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STATE OF MICHIGAN
30TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF INGHAM
CIVIL DIVISION

EDWIN MARTEL, BRUCE CARPENTER,
WILLIAM LANE and CLAUDIA AGEMAK,

Petitioners,

v

Case No. 09-866-AA
Hon. Paula J.M. Manderfield

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Respondent.

_____ /

ORAL ARGUMENT

BEFORE THE HON. PAULA J.M. MANDERFIELD, CIRCUIT JUDGE

Ingham County, Michigan - Thursday, December 10, 2009

APPEARANCES:

For the Petitioners: ROBERT K. KAUFMAN (P26719)
Attorney at Law
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Traverse City, MI 49685-3054

For the Respondent: LOUIS B. REINWASSER (P37757)
Environment, Natural Resources
And Agriculture Division
P.O. Box 30755
Lansing, MI 48909

ALSO PRESENT: Edwin Martel, Petitioner

REPORTED BY: Melinda I. Dexter, RPR, CSR-4629
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T A B L E O F C O N T E N T S

WITNESSES:

None

EXHIBITS:

None

1 Ingham County, Michigan
2 Thursday, December 10, 2009 - 10:23 a.m.
3 THE COURT: We're on the record in the matter
4 of Edwin Martel, Bruce Carpenter, William Lane, and
5 Claudia Agemak versus the Department of Environmental
6 Quality, Docket 09-866-AA. This is the time set for oral
7 argument in this matter.
8 Mr. Kaufman, you're here on behalf of the
9 Appellants?
10 MR. KAUFMAN: Yes, your Honor. And seated to
11 my right is Ed Martel, one of the Petitioners.
12 THE COURT: Okay. And then, Mr. Reinwasser,
13 you're here on behalf of the Department?
14 MR. REINWASSER: That is correct, your Honor.
15 THE COURT: Okay. Good morning. Thank you for
16 coming in earlier. We have another thing scheduled at
17 2:30, like about six criminal motions, so I thought we'd
18 have more time if you came in, in the morning.
19 So, okay, Mr. Kaufman, you're the Petitioner or
20 the Appellant, so if you wouldn't mind coming up to the
21 podium, please. I think there is room if you want to
22 bring your laptop.
23 MR. REINWASSER: That's a pretty big laptop.
24 THE COURT: Pardon?
25 MR. REINWASSER: It's a pretty big laptop.

3

1 MR. KAUFMAN: I got a pretty big lap.
2 THE COURT: Okay. Go ahead, please.
3 MR. KAUFMAN: Your Honor, my clients are the
4 owners of real property situated in the Keystone
5 Subdivision. The Keystone Subdivision recently was
6 favored by and abutted the waters of Boardman Pond.
7 Boardman Pond was the impoundment of the Boardman Dam,
8 and my clients were the owners of lakefront property.
9 That situation changed when Grand Traverse
10 County received a permit issued by the Respondent
11 pursuant to Parts 301 and 315 of the NREPA conferring on
12 Grand Traverse County permission to draw down the dam
13 impoundment to the greatest extent physically possible
14 consistent with the physical location of the dam
15 penstocks.
16 I would like to begin by directing this Court's
17 consideration to the fact that that permit issued on an
18 application, which, by no stretch of the imagination,
19 could be regarded as administratively complete or even a
20 serious attempt at being administratively complete. The
21 application was received as Exhibit P-20. At page 1,
22 item 4, there is no, quote:
23 Description of alternatives
24 considered to avoid or minimize
25 project impacts.

4

1 Close quote. There was no recitation of
2 alternatives considered to augment the spillway capacity
3 of Boardman Dam or to divert impounded water in the event
4 of a catastrophic flood. At page 4, item 12, the
5 Applicant is directed to, quote:
6 Attach additional sheets, if
7 necessary, and label the impacted
8 areas on a site plan drawn to
9 scale.
10 Close quote. The Applicant did not do that.
11 On the same page, the Applicant is directed to, quote:
12 Describe the wetland impacts and
13 efforts to avoid or minimize
14 impacts. Describe the wetland
15 alternatives and provide the type
16 and amount of mitigation if more
17 than one-third of an acre is to
18 be impacted.
19 End of quotation. Now, the Applicant did
20 insert some verbiage following that instruction, but
21 it -- it should be noted that what Grand -- what the
22 Applicant said in response to that interrogatory simply
23 has nothing to do with the question. They said, quote:
24 Controlled drawdown of
25 impoundment per MDEQ safety

5

1 guidelines.
2 Close quote. So what we have here is basically
3 a brazened and flagrant pseudo-answer.
4 I'd like to pass now to the legal requirements
5 governing the sufficiency of an application for a land
6 use permit under the NREPA, specifically Part 301, the
7 Inland Lakes and Streams Act, which included a grant of
8 rule making authority. The Department's Rule 281.812(2)
9 says:
10 An application for a permit shall
11 not be deemed as received or
12 filed with the Department until
13 all of the information requested
14 on the application form has been
15 received.
16 End of quotation. Consistent with the
17 Department's own rule, this very incomplete application
18 is, in legal contemplation, no application at all. And
19 Part 301 is very explicit that a permit shall issue only
20 on a completed application. Rule 218.814 [sic] under the
21 Inland Lakes Rules says, quote:
22 In each application for a permit,
23 all existing and potential
24 environmental effects shall be
25 determined.

6

1 End of quotation. The Applicant, in its
 2 application, didn't make even a serious attempt to do
 3 that.

4 Now, the rules that the Department is obliged
 5 to consider in a case with wetland impacts include the
 6 rules promulgated under NREPA, Part 303, the Wetland
 7 Protections Act, and that's true regardless of whether
 8 the application actually makes specific reference to Part
 9 303 or not. Of course the authority for that proposition
 10 I've just asserted is found in the seminal case of *Blue*
 11 *Water Isles Company v Department of Natural Resources*, a
 12 1988 decision of the Court of Appeals.

13 Part 303 at § 30306 governs the part of Part
 14 303 applications, and it says that the application,
 15 quote:

16 Shall include the location of the
 17 wetland and the wetland owner's
 18 name and address.

19 That's another thing that the Applicant,
 20 Traverse City Light and Power Company, did not do.

21 Turning now to the requirements of Part 301,
 22 the Inland Lakes and Streams Act, as to what has to be in
 23 an application. Rule 281.814 says that a permit shall
 24 not issue unless the Department is satisfied that, quote:
 25 (a), the adverse impacts to the

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1 public trust, riparian rights,
 2 and the environment will be
 3 minimal; and (b), that a feasible
 4 and prudent alternative is not
 5 available.

6 As I've mentioned, the permit application in
 7 this case didn't address either one of those things.
 8 Rule 281.922a(s) requires that the Applicant shall
 9 demonstrate that the project will not result in
 10 unacceptable disruption to aquatic resources, and that
 11 there are no feasible or prudent alternatives. Rule
 12 281.922a(3) says, quote:

13 The Department shall
 14 independently evaluate the
 15 information provided by the
 16 Applicant to determine that the
 17 Applicant has made the required
 18 demonstrations.

19 Your Honor, in this case the Department could
 20 not have done that because there was no such information
 21 to subject to an independent evaluation. It is
 22 elementary that when an administrative agency acting
 23 under the authority of a grant of legislative authority
 24 issues rules in conformity with the Administrative
 25 Procedures Act, not only are those rules binding on the

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1 general public, they are also binding on the state
 2 government.

3 One of the numerous cases so holding is *Detroit*
 4 *Base Coalition For Human Rights of the Handicap v*
 5 *Department of Social Services*, a 1988 decision, in which
 6 our Supreme Court held that the Department of Social
 7 Services was precluded from conducting general assistance
 8 termination hearings over the telephone because it had
 9 adopted a rule prohibiting itself from doing so.

10 In *Fass v City of Highland Park*, a 1949 Supreme
 11 Court decision, the Court considered the effect of a
 12 municipal ordinance and the extent to which it bound the
 13 municipality that adopted it. The *Fass* court said,
 14 quote:

15 Once legally adopted, it becomes
 16 binding on all of the citizens,
 17 officers, as well as private
 18 citizens. This duty is not a
 19 private duty that can be waived
 20 at their will, nor can they be
 21 estopped by any actions of theirs
 22 from the faithful performance of
 23 the same.

24 Let us pass now to what I can only describe as
 25 the negligible or fictitious character of the

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1 Department's own inquiries into the environmental impact
 2 of this drawdown prior to the issuance of the permit.

3 Exhibit P-24 is what was purported to us as
 4 being the Department's pre-issuance regulatory file. We
 5 got that in response to a Freedom of Information Act
 6 request submitted by Petitioner Bruce Carpenter.

7 Your Honor, it's more notable for what's not in it than
 8 for anything that is actually in it. If you go through
 9 Exhibit P-24, let me just inventory some of the things
 10 you're not going to find:

11 There is nothing in that document considering
 12 the question of the maximum amount of precipitation
 13 likely to fall on the lower Boardman Watershed in any
 14 particular time interval. There is nothing in that file
 15 considering the question of how much of that rainwater
 16 would be soaked up by the ground and how much of it would
 17 actually get into the lower Boardman River. There is
 18 nothing in there addressing the question of how much
 19 water is capable of flowing through the Boardman Dam
 20 spillways. There is nothing in there identifying the
 21 location or the size of wetlands hydrated or primarily
 22 hydrated by the Boardman Dam impoundment. There is
 23 nothing in there about the impact on the Grand Traverse
 24 County Natural Education Reserve that would ensue as a
 25 result of desiccating that dam impoundment.

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1 So, really, the Department had two sources of
2 information to consider when passing on this permit
3 application. There was what the Applicant told it, which
4 was as good as nothing at all, and its own inquiries and
5 data collection efforts, which were likewise as good as
6 nothing at all.

7 The person who signed this permit was a
8 professional engineer connected with the Department's Dam
9 Safety Unit, a Mr. James Pawlowski. Exhibit P-3 is
10 Mr. Pawlowski's project review report of January 2007.
11 On this document, your Honor will note that Mr. Pawlowski
12 left blank items inquiring as to total wetland acreage to
13 be impacted by the proposed project, the dominant plant
14 species at those locations, the extent of their
15 hydrophytic affinity; that is to say, the extent to which
16 they are either capable of growing in wetland or can only
17 grow in wetland, and there is likewise no information as
18 to soil horizons or depth to soil horizons.

19 This is information that a scientist would use
20 to assess the presence or absence of so-called hydric
21 soils. Hydric soils, your Honor, are soils which undergo
22 distinctive changes in color morphology and chemistry due
23 to the action over a long period of time of anaerobic
24 microorganisms which thrive in a saturated soil milieu
25 because the water displaces the oxygen from the soil

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1 particle interspaces.

2 So in order to complete this form, you've got
3 to gather an awful lot of information. And it's plain on
4 the face of Exhibit P-3 that Mr. Pawlowski and his
5 colleagues gathered none of this information.

6 THE COURT: So you're saying they violated
7 their own rules?

8 MR. KAUFMAN: That's right, extensively. And
9 they -- we first raised that subject with the Department
10 when Petitioner Claudia Agemak filed a motion for summary
11 judgment. And the gist of that motion was that it was
12 obvious that the permit had issued on the basis of an
13 administratively incomplete application and that the
14 omissions were by no means trivial. Rather, they were
15 fundamental, going to the very core of the information
16 that the Department is required by law to gather as a
17 condition precedent to issuing a permit.

18 The Department's response embodied both in an
19 order denying the motion for summary judgment and in the
20 Attorney General's response to our motion and the
21 proposal for decision was this: It doesn't really make
22 any difference what is or is not in the application
23 because at a contested case hearing conducted under the
24 APA, the administrative law judge reviews the record *de*
25 *novo*, and, therefore, if there is something that was

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1 lacking in the application, the Petitioner and the
2 Respondent can call it to the administrative judge's
3 attention, and he can determine if the project is sound
4 or not.

5 Your Honor, that analysis suffers from the fact
6 that it finds no textual support in Part 301 or Part 303
7 or Part 315 or any part of the NREPA. We must ask
8 ourselves this question: In adopting the NREPA, did the
9 legislature contemplate that as a substitute for
10 submission of data by the Applicant in the application
11 and review of the application by the Department that it
12 would be an acceptable substitute to dump the burden of
13 making that inquiry on private citizens with less than
14 powerful, technical credentials, and not an awful lot of
15 money to spend, have private citizens aggrieved by the
16 application do that in the place of the Department and
17 the Applicant? I submit, your Honor, that if the
18 legislature had intended that, the legislature would have
19 said so, and since the legislature didn't say so, the
20 legislature didn't intend any such result.

21 A principal source of contention in this case
22 was whether Boardman Dam at the time of the hearing was
23 capable of passing a regulatory criterion embodied in
24 Part 315. Part 315 is the Dam Safety Act. The
25 regulatory criteria that I have in mind is somewhat of a

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1 technical nature, and I hope the Court will indulge me in
2 a brief explanation. I'm talking about the so-called
3 one-half probable maximum flood. The one-half probable
4 maximum flood under Part 315, your Honor, is a number
5 which is derivative mathematically from another number,
6 and that progenitor number is termed the probable maximum
7 flood. The probable maximum flood.

8 The probable maximum flood, in effect, is
9 defined as the maximum amount of water that is likely to
10 fall on the area under consideration within a specified
11 time period. The record in this case includes no
12 calculations establishing what the magnitude of the
13 probable maximum flood or precipitation event for the
14 lower Boardman Watershed actually is. Various documents
15 toss around various figures as to what it is.

16 One of the Department's witnesses,
17 Mr. Pawlowski, mentioned in his testimony what somebody,
18 specifically the DEQ Hydrology Unit, thought it was, but
19 no evidence was introduced from which one could
20 independently calculate the probable maximum
21 precipitation event.

22 I asked Mr. Pawlowski when he was on the
23 witness stand, where did this number come from? I said,
24 where is the document that allegedly embodies this
25 number? He said that if he had it, it must have been in

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1 a, quote, different file, unquote, and that if he had
2 this different file, he must have left it in his Gaylord
3 Office.
4 So when the Department proposes that the
5 probable maximum flood has an ascertained numerical value
6 and that the one-half probable maximum flood has an
7 ascertained value, they're asking you to take those
8 numbers on faith. The record includes no calculations
9 showing how either the Department or the Applicant,
10 Traverse City Light and Power, or one of the Department's
11 contractors, the Gannett Fleming Engineering Firm,
12 actually derived the regulatory number, one-half probable
13 maximum flood, from the probable maximum precipitation
14 event.
15 When we divide the probable maximum
16 precipitation maximum event by two, we arrive at the half
17 probable maximum precipitation event. We cannot,
18 however, take recourse to such a simple arithmetic
19 operation in order to deduce the probable max -- the
20 one-half probable maximum flood from the probable maximum
21 flood. And why is that so? Because something changes
22 over the course of a precipitation event. Water seeps
23 into the soil, and it's conducted to lower strata by
24 percolation, but if it's raining very, very hard, the
25 upper soil strata may become saturated. So,

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1 consequently, the amount of water actually reaching the
2 river may change as -- as the precipitation event
3 changes.
4 Exhibit P-29 is a report by the Gannett Fleming
5 Engineering Firm, which, as I mentioned, was a contractor
6 hired by Traverse City Light and Power. This document
7 asserts that the probable maximum precipitation event
8 used in their report, Exhibit P-29, is about three times
9 larger than the largest storm that was ever observed for
10 as long as records have been kept.
11 Also, the Gannett Fleming Report sets forth
12 some conclusions as to the numerical value of the
13 probable maximum flood. I caution that that report
14 doesn't say what the value of the half probable maximum
15 flood is. Instead, it addresses the regulatory criterion
16 used by the Federal Energy Regulatory Commission, the
17 probable maximum flood.
18 The Gannett Fleming Report, Exhibit P-29,
19 points out two different ways of making that calculation;
20 although, as I say, the report does not actually set
21 forth the calculations. But if the calculation is made
22 using the so-called arithmetic mean methodology, then
23 consistent with their assumed value as to the probable
24 maximum precipitation event, 8,310 cubic feet per second
25 of water would enter the lower Boardman River during the

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1 assumed probable maximum precipitation event.
2 On the other hand, if we resort to a different
3 calculation technique known as the geometric mean, then
4 the probable maximum flood would be 11,500 cubic feet per
5 second. Your Honor will find those figures at page 79 of
6 Exhibit P-29B, which is the Gannett Fleming report.
7 The Gannett Fleming report at those same pages
8 also said that using the arithmetic mean method for
9 probable maximum flood computation, Boardman Dam was
10 capable of passing the probable maximum flood. Now, that
11 is a very significant conclusion. It's a very
12 significant conclusion because under state law, the dam
13 is only obliged to comply with a far less stringent
14 regulatory criterion, the one-half probable maximum
15 flood.
16 Mr. Pawlowski, testifying on behalf of the
17 Department, at page 61 of the transcript, said that he
18 had endorsed a figure of 5,600 cubic feet per second as
19 being the one-half probable maximum flood. We asked him
20 where that number came from. He said it came from the
21 Hydrologic Studies Unit in Lansing. We asked him, "Where
22 are the calculations justifying that figure?" And he
23 said, "I don't know exactly." Mr. Pawlowski also
24 testified to a somewhat lower number, in the neighborhood
25 of approximately 5,128 cubic feet per second as allegedly

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1 being the half probable maximum flood. That number was
2 derived from the earlier number, which he was unable to
3 explain.
4 Now, I would like to direct the Court's
5 attention to the question, what does the record say on
6 the topic of spillway capacity? That is to say, how
7 much -- what's the maximum amount of water that can pass
8 through the dam's spillways?
9 According to Exhibit P-29B, the Gannett Fleming
10 Report at page 79, the dam's total spillway capacity is
11 9,070 cubic feet per second. That's a lot more spillway
12 capacity than the half probable maximum flood even under
13 the numbers supplied by Gannett Fleming and supplied by
14 the Department.
15 Mr. Pawlowski reached a different conclusion.
16 He came up with numbers that are only a little more than
17 half of the Gannett Fleming report's figure. We asked
18 him, what is the authority for that? And he drew our
19 attention to Exhibits P-15 through P-17, which I analyze
20 in detail in our brief, but suffice it to say that none
21 of those exhibits, individually or collectively, contain
22 any calculations justifying those numbers. They simply
23 assume them to be true. So I think that the record does
24 not uphold the claim of even technical noncompliance with
25 the applicable regulatory criterion.

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1 Now I'd like to discuss a somewhat related
2 question. And that is, apart from whatever Part 315 has
3 to say on spillway capacity, does the record show a
4 danger, as the Department insisted, of loss of life and
5 property damage if the dam impoundment were restored?
6 Mr. Pawlowski testified, in effect, that during
7 a half probable maximum flood event, the water in the
8 impoundment would rise to such a level that it would
9 enter a structure known as the emergency spillway. The
10 emergency spillway is bounded on one side by a structure
11 of the dam known as the detached earthen embankment,
12 which is compressed earth around a concrete core and on
13 the other side by the berm of Cass Road. This forms sort
14 of a pocket.
15 I could paraphrase Mr. Pawlowski's testimony
16 along these lines: He said, in effect, that during a
17 half probable maximum flood event, water would exit the
18 emergency spillway so slowly that the detached earthen
19 embankment would become saturated with water, would
20 weaken, and would fail with allegedly catastrophic
21 results.
22 Mr. Pawlowski went on to say that an abrupt
23 release of the water in that impoundment ensuing as a
24 result of that failure of the detached earthen embankment
25 would send a slug of water into the river of such great

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1 volume that it would knock over the two downstream dams
2 and that it would sweep motor vehicle traffic off of
3 South Airport Road and destroying the cars and killing
4 the occupants.
5 I've got a couple of observations to make about
6 that scenario. First of all, one of the two structures
7 defining this pocket, the embankment of Cass Road, is not
8 actually part of the dam. It is something that the Grand
9 Traverse County Road Commission inserted at a later date,
10 for better or worse. And in that regard might I draw
11 your Honor's attention to Exhibit P-52, which depicts the
12 dam as it was originally before somebody got the bright
13 idea of extending Cass Road so that it bisected the
14 emergency spillway. Mr. Pawlowski on cross-examination
15 more or less conceded that this risk of saturation and
16 collapse of the detached earthen berm would be eliminated
17 if Cass Road bisecting the emergency spillway were
18 removed.
19 In that regard, your Honor should turn to
20 Volume IV of the transcript at pages 520 and 521. There
21 are apparently four culverts that communicate between the
22 emergency spillway, pass underneath the berm of Cass
23 Road, and open into a normally dry tributary of the
24 Boardman River. We asked Mr. Pawlowski if he had made
25 any calculations as to how many cubic feet per second of

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1 water those various culverts were capable of conveying.
2 He said that he had not. So when he ventures the opinion
3 that there isn't enough transport capacity to move the
4 water from the emergency spillway into the dry --
5 normally dry tributary, he's giving you an opinion that
6 is somewhat lacking in scientific rigor.
7 Also, I questioned him as to the scientific
8 basis for his scenario of sequentially collapsing dams.
9 I asked him if there were an abrupt failure of the
10 detached earthen embankment, by how much would it raise
11 the level of the Boardman River. And he testified that
12 he did not know. I asked him how many additional cubic
13 feet of water would be communicated to the two downstream
14 dams as a result of such an abrupt failure. He didn't
15 know that either. I asked him the spillway capacity of
16 the two dams downstream from Boardman Dam, and he didn't
17 know that either.
18 Your Honor, anybody can crouch on a witness
19 stand and venture scientifically baseless, seat-of-the-
20 pants conclusions about scientific matters, but such
21 conclusions do not rise to the dignity of being evidence
22 of anything. And in that regard, I think the situation
23 is controlled by Michigan Rules of Evidence 702, which
24 requires, as a condition of scientific testimony, among
25 other things, that there actually has to be a factual

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1 predicate sufficient to uphold the conclusions, and that,
2 your Honor, was not present in this case.
3 One of the controversies in this case has been
4 the magnitude of the impact on wetlands resulting from
5 the draining of Boardman Pond. Now, as I mentioned, the
6 Department made no effort to establish what that was
7 prior to granting the permit, and the Applicant did not
8 allude to that topic in the application. But after the
9 permit was issued, the Department detailed Mr. Pawlowski
10 and another one of its employees, a Mr. David Jentoft, to
11 look into the situation. Mr. Jentoft and Mr. Pawlowski
12 went down to Boardman Dam. They canoed the Boardman
13 River. They walked around the vicinity of the
14 impoundment while the drawdown was in progress.
15 Mr. Jentoft used a global positioning satellite
16 device to plot the areas where, in his opinion, he
17 encountered hydrophytic vegetation; that is to say,
18 vegetation suggestive of the presence of wetland. And
19 then using his GPS data, he made a computation as to the
20 total surface area of wetland that he found in the
21 vicinity.
22 Now, of course, the key question was how much
23 wetland was actually destroyed as a result of that
24 drawdown? Where did the Department's number come from
25 used to make that calculation? Mr. Jentoft testified

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1 that he used something called the National Wetland
2 Inventory Map and, in effect, subtracted the two figures
3 and thereby reached the conclusion that any net loss of
4 wetland due to the drawdown was negligible, if any.
5 Your Honor, that National Wetland Inventory Map
6 is the topic of a still pending motion by the Petitioners
7 filed after the close of proofs. It's still pending
8 because the Department never decided it and never
9 explained the omission to decide it.
10 We moved to reopen the record to include a copy
11 of that National Wetland Inventory Map. You know, I
12 asked Mr. Jentoft on the witness stand where is that map,
13 and he had left that document back at his office in
14 Gaylord. And after perusing it myself, I can certainly
15 see why. It says at the bottom of that map, which is an
16 exhibit to my motion, that the data should not be
17 regarded as sufficiently reliable to be acceptable for
18 regulatory purposes.
19 I contend that my clients, the owners of lots
20 abutting the former Boardman Pond, are riparian owners.
21 Parts 301 and 303 are very explicit that impacts to
22 riparian rights are a factor weighing against issuing a
23 permit. The Department's answer to that contention
24 appears to be this: There is a person by the name of
25 Nyal Deems, a lawyer. Mr. Deems looked into the

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1 situation on behalf of an entity called the Boardman Dam
2 Review Committee and reached the conclusion that my
3 clients were not riparian owners. Mr. Deems' opinion
4 letters were the subject of my motion in limine to
5 exclude Mr. Deems' opinion letters as well as any
6 testimony by Mr. Deems.
7 My motion argued that the question of who is
8 and who is not a riparian owner is something that can
9 only be ascertained by an examination of the documents
10 conferring title. I mean the deeds and the easements and
11 so forth, and that the question of the legal meaning of
12 such documents is never a sub -- an appropriate subject
13 of opinion testimony.
14 At the trial, the Department attempted to
15 introduce Mr. Deems' opinion letters. I objected for the
16 reasons set forth in my motion, and that objection was
17 sustained.
18 On the other hand, over my objection, both
19 Mr. Pawlowski and Mr. Jentoft were permitted to testify,
20 in effect, that they had heard it said that Mr. Deems
21 reached this conclusion. I say that such testimony does
22 not rise to the dignity of being substantial evidence or
23 being any evidence at all. If, as I submit, the
24 administrative law judge rightly excluded Mr. Deems'
25 opinion letters, well, then, no weight whatsoever could

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1 be attached to somebody else's hearsay recitation of
2 Mr. Deems' opinions on the topic.
3 I also note that in the State's brief, the
4 State said that our common grantor sold the riparian
5 rights to Grand Traverse County's predecessor in title.
6 I submit, your Honor, that that simply cannot be true.
7 It cannot be true as a matter of law.
8 As a matter of law, riparian rights are not
9 severable and separately saleable from the freehold of
10 which they are a component. The authority for that
11 proposition is *Thompson v Enz*. The decision is reported
12 at 379 Mich 667, a 1967 decision of the Supreme Court.
13 Also, your Honor might find it profitable to
14 take a look at the deed in which this alleged severance
15 supposedly happened. I submit it's pretty clear on the
16 face of the instrument that it doesn't purport to say
17 anything of the kind. On the contrary, it says that the
18 County's predecessor in title was privileged to submerge
19 the grantor's lands and actually had an ownership
20 interest in what was the grantor's lands for as long as
21 they were submerged by the waters of a dam presently
22 existing or hereafter to be created.
23 Well, those lands were, more or less,
24 continuously submerged from 1930 up to 2007, but they
25 haven't been submerged anymore, and I submit that a

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1 possibility of reverter has ripened into a present estate
2 and that Grand Traverse County has no ownership interest
3 whatsoever in the now exposed bottomland.
4 Rather, consistent with the deed from our
5 common grantor, that property now belongs to -- belongs
6 to my clients, and this drawdown has damaged that
7 property pretty severely.
8 THE COURT: How many homeowners are -- are
9 around the dam?
10 MR. KAUFMAN: May I consult with my client for
11 just a moment and answer that question --
12 THE COURT: Sure.
13 MR. KAUFMAN: -- your Honor?
14 THE COURT: Just a ball park figure.
15 MR. KAUFMAN: The Keystone I Subdivision,
16 your Honor, has 12 lot owners, and neither Mr. Martel nor
17 I could tell you from memory how many are in the Keystone
18 II Subdivision.
19 THE COURT: Okay.
20 MR. KAUFMAN: Our preference is that the --
21 that this permit simply be vacated. However, if the
22 Court has any doubt whatsoever as to whether that's the
23 appropriate outcome, then it is our request that this
24 matter be remanded to the Department with directions and
25 that those directions be that the Department is to rule

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1 on our motion to reopen the proofs. Our proposed new
2 exhibit is material because it exposes as a sham
3 Mr. Jentoft's testimony that the wetland losses
4 attributable to the drawdown were negligible.
5 Mr. Jentoft couldn't possibly know that, and his factual
6 predicate doesn't show any such thing.

7 Does the Court have any questions?
8 THE COURT: No, I don't believe I do.
9 Well, if I understand correctly -- so after the
10 drawdown, then are there repairs to be made pursuant to
11 the permit, and will the lake be refilled?

12 MR. KAUFMAN: The permit -- the now existing
13 permit does not address the question of what is to be
14 done with or to the dams after the drawdown. I can
15 answer that question by alluding to something that's not
16 actually part of the administrative record.

17 THE COURT: Okay.
18 MR. KAUFMAN: And I mention it only for
19 information purposes. And I'm sure your Honor would not
20 consider this as part of the basis for decision, but in
21 March of this year, there was a joint meeting of the
22 Traverse City City Council and the Grand Traverse County
23 Board of Commissioners. At that joint meeting, these two
24 bodies voted to remove three of the four dams in the
25 lower Boardman leaving only the Union Street Dam, the dam

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1 furthest downstream in place for -- in the hope of
2 restraining infiltration by invasive species.

3 In order to carry out that plan, it would be
4 necessary, among other things, for Grand Traverse County
5 to seek and obtain a Part 315 removal permit from the
6 Department because the permit Grand Traverse County
7 already has, which is the subject of this appeal, doesn't
8 authorize anything other than the drawdown.

9 THE COURT: I see. Okay. Thank you.
10 MR. KAUFMAN: Does the Court have any further
11 questions?
12 THE COURT: No, I don't. Thank you, very much,
13 Mr. Kaufman.
14 Okay. Mr. Reinwasser?
15 MR. REINWASSER: Morning, your Honor.
16 THE COURT: Good morning.
17 MR. REINWASSER: With regard to the Court's
18 question, Mr. Kaufman has it correct; that this -- this
19 permit was only for a temporary drawdown. So the impact
20 is only temporary. What the next step will be, I am not
21 sure anyone knows for sure. It is possible that the dam
22 will, in fact, be removed, at which point another permit
23 would have to be applied for, and this process would --
24 would start all over again. There would be an
25 application. People -- if the permit were issued, there

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1 would be an opportunity for folks, such as the
2 Petitioners, to object to the removal of the dam.

3 So there is -- this part of it has always been
4 just for a temporary measure. And that temporary measure
5 was taken to give the owner of the dam, Grand Traverse
6 County, the opportunity to conduct feasibility studies to
7 determine what the next phase should be: Should they put
8 money into this dam; should they rebuild it; should they
9 make the spillways larger; should they increase the
10 height? You know, what -- what are the potential repairs
11 or construction that could occur to fix this dam because
12 the dam, as it stood, was not licensable under state law.

13 This whole issue came up as a result of the
14 federal government, Federal Energy Regulatory Commission,
15 I guess, which had originally been regulating this dam
16 and had given it a license, when FERC decided that the
17 dam was not permitable under federal law anymore, it was
18 essentially handed off to the State and the MDEQ. And as
19 part of that process, the DEQ has to determine whether
20 that dam is permitable under state law as well. And
21 essentially what occurred here was the State determined
22 that it was not permitable. That's why they entered into
23 what was essentially a consent agreement with the owner
24 of the dam, Grand Traverse County, so that they could
25 proceed with a feasibility study to determine what the

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1 next step should be.

2 In this -- and I don't know what that next step
3 is going to be. Mr. Kaufman has indicated that something
4 -- a decision has been made to remove the dam. If that
5 is true, like I say, this process will start all over
6 again. These folks will then have an opportunity to come
7 in and participate in that process. And if they believe
8 that the dam should not be removed and they can make that
9 case, then maybe they can, you know, have that permit
10 denied, or they can object to that permit at that time.
11 But this proceeding here only deals with the effects of
12 the drawdown, which are temporary. The only way they
13 could become permanent is through the issuance of another
14 permit.

15 I guess I'd like to start by re-emphasizing
16 what the Court already knows, which is that this is an
17 appeal from a contested case hearing. Contested case
18 hearings are conducted under the Administrative
19 Procedures Act. Contested case hearings are evidentiary
20 hearings. I don't think Mr. Kaufman would disagree with
21 that. You consult the APA. It's clear that evidence is
22 to be taken at a contested case hearing. MCL 24.275 from
23 the APA. In a contested case, the rules of evidence as
24 applied in a nonjury case in a circuit court shall be
25 followed as far as practical. Depositions may be used.

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1 There is no question that this is not a case
2 that's conducted on -- as an appeal might be conducted as
3 this proceeding before the Court now. This is not a case
4 that is conducted on some record that is prepared by the
5 staff of the MDEQ. This is an evidentiary hearing where
6 all evidence that would be admissible under the rules of
7 evidence is admissible for consideration by the ALJ
8 initially and then by the Director of the MDEQ.
9 In fact, the APA says specifically that the
10 final decision by the Director has to be based on the
11 evidence -- er, on the record as a whole as produced at
12 this evidentiary hearing. So this whole line of argument
13 that, you know, the application was somehow deficient,
14 that the investigation by Mr. Pawlowski initially before
15 the permit was issued was somehow deficient, as we
16 indicated in our briefs, and as Mr. Kaufman to his credit
17 indicated to the Court has been our position, that is, in
18 fact, meaningless to the final decision that is
19 un-reviewed by this Court.
20 This Court is not reviewing the initial
21 determination by the MDEQ to issue a permit. That
22 determination was reviewed by the ALJ and ultimately by
23 the Director of the MDEQ who issued a final decision and
24 order based on that, and that's what's being reviewed by
25 this Court. It's that FDO, the final decision and order,

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1 which is before this Court, not the preliminary steps of
2 issuing the permit and the process of issuing the permit
3 and a review of the application that was submitted by the
4 Applicant for the permit.
5 THE COURT: So it doesn't matter if it was
6 incomplete, is what you're saying?
7 MR. REINWASSER: It doesn't matter one whit
8 whatsoever. The evidence -- now, if the evidence at the
9 hearing was somehow incomplete and there wasn't
10 substantial evidence on the record to support the
11 findings of the ALJ and the Director, that would be a
12 different matter. That is where this Court steps in and
13 says, "There is not substantial evidence to support those
14 findings." But this Court looks at that entire record,
15 and we've produced it. It's five volumes, along with
16 exhibits and everything, and that's the basis for the
17 determination of whether or not the permit should be
18 issued.
19 What was done initially by staff isn't subject
20 to review by this Court. If that were the case, you
21 know, circuit courts would be reviewing, you know -- I
22 mean, you'd file an appeal, I guess, after you got the
23 permit initially, and it would go to circuit court. But
24 that's not how it's set up. It's set up so that you file
25 an appeal, an ALJ hears it, and then the Director of the

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1 DEQ makes a final determination. It's only after that
2 occurs that then it comes up on appeal to this Court.
3 The APA -- though Mr. Kaufman may be correct
4 that there is nothing in NREPA that says that it's a *de*
5 *novo* review, the APA is clear that it is a review on the
6 evidence adduced at the contested case hearing, and the
7 decision of the Director has to be based on all the
8 evidence in the record as a whole that was produced at
9 the hearing.
10 MCL 24.285 talks about the final decision and
11 order, and it requires that there -- that it include
12 findings of fact. Now, if -- if you have to include
13 findings of fact -- if the ALJ and the Director are
14 making findings of fact, it is clear that they are
15 reviewing evidence. And it's clear that those findings
16 of fact -- what's it say?
17 Findings of fact shall be based
18 exclusively on the evidence.
19 Again, that's 24.285. So if there is evidence
20 that supplements the evidence -- er, the matters that
21 were included in the application and that evidence is
22 admitted, it's considered by the ALJ. He is fully
23 authorized to make a determination that a permit should
24 be issued, and that happens all the time. The initial
25 permit is not the final permit if exceptions are filed by

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1 a party who has a complaint about it. It's only -- once
2 those exceptions are filed or once an appeal is taken
3 from that initial permit, that permit is not issued.
4 It's only after the Director himself or herself issues
5 that permit. That's when it is an issued permit.
6 So that whole process is what is preliminary to
7 the issuance of a permit here. And if that process fills
8 in the gaps -- and, generally, I mean, it's not unusual
9 for a permit not to be complete. A lot of times permits
10 are submitted by homeowners who are not lawyers or not
11 consultants or engineers, and you fill out the form, and
12 frequently those aren't complete or there is something
13 that might be missing.
14 To tie the MDEQ's hands on issuing the permit
15 to make sure, first, that every "i" is dotted, every "t"
16 is crossed would make this process of issuing permits
17 entirely cumbersome.
18 THE COURT: Okay. So the permit is not -- er,
19 the application is not complete. And I'm interested in
20 the effect on the wetlands, but you're saying there was
21 evidence at the hearing addressing all of these issues?
22 MR. REINWASSER: Absolutely.
23 THE COURT: That would have been noted on the
24 application?
25 MR. REINWASSER: Absolutely. I mean, the

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1 application is itself not evidence. It is -- I mean,
2 it's put into evidence, but the application is the owners
3 filling out a form and providing information to the
4 DEQ. It could -- many times that could be incorrect
5 information. It could be false information.
6 I mean, the DEQ would still have to go out and
7 do an investigation even if the application wasn't
8 complete in some fashion. But the DEQ has never held,
9 you know, applicants for permits to that high of a
10 standard. I mean, it -- you know, it frequently goes
11 back and says, "Provide more information. We need more
12 information." But it's up to the DEQ to decide when they
13 have enough information to issue a permit. And whether
14 they get it as a result of it's put on the application or
15 they go out and they get it independently and conduct
16 their own investigation, that's in their discretion to
17 determine whether -- when they have enough information
18 and when they're going to issue a permit.
19 To make the application -- I mean, to somehow
20 deny -- to reverse this permit because information in the
21 application was incomplete would turn this whole process
22 upside down on its head, and it would make it so
23 cumbersome that it would not work.
24 The Agency has to be able to work with folks to
25 get the information that they need, even if it doesn't

1 show up on the permit necessarily. And in this case, to
2 answer the Court's question, that information did come in
3 prior to the hearing, during the hearing. Information
4 was provided with regard to the wetlands and the impacts
5 on the Boardman Pond. And the ALJ made a very thorough
6 review of that information and issued what I thought was
7 a very thorough proposal for decision where he went
8 through each of the factors set out in Part 301,
9 Part 303, and went back to the record and found evidence
10 to support his findings and conclusions and included that
11 in his findings.
12 And I've done that in my brief as well. I've
13 gone back -- with each one of the factual findings that
14 the ALJ made in his decision, I've gone back to the
15 record and found in the transcript or in the documents
16 and plugged that in and supported that finding with
17 evidence from the record.
18 Now, as the Court knows in a case like this
19 where it's on appeal pursuant to the APA, there is a very
20 limited standard of review by this Court particularly of
21 factual matters that are found by -- in the final
22 decision. And as we've said in the brief, and the Court
23 knows, that is if that decision or if that finding is
24 supported by substantial evidence, then it must be
25 affirmed. And there's a lot of case law on what does

1 substantial evidence mean? And it's -- basically, it's a
2 reasonable bit of evidence that is more than a scintilla
3 of evidence, but it can be substantially less than a
4 preponderance of the evidence.
5 So even if the Court were to look at the
6 evidence and say, "Well, I might disagree with that final
7 decision of the ALJ," if there is a rationale basis for
8 that conclusion, the Court still needs to affirm that
9 finding, even if the Court would disagree with the
10 ultimate decision if there is some evidence there to
11 support it. And the reason for that is obvious.
12 This is an administrative proceeding, and the
13 Agency has a great deal of expertise in these matters in
14 issuing permits; wetland permits, inland lakes and
15 streams permits. And in dam safety permits, they have
16 the expertise. So the courts are reluctant to substitute
17 their judgment particularly in the area of findings of
18 fact where the ALJ was sitting there listening to the
19 testimony, reviewing the evidence in the first case, and
20 makes the determination applying that expertise that the
21 Agency has to the evidence that he has reviewed and
22 observed.
23 The courts of appeal have said, quite
24 rationally, that reviewing courts should defer to that,
25 unless there is really good reason not to defer to it.

1 And in this case, we would submit, and, again, it's all
2 in the brief, I'm not going to reiterate it here, there
3 was substantial evidence in the record to support the
4 findings that are being challenged here.
5 In particular, it seems to me that the primary
6 challenge that's being mounted here is against this
7 finding that the dam was a danger; that it didn't comply
8 with the statutory requirements for containing flood
9 waters. Mr. Kaufman went through a long, detailed sort
10 of discussion of questions that he had posed to the
11 experts of the -- that the DEQ had put on the stand.
12 What Mr. Kaufman didn't go through and describe to the
13 Court was any expert testimony that the Petitioners put
14 on themselves that would disagree, expert to expert, with
15 the conclusion of Mr. Pawlowski that this dam did not
16 satisfy the statutory requirements for containing a
17 flood. That's because there was no expert testimony in
18 the record that would contradict the conclusion by
19 Mr. Pawlowski that he reached in his opinion that this
20 dam was deficient and effectively could not be permitted
21 to operate in Michigan under Michigan state law because,
22 in his opinion, that dam was not safe.
23 Now, I'm not saying Mr. Kaufman is not entitled
24 to try to poke holes into an opinion of an expert, but
25 just asking some questions and making assumptions of his

1 own about, well, is this scientific if he can't respond
2 with a formula or with a calculation that Mr. Kaufman
3 thinks maybe is important, is that sufficient to -- for
4 the Court to throw out that opinion as not being
5 scientific? And I would say, it's not.

6 Here, there is, again, evidence in the record,
7 and I have cited to the testimony of Mr. Pawlowski and
8 the exhibits that were submitted that support the
9 conclusion that he reached. But, more importantly, there
10 is no dispute here that Mr. Pawlowski is, in fact, an
11 expert on dam safety issues. His resume is an exhibit in
12 the file. I've set out his qualifications at the
13 beginning of the brief. He's -- he's been dealing with
14 dam safety issues for something, like, 20 years or more,
15 and he's been doing it under Michigan law. And the Court
16 would -- you'd have to ask yourself, "Why would he -- you
17 know, why would he make this up?" Why would
18 Mr. Pawlowski, who is a professional licensed engineer
19 who works for the state of Michigan, why would he make
20 this up to reach a false conclusion that this dam is not
21 safe? It does not make any sense.

22 But here he has given that opinion. His
23 testimony was observed and witnessed by the ALJ who
24 conducted the hearing. Based on that opinion, the ALJ
25 specifically found that this dam did not meet the

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1 statutory requirements for containing a flood and ruled
2 that issuing the permit to allow the drawdown was proper
3 on that basis, and he ruled that as a matter of fact.

4 And if you think about it for a second, the
5 question, what is the capacity of this dam to contain
6 flood waters? That's a factual question. It's a
7 scientific question. It's not a question of law. And
8 Mr. Pawlowski made that determination, and it was adopted
9 as a finding by the ALJ and ultimately by the Director of
10 the MDEQ applying the expertise of the Agency to make
11 that determination.

12 I would submit something that I hadn't noticed,
13 quite frankly, when I was writing the brief for the
14 Court, but -- and when I was reviewing my brief in
15 preparation for oral argument, I went back and looked at
16 the language of the dam safety statute, Part 315, and
17 specifically I was looking at 324, 315, 316. 315 -- 16,
18 I'm sorry. And it says in (3):

19 If a dam cannot pass the designed
20 flood, an auxiliary spillway must
21 be provided.

22 And there is an auxiliary spillway here, but it
23 was determined not to be sufficient. The statute goes on
24 to say that:

25 The owner must document to the

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1 satisfaction of the Department
2 that the dam has sufficient
3 spillway capacity and that proper
4 means are available to operate
5 the spillway or spillways during
6 the designed flood.

7 Now, what is significant about that language, I
8 believe, is that it is giving extra discretion to the
9 Department to make this determination. It says:

10 The owner must document to the
11 satisfaction of the Department
12 that this spillway has sufficient
13 capacity.

14 Here, the Department has determined that this
15 spillway does not have sufficient capacity to contain a
16 flood. And on top of what I believe is the appropriate
17 standard of review here, which is great deference to the
18 determination made by the Agency, you throw in this
19 language from the dam safety statute itself that pretty
20 much cedes that determination and that decision to the
21 agency responsible for monitoring dams and the safety of
22 dams. You know, Mr. Kaufman's argument, I think,
23 completely goes by the wayside.

24 I don't think we can substitute his judgment
25 since he was really the one testifying here at this

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1 hearing through his questioning of our expert by trying
2 to poke holes in it. He didn't have his own expert
3 testify. He was asking questions and trying to present
4 evidence in the record based on assumptions that he was
5 making. I don't think we can substitute that for the
6 decision of the expert in this case from the MDEQ.

7 So I think the finding that this dam is not
8 safe cannot be assailed here. And once you make that
9 finding, the rest of this case really is -- boils down to
10 whether or not there is a feasible and prudent
11 alternative to lowering, on a temporary basis, the
12 impoundment, Boardman Pond.

13 Under Part 301, the Inland Lakes and Streams
14 Act, under Part 303, the Wetlands Act, the question of
15 feasible and prudent alternative is the essential
16 question here. And if there is no feasible and prudent
17 alternative to drawing down the dam or the impoundment,
18 then this permit should issue.

19 And in this case, I would submit to the Court
20 if you think about were there feasible alternatives,
21 there was testimony suggesting that there were
22 alternatives that could, in fact, be implemented that
23 might affect this -- er, you know, create a situation
24 where the dam wasn't an endangerment, but would it be
25 prudent under these circumstances, I think is the real

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1 question here. And there was -- the ALJ went through
2 that analysis and found specifically, again, as a matter
3 of fact, that there were no feasible and prudent
4 alternatives either because of costs or because of time
5 that it would take to implement them to the drawdown of
6 the dam, which made the most -- er, drawdown of the
7 impoundment, which made the most sense under these
8 circumstances.

9 So, I guess in a nutshell, we would ask the
10 Court -- let me just look at my notes here before I get
11 to the end. Oh, there is one other thing I do want to
12 point out, and that's Mr. Kaufman's challenge to whether
13 or not the failure of this dam would cause significant
14 damage either to homes or the environment or to
15 automobiles, or whatever.

16 The statute, the dam safety statute, addresses
17 that question specifically in the definitional provision.
18 This dam is considered a high hazard potential dam, and
19 that was stipulated to by the Petitioners at the
20 beginning of the contested case hearing, and Mr. Kaufman
21 has pointed that out on page 5 of his brief. Under the
22 statute, and it's MCL 324.31503(11), it says:

23 High hazard potential dam means a
24 dam located in an area where a
25 failure may cause serious damage

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1 to inhabited homes, agricultural
2 buildings, campgrounds,
3 recreational facilities,
4 industrial or commercial
5 buildings, public utilities, main
6 highways, or Class I carrier
7 railroads, or where environmental
8 degradation would be significant
9 or a danger to individuals exist
10 with the potential for loss of
11 life.

12 So that question, I don't think, is on the
13 table any longer based on the stipulation that this was a
14 high hazard potential dam. The statute already tells us
15 that under those circumstances because of the size of
16 this dam and where it's located, if it fails, there is a
17 significant potential for a significant destruction to
18 life and limb. And to attempt to disagree with that at
19 this point, I think, is inappropriate based on the
20 stipulation and the language of the statute.

21 So here we have a dam that, if it fails, could
22 cause significant destruction to both life and to
23 property and also to the environment. It's sort of
24 ironic here that the Petitioners are arguing that we have
25 destruction of the wetlands and loss of some acreage of

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1 this pond and that this is, you know, damaging the
2 environment.

3 You kind of have to look at the flip side
4 too. What if we're wrong? What if we don't draw down
5 this thing, and we have -- you know, the half probable
6 maximum flood, whatever it is, comes and the dam fails,
7 and all that water comes rushing downstream. There is
8 going to be a significant damage to the environment from
9 that event as well.

10 So the DEQ, you know, doesn't have the luxury
11 to sort of look at one side of it. They've got to look
12 at both sides. And given the high risk here, and even if
13 it's -- you know, maybe we're not going to have this
14 storm. Maybe it's not going to come during the time
15 period where the feasibility study is being conducted.
16 The potential for damage and destruction is so great that
17 you can't really take that risk. And the prudent
18 alternative under those circumstances is to conduct this
19 drawdown on a temporary basis, and that's what's happened
20 here. We would ask the Court to affirm the decision and
21 leave this permit in place.

22 THE COURT: Okay. Thank you, very much.
23 Okay. Counsel, I'm going to write an opinion.
24 I'll get that out as soon as I can. Okay.
25 MR. REINWASSER: Thank you.

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1 THE COURT: I enjoyed listening to your
2 arguments.

3 MR. REINWASSER: It's an interesting issue.
4 THE COURT: It's my first dam case.
5 MR. REINWASSER: I love saying dam safety.
6 THE COURT: Okay. Was there anything else?
7 MR. KAUFMAN: May Petitioners briefly be heard
8 in response?

9 THE COURT: Okay. Go ahead.
10 MR. KAUFMAN: The Department has declared
11 that it has a great deal of expertise and experience with
12 regard to the technical questions raised by this case.
13 Now, the Petitioners don't necessarily challenge that.
14 And the Department has also stated that because it has
15 got a lot of experience in the operation and regulation
16 of hydro-powered dams and your Honor presumably does not,
17 it would not do for your Honor to substitute your Honor's
18 judgment as to these technical matters for the
19 Department's judgment, and we don't necessarily challenge
20 that proposition either.

21 Although I certainly do challenge the
22 conclusions that the State proposes to draw from these
23 generalizations. Under Michigan Rule of Evidence 702,
24 the task devolves on this Court always and as to any
25 sphere of technical expertise to be a gate keeper to pose

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1 the question: Does the testimony actually represent the
2 reliable application of scientific principals to data
3 sufficient to answer the question? And in this case I
4 think the answer is pretty clearly, no.

5 The Department said that just because
6 Bob Kaufman thinks that some particular form of data is
7 important, that doesn't make it so, and I agree with
8 that. The fact that I think that something is important
9 isn't really proof in this context or any other that it
10 actually is of importance.

11 Now, it's not just a matter of my personal
12 opinion or tastes what the probable maximum precipitation
13 event over the lower Boardman Watershed really is. It's
14 not my opinion that makes it important. It's Part 315
15 that makes it important. It's not a matter of opinion on
16 my part whether the record is totally devoid of any
17 theoretical or empirical justification for the figure
18 that was ventured. Anyone can make that determination by
19 reading the record. A scientific or engineering
20 background is not required to do that. All that is
21 required is English language literacy.

22 It's not just a matter of my opinion whether
23 the magnitude of the half probable maximum flood is an
24 important scientific datum in this case. Part 315 makes
25 it important. It's not a matter of opinion on my part

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1 whether Mr. Pawlowski and Mr. Byron Lane were both unable
2 to justify their assumed values for one-half PMF or the
3 probable maximum precipitation event. All you have to do
4 is read the record to satisfy yourself that that's the
5 case.

6 Counsel posed a question, which I assume is
7 rhetorical: Why would this professional engineer,
8 Mr. Pawlowski, say things that are as false as
9 Bob Kaufman implies they are?

10 Well, I cannot read people's minds. I don't
11 know why Mr. Pawlowski says the things he says. But
12 there is no doubt that could be entertained from a study
13 of this record that Mr. Pawlowski says things that are
14 not scientifically accurate and sometimes says things
15 that stretch the limits of credulity, and might I cite
16 one example? Mr. Pawlowski wanted to retreat from the
17 spillway capacity number to which he testified in a
18 related circuit court case where he said that by
19 excluding the capacity of the emergency spillway, he
20 reached the conclusion that the dam can conduct no more
21 than a 5,600 cubic feet of water per second.

22 At the administrative contested case hearing,
23 Mr. Pawlowski wanted to shave about 400 cubic feet per
24 second from that figure, and he justified it by asserting
25 that somebody told him that a turbine runner, a piece of

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1 hydroelectric generating equipment, in one of the
2 penstocks fell off of its mountings and crashed to the
3 bottom of the penstock blocking it so that water can no
4 longer pass through it. I asked Mr. Pawlowski, "What was
5 the name of the county employee who told you that?" He
6 said that he didn't remember. I said, "In the allegation
7 of this county employee, whoever he was, when did this
8 alleged event happen?" He could be no more precise than
9 to say that he was given to understand that it happened
10 sometime in calendar year 2007.

11 I asked Mr. Pawlowski, "Do you claim that you
12 saw this?" He agreed that he had not. I called to the
13 stand the owner of that turbine runner and all of the
14 other hydroelectric generating equipment that used to be
15 located in that dam, Mr. Charles Peterson. Mr. Peterson's
16 testimony was that it was not so, or at least it was not
17 so of -- as of the three weeks -- as of three weeks prior
18 to the date of hearing. And, furthermore, Mr. Peterson
19 ventured the opinion that it was physically impossible.

20 And it is physically impossible because this
21 piece of equipment is not held onto its mountings by the
22 force of gravity, the way that carafe or that paper cup
23 rests on counsel table. It's held on with bolts. So in
24 order to give the appearance of verisimilitude to
25 something that would tend to minimize the dam's spillway

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1 capacity, Mr. Pawlowski in this instance said something
2 that is not only factually inaccurate but doesn't even
3 make any sense.

4 Now, I can't prove that somebody didn't
5 actually tell Mr. Pawlowski that because Mr. Pawlowski
6 said he didn't know this person's name, and that makes
7 his story impossible to check. But my point is, it's not
8 really necessary to answer the question, why would
9 Mr. Pawlowski say things that prove to be false because
10 we know that he does say things that prove to be
11 factually inaccurate. So it unnecessarily augments our
12 burden of proof to expect the Petitioner to demonstrate
13 the motives that inspire Mr. Pawlowski to say the things
14 that he does.

15 Counsel has stated that a decisive issue in
16 this case is the question of whether there exists any
17 feasible and prudent alternatives to drawing down
18 Boardman Pond. The record includes some un rebutted
19 evidence on that point. Mr. Wayne Boss testified for the
20 Petitioners that you could use a Cat. dozer to cut the
21 berm of Cass Road if you got a report that a storm of
22 this magnitude, which appears to be three times bigger
23 than the biggest storm that's ever been observed in Grand
24 Traverse County since the 19th Century. Now, what
25 rebuttal evidence did the Department come up with to

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1 oppose that? None whatsoever. So there really is no
2 conflict in the testimony on this point.

3 Now, as I mentioned, there appear to be at
4 least four culverts communicating between the emergency
5 spillway and the dry tributary of the Boardman River, and
6 there is no evidence that they aren't actually big enough
7 to conduct the flood that would be developed -- that
8 would ensue during a half probable maximum flood event.
9 But if it were deemed necessary to increase that
10 capacity, Mr. Boss testified that you could install
11 bigger culverts, rectangular or polygonal culverts known
12 as box culverts. He also testified that you could reduce
13 the capacity of the berm of Cass Road to pool water by
14 engineering a dip into the road so that the water would
15 more -- would more readily overflow the pavement.

16 There is really nothing in the record to rebut
17 that. He tells you that findings of the Department are
18 to be upheld where there is presented anything more than
19 a scintilla of evidence, not necessarily a preponderance
20 of the evidence, and I agree that is the applicable
21 standard, but there really isn't a scintilla of evidence
22 that would lead this Court to conclude that feasible and
23 prudent alternatives were excluded.

24 On the witness stand, Mr. Pawlowski testified
25 that he considered the possibility that perhaps it would

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1 be a good thing to try to increase the spillway capacity
2 of Boardman Dam as an alternative to granting the present
3 permit, and he testified that he conveyed this
4 recommendation of his to his superiors. And he said that
5 he had two superiors to whom he broached this suggestion.
6 One was another professional engineer by the name of
7 David Hamilton, who did not testify, and the other was a
8 Mr. Byron Lane, another professional engineer who did
9 testify. When I asked Mr. Byron Lane about that point,
10 he denied that Mr. Pawlowski made that suggestion to him.

11 Anyway, my point is simply this: The record
12 does not uphold the asserted absence of feasible and
13 prudent alternatives.

14 Finally, it's been suggested that any question
15 as to whether the dam poses a threat to public safety is
16 resolved by the agreement that it is a Part 315 "high
17 hazard dam." I don't think that that really means any
18 such thing. A dam is characterized under Part 315 as
19 being a high hazard dam if it satisfies the following
20 criteria: It attains a head of over 40 feet. That is to
21 say, the distance from the bottom of the water to the top
22 of the water exceeds 40 feet, and it's located in an
23 urban area. We don't deny that both of those conditions
24 are satisfied, but that doesn't mean that the horrendous
25 consequences alleged by Mr. Pawlowski if the detached

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1 earthen berm were to turn to mud and wash away actually
2 happened. And Mr. Pawlowski, on cross-examination, was
3 unable to demonstrate any theoretical or factual
4 predicate that would uphold his conclusion.

5 Does the Court have any questions?
6 THE COURT: No. Thank you, very much,
7 Mr. Kaufman.

8 MR. KAUFMAN: Thank you.
9 THE COURT: Okay. Thank you, Counsel.
10 And, again, I'm taking the matter under
11 advisement, and I'll issue an opinion.

12 MR. REINWASSER: Thank you, your Honor.
13 MR. KAUFMAN: Thank you, your Honor.
14 THE COURT: You're welcome.
15 (At 11:35 a.m., the matter is
16 concluded.)
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1 STATE OF MICHIGAN)
) SS.
2 COUNTY OF INGHAM)

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4 CERTIFICATE OF REPORTER

5
6 I, Melinda I. Dexter, Certified Shorthand
7 Reporter, do hereby certify that the foregoing
8 **53 pages** comprise an accurate, true, and complete
9 transcript of the proceedings and testimony taken in the
10 case of **Edwin Martel, et al.**, versus **Michigan Department**
11 **of Environmental Quality, Case No. 09-866-AA**, on
12 **Wednesday, December 10, 2009.**

13 I further certify that this transcript of the
14 record of the proceedings and testimony truly and
15 correctly reflects the exhibits, if any, offered by the
16 respective parties. WITNESS my hand this the
17 thirty-first day of March, 2010.

18 **Melinda**
19 **Dexter**
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