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OF COUNSEL RICHARD D McNULTY

January 15, 2025

Mr. Ken Recker Livingston County Chief Deputy Drain Commissioner 2300 E. Grand River Avenue, Ste. 105 Howell, MI 48843 Sent Via E-Mail

Re: Statutory responsibilities of the County Board of Commissioners after submission of a valid lake level petition under Part 307 of the Natural Resources and Environmental Protection Act, MCL 324.30701 et seq. ("NREPA")

Dear Mr. Recker:

You have advised that the Drain Commissioner's Office received a lake level petition under Part 307 of the NREPA (the "Petition") from certain owners of property abutting Faussett Lake in Deerfield Township ("Faussett Lake"). You advised that the Petition facially appears to contain the signatures of 2/3 of the requisite property owners who abut the lake. To assist you in providing guidance to members of the Courts, Public Safety, and Infrastructure Development Committee and/or the Livingston County Board of Commissioners ("LCBOC"), you prudently requested an opinion addressing the statutory responsibilities of a County Board of Commissioners after submission of a valid lake level petition under Part 307 of NREPA. This letter addresses this issue and outlines the mandatory and discretionary duties of the Board of Commissioners.

Part 307 of NREPA provides the means to perform and finance projects to establish and maintain an established lake level of an inland lake and to build and finance dams as necessary to maintain the desired lake level. *In re Van Ettan Lake*, 149 Mich App 517 (1986). A lake level determination can be initiated by either a motion of the County Board of Commissioners or, as here, by petition to the County Board of 2/3 of owners of land abutting an inland lake.

Where, as here, a petition has been filed by 2/3 of owners of land abutting an inland lake, the Board of Commissioners (mandatory) "within 45 days following receipt of a petition"... "shall initiate action to take the necessary steps to cause to be determined the normal level of the inland lake." MCL 324.30702(1). The following statutory decisions need be made by the Board of Commissioners within this 45 day period – preferably by resolution:

Appointment of a delegated authority (discretionary). Under MCL 324.30702(3), the County Board of Commissioners is authorized to appoint a "delegated authority" to address the legal

and administrative requirements of a petition to maintain the normal lake level (and/or to address issues of an inland lake that is already subject to a Circuit Court Lake Level Control Order). In most instances, this is the County Drain Commissioner. However, another person or entity, such as the County Road Commission, could also be appointed. MCL 324.30702(2). If delegation is not made, the Board of Commissioners would be required to perform the administrative and statutory duties, as a body. While delegation is not, strictly speaking, mandatory, delegation, in our experience, is the overwhelmingly common and prudent practice.

- Determine whether a preliminary engineering study will be performed (both discretionary and mandatory). Before proceeding on a petition filed, a County Board of Commissioners "may" require a preliminary study by a licensed professional engineer. MCL 324.30703(2) requires that a preliminary study shall include all of the following:
 - (a) The feasibility of a project to establish and maintain a normal level of the inland lake.
 - (b) The expediency of the normal level project.
 - (c) Feasible and prudent alternative methods and designs for controlling the normal level.
 - (d) The estimated costs of construction and maintenance of the normal level project.
 - (e) A method of financing initial costs.
 - (f) The necessity of a special assessment district and the tentative boundaries if a district is necessary.
 - (g) Other information that the county board resolves is necessary.

While the preliminary engineering study is statutorily not mandatory (i.e. "may"), such study is the generally accepted and prudent mechanism upon which the (later) decision of the Board of Commissioners directs the filing of a court petition for determination of the normal lake level (as well as the costs). Specifically, MCL 324.30704 predicates the filing decision on the results of the engineering study ("(1) If the county board, based on the preliminary study, finds it expedient to have and resolves to have determined and established the normal level of an inland lake ..."). In addition, a preliminary engineering study will almost certainly be required to be performed prior to court action, as it will be necessary to have an engineer testify at the court hearing about a recommendation for setting the lake level, the mechanism, and the projected costs.

- Whether a deposit by the petitioners will be required to finance the preliminary engineering study. The County Board has the following choices for financing the preliminary engineering report:
 - 1. Utilize general fund monies;
 - 2. Utilize general fund monies, but require that such monies be returned to the County by the owners if the project moves forward, with the engineering study costs becoming part of the project costs or as a credit to any assessment against the County; OR
 - 3. Cash payment deposit by the petitioners of \$10,000.00 or the cost of the preliminary study, whichever is less, that can be credited to the petitioners' assessment if the establishment of the lake level moves forward and include the engineering study costs as part of the entire project.

Generally speaking, the most common practice, in our experience, is option 3.

If, based on the results of the preliminary engineering study, the County Board of Commissioners, as a body, finds it appropriate to have a legal lake level established, it directs the delegated authority's counsel, the prosecuting attorney or other legal counsel to initiate lake level proceedings in the Circuit Court. At that point, the Board would also direct whether the project will be paid for by the general fund or by a special assessment district (which is, in our experience, the norm). The second resolution of the Board of Commissioners would address the issue of the Board's determination as to whether a special assessment district is necessary. I have attached sample resolutions to this letter; these are illustrative of the decisions and not intended to be a final version.

Lake level proceedings culminate in an order from the court setting the legal lake level and establishing a special assessment district, if necessary. Once a legal lake level has been established, the court has continuing jurisdiction and may provide for a departure from the legal level to accomplish the purposes of the Act.

If you have any questions with regards to attached, do not hesitate to contact me.

Sincerely,

COHL, STOKER &TOSKEY, P.C.

/S/ Richard D McNulty

Enclosures

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