dams, and the “administration, operation, maintenance, repair, replacement and improvement” of the dams. Following the catastrophic events of May 19, 2020 this agreement was amended, and the Counties authorized the Four Lakes Task Force “to coordinate any and all efforts, including funding, design, contracting, with Federal, State and local agencies and departments with respect to the restoration, replacement and/or repairs of the damaged Part 307 Facilities, and the restoration of Wixom and Sanford Lakes.”³

Finally, as you may be aware, recently the legislature amended Part 307 to permit the Special Assessment District to issue Bonds and Notes for up to 40 years. This statutory amendment has nothing to do with the legal level or the proceedings before the circuit court. Dams properly designed and constructed should far exceed a useful life of 40 years. The proposed revision clarifies that bonds or notes may be issued up to 40 years, which will allow for the spreading of costs to landowners over a longer period of time and lower assessments for property owners. This change is also consistent with the financing term (i.e. up to 40 years) set forth in other public works and infrastructure statutes in Michigan.⁴ Again, project costs and the financing of project costs is not a function of the circuit court lake level proceedings.

Below is a more detailed discussion with respect to the process for establishing the normal levels of the Four Lakes system, and the special assessment process.

1. Part 307 “Inland Lake Levels” of the Michigan Natural Resources and Environmental Protection Act (“Part 307”).

Michigan common law does not require a private dam owner to maintain the existence of a dam or the artificial level of a lake. The case of *Goodrich v McMillan*⁵ established the rule that ownership of a dam *does not impose a duty* on the dam owner to maintain the water at an artificial level created by operation of a dam. (Emphasis added). Similarly, in *Drainage Board v. Village of Homer*⁶, a dam owner was allowed to destroy a dam over the complaints of the riparian landowners that lowering the impoundment would

² Agreement – Midland and Gladwin Counties and Four Lakes Task Force, dated August 21, 2019.

³ Amendment #1 to Agreement between Midland and Gladwin Counties and Four Lakes Task Force, dated June 9, 2020.

⁴ See, County Public Improvement Act of 1939, 1939 PA 342, as amended, MCL 46.171 et seq.; specifically, Sections 46.175, 46.175a and 46.175c; and County Public Works Act, 1957 PA 185, as amended, MCL 123.731 et seq.; specifically, MCL 123.755.

⁵ *Goodrich v. McMillan*, 217 Mich. 630, 187 NW 368 (1922).

⁶ *Drainage Board v. Village of Homer*, 351 Mich. 73; 87 NW2d 72 (1957)

diminish their ability to use sub-surface water for irrigation. The Court in that case stated that the riparian owners were continuously charged, by the very fact of the dam and its gates, *with notice that the pond is artificial (as distinguished from natural level) and that its level may be lowered or returned to natural state at any time by the dam owner.* (Emphasis added). The harshness of the law created considerable uncertainty among lake front property owners. Part 307 (and prior Michigan law dating back to the early 1900's) provides a public solution for preserving lakes that were created by the artificial impoundment of water.

Part 307 (formally known as the Inland Lake Level Act) is the exclusive authority for establishing and maintaining the legal levels of a natural or artificial lake. Section 30701 of Part 307 defines "Normal level" of an inland lake as:

[t]he level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake.⁷

The purpose of Part 307 is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public.⁸ The act essentially authorizes counties to make policy decisions as to the levels of their inland lakes, and to build and finance dams as necessary to maintain the desired lake levels.⁹ However, it is the circuit court that ultimately has the authority to weigh competing factors in its determination of the normal levels of an inland lake. Section 30707 of Part 307, in pertinent part, provides:

- (4) In a determination of the normal level of an inland lake, the court shall consider all of the following:
- (a) Past lake level records, including the ordinary high-water mark and seasonal fluctuations.
 - (b) The location of septic tanks, drain fields, sea walls, docks, and other pertinent physical features.
 - (c) Government surveys and reports.
 - (d) The hydrology of the watershed.
 - (e) Downstream flow requirements and impacts on downstream riparians.
 - (f) Fisheries and wildlife habitat protection and enhancement.
 - (g) Upstream drainage.
 - (h) Rights of riparians.
 - (i) Testimony and evidence offered by all interested persons.
 - (j) Other pertinent facts and circumstances.¹⁰

Moreover, once established, the circuit court has "continuing jurisdiction" over the lake levels, which means, anything affecting the lake levels, including departures from the normal levels, should be presented to the circuit court for its consideration.

⁷ MCL 324.30701(h)

⁸ *In re Martiny Lakes Project*, 381 Mich 180, 187; 160 NW2d 909 (1968); *Lenawee Board of Comm'rs v. Abraham*, 93 Mich App 774, 779; 287 NW2d 371 (1979).

⁹ *In re Matter of Van Etten Lake*, 149 Mich App 517, 525; 386 NW 2d 572 (1986).

¹⁰ MCL 324.30707(4).

Part 307 also provides the financial model for sustainability of lake level structures. Part 307 authorizes the establishment of a special assessment district to defray the costs in connection with administration, operation, maintenance and improvement of lake level structures.¹¹ Moreover, the special assessment district is authorized to issue municipal bonds, notes and lake level orders in anticipation of special assessments.¹² Acknowledging that dam improvements, if engineered properly, can have a useful life exceeding 40 years, Part 307 authorizes the Delegated Authority to finance improvements and assess private property, the State of Michigan, counties and local municipalities up to 40 years.¹³

Finally, Part 307 authorizes county to acquire dams and lake level structures by way of “gift, grant, purchase, or condemnation proceedings, an existing dam that may affect the normal level of the inland lake, sites for dams, or rights in land needed or convenient in order to implement” Part 307.¹⁴

Thus, Part 307 provides the statutory framework for transitioning private dams to public ownership, and a mechanism for long-term sustainability.

2. Four Lakes Task Force and the Four Lakes Special Assessment District.

Prior to December 2020, all four hydroelectric dams that impounded water creating the Four Lakes, were privately owned and regulated under the jurisdiction of the Federal Energy Regulatory Commission (“FERC”). Meaning, at that time, neither the Counties of Midland and Gladwin, nor the State of Michigan had any jurisdiction over the four hydroelectric dams. The dam operator, Boyce Hydro Power, LLC, although subject to FERC licenses, had complete control over dam operations. Ownership of the dams, was held by various Boyce entities affiliated with Boyce Hydro Power, LLC (collectively, “Boyce”)

In early 2018, a group of lakefront property owners learned that Boyce was not in compliance with its terms of the FERC license (in connection with the Edenville Dam) and that FERC was threatening to revoke the Edenville license. Concerned with the potential loss of Wixom Lake, and future loss of the other three lakes, the lake associations sought a public solution.

In July 2018, the Counties of Midland and Gladwin (“Counties”) adopted resolutions recommending and inviting the lake associations or representatives for all Four Lakes, to form a “Citizen Task Force” to develop a plan and present recommendations of establishing the normal (i.e. legal) levels of all Four Lakes. The citizen task force was also to address recommendations with respect to the potential special assessment boundaries and the entity to serve as the Counties’ Delegated Authority (to oversee and manage the lake levels, prepare the special assessment district, and the options for the long-term ownership, finance, operations, maintenance and improvement of the lake level structures).

In October 2018, the Counties adopted resolutions finding that in “order to protect the public’s health, safety and welfare, to best preserve the natural resources of the state, and to preserve and protect the

¹¹ MCL 324.30711(1): “The county board may determine by resolution that the whole or a part of the cost of a project to establish and maintain a normal level for an inland lake shall be defrayed by special assessments against the following that are benefited by the project: privately owned parcels of land, political subdivisions of the state, and state owned lands under the jurisdiction and control of the department. If the county board determines that a special assessment district is to be established, the delegated authority shall compute the cost of the project and prepare a special assessment roll.”

¹² MCL 324.30705.

¹³ *Id.*, as amended 2020 PA 221.

¹⁴ MCL 324.30708.

value of property around the lakes”¹⁵ that it was necessary to establish the normal levels for all Four Lakes. In addition, the resolutions provided that all costs in connection with the maintenance of the normal levels of the Four Lakes “shall be defrayed by special assessments for the benefits derived against privately owned parcels of land, political subdivisions of the state, and state owned lands.”¹⁶ The Sanford Lake Preservation Association (now known as the Four Lakes Task Force) was appointed the Counties’ Delegated Authority, and to act on behalf of the Board of Commissioners to oversee the lake level project, to prepare a special assessment district(s) and special assessment roll(s), and to “take all other actions as necessary and required by the delegated authority as provided in Part 307.”¹⁷ The Counties further directed their respective legal counsel to file a petition in the circuit courts of the Counties for the determination of the legal lake levels and boundaries of the special assessment district.

In accordance with the Counties’ resolutions, a petition was filed in both the circuit courts of each county. By order of the State Court Administrator, Midland County Judge Stephen Carras was assigned to hear both cases, including the case filed in the Gladwin County Circuit Court. The hearing was scheduled for May 3, 2019, and in accordance with the notice requirements set forth in Part 307, all property owners within the proposed special assessment district, political subdivisions (i.e. counties, villages and townships) were provided a notice of the hearing. Affidavits of mailing were executed by the drain commissioners from both Counties. In addition, notice of the hearing was published in *The Gladwin County Record* newspaper on April 10th, 17th and 24th, 2019¹⁸; and published in *Midland Daily News*, April 11th, 18th and 25th, 2019¹⁹.

On May 3, 2019 Judge Carras received information supporting the petition, and testimony was taken. After providing an opportunity for all those present at the hearing and taking into consideration the factors set forth in Part 307, on May 28, 2019, Judge Carras established the normal levels for each of the Four Lakes (which was based on the historical water levels and conditions set forth in the FERC licenses) and approved the Four Lakes Special Assessment District. This was a final order, and anyone aggrieved by Judge Carras’ order had the right to appeal the decision within 21 days following the entry of the order. There were no appeals of this order.

The Four Lakes Task Force was appointed by the Midland and Gladwin County Board of Commissioners as the “delegated authority” as provided in Part 307. The responsibilities and duties of the Part 307 Delegated Authority are set forth in the statute. As previously indicated, there is an agreement between the Four Lakes Task Force and the Counties, that establishes protocols between the Four Lakes Task Force and the counties. The Four Lakes Task Force (as the Counties’ Delegated Authority) sought to acquire by purchase the Four dams from Boyce. Unfortunately, because of the catastrophic events of May 19, 2020 the purchase of the dams did not take place. In June 2020, the Counties authorized the condemnation and taking of the properties from Boyce. After six months of battle through the Bankruptcy Court to rescue these properties, the condemnation occurred, and the Counties acquired the property. Four Lakes Task Force is now in control of operations of the lakes and restoring of the lake levels as mandated by Part 307.

¹⁵ County of Gladwin Resolution 2018-034, adopted October 9, 2018; County Midland Resolution, adopted October 16, 2018.

¹⁶ Id.

¹⁷ Id.

¹⁸ Affidavit of Publication, Mark Schaefer, The Gladwin County Record, Inc., April 24th, 2019.

¹⁹ Affidavit of Publication, Cathy Bott, Advertising Director, Midland Daily News, April 25th, 2019.

THE LAKE LEVEL ORDER AND SPECIAL ASSESSMENT DISTRICT WAS CONFIRMED. The proposed project costs presented to the Court at the time of the lake level hearing (May 2019) was for information purposes only. The Circuit Court does not have the jurisdiction over lake level projects. At this time, no proceedings have taken place to impose a special assessment on properties within the special assessment district. The Four Lakes Task Force cannot legally impose a special assessment without first following the procedures outlined in Part 307.

As the Part 307 Delegated Authority, Four Lakes Task Force is responsible for determining the project costs, and then “apportioning” those costs “against the following that are benefited by the project: privately owned parcels of land, political subdivisions of the state, and state owned land[s].”²⁰ That is, assessments are based on the benefits derived, and Four Lakes Task Force is responsible for determining the factors that contribute to the “benefits derived.” In general, there is no specific method of apportioning the cost of an improvements, except that the method selected must be fair, just, equal and in proportion to the benefits conferred.²¹

In addition, “[A]ll proceedings relating to the making, levying, and collection of special assessment authorized by this part [Part 307] and the issuance of bonds, notes, or lake level orders in anticipations of the collection of the special assessment shall conform as nearly as possible to the proceedings for levying special assessment and issuing special assessment bonds as set forth in the drain code of 1956.” Special assessments are a means of distributing the burden of a particular improvement to lands that specifically benefit.

Prior to imposing special assessments and placing them on the tax bill, the first step will involve preparing a computation of the project and acquisition costs. The next step requires the Delegated Authority to prepare an assessment roll apportioning the project costs. Thereafter, the Delegated Authority is required to notify all property owners within the special assessment district and hold a meeting to hear objections. Once the project costs and assessment rolls have been confirmed by the Delegated Authority, they must be approved by each of the County Board of Commissioners. Once approved by the County Board of Commissioners, the cost and special assessment roll “shall be final and conclusive unless appealed in a court within 15 days after county board approval.”²²

3. Financing Part 307 Project Costs – Municipal Financing.

The Four Lakes Special Assessment District must operate within a restrictive set of rules in financing specific projects. The revenue collected special assessments must only be used for the purposes set forth in Part 307. In addition, the Counties have determined by resolution that the lake level projects costs shall be defrayed by special assessments for the benefits derived against privately owned parcels of land, political subdivisions of the state, and state owned lands. Recently, the legislature amended Part 307 to clarify that the Four Lakes Special Assessment District may issue Bonds or Notes for a period of up to 40 years. As noted, the proposed revision will allow for the spreading of costs to landowners over a longer period of time and lower assessments for property owners. This statutory amendment to Part 307 has nothing to do with the lake level order or proceedings establishing the lake levels. The circuit has no jurisdiction over the project or project costs. Accordingly, questions or concerns in connection with what

²⁰ MCL 324.30711.

²¹ *Graham v Kochville Township*, 236 Mich App 141, 599 NW2d 793 (1999).

²² MCL 324.30714.

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presented at the time of circuit court hearing to establish the normal or legal level has nothing to do with the period of time authorized for the financing of lake level projects.

Should you have any questions or concerns regarding the foregoing, please feel free to contact me.

Sincerely,

CLARK HILL PLC

A handwritten signature in black ink, appearing to read "Joseph W. Colaianne". The signature is written in a cursive style with a large, prominent initial "J".

Joseph W. Colaianne

Enclosures

Cc: Dave Kepler, President, Four Lakes Task Force

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