STATE OF MICHIGAN
CIRCUIT COURT FOR THE 34TH JUDICIAL CIRCUIT
ROSCOMMON COUNTY

CITIZENS FOR HIGGINS LAKE LEGAL LEVELS, ERIC OSTERGREN, STEVE RICKETTS, THOMAS THOMSON, CAROL THOMSON, GLENN R. FAUSZ, ROBERT OBRYAN, DRU OBRYAN, THOMAS THOMSON, CAROL THOMSON, and JANICE JAMESON as trustee of the JANICE JAMESON TRUST,

Petitioners-Plaintiffs,

v

BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON,

Respondent-Defendant.

No. 19-724711-AW

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INTERVENOR-DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT

Intervenor-Defendant the Michigan Department of Environment, Great Lakes, and Energy (EGLE), through its attorneys, Dana Nessel, Attorney General for the State of Michigan, and Daniel P. Bock, Assistant Attorney General, brings this motion for summary disposition. In support of its motion, EGLE states:

1. The complaint filed in this matter fails to state a claim on which relief can be granted, and summary disposition is appropriate under MCR 2.116(C)(8), for several reasons.

2. The complaint is premised on the notion that it is illegal for the Defendant, Roscommon Board of County Commissioners (County) to allow any fluctuation from the Court-ordered normal lake level, but Michigan law does not require that normal lake levels be maintained perfectly. Some fluctuation is, in fact, unavoidable.

3. The complaint alleges that the Plaintiffs are injured by not being able to enjoy recreational pursuits because the level of Higgins Lake is too low, but Michigan law does not create a private cause of action by which lakefront property owners can challenge the policy decisions of the County to advance their personal recreational interests.

4. The complaint asks the Court to issue a writ of mandamus compelling the County to take specific actions which are discretionary, and to dictate the manner in which the County performs its discretionary duties, both of which are outside the scope of the Court's jurisdiction.

5. Summary disposition of a portion of the complaint is also proper under MCR 2.116(C)(10).

6. The complaint asks the Court to order the County to adopt recommendations of an engineering report prepared by the Spicer Group.

7. To the extent that the Spicer Group has recommended closing a 4.75 foot "low flow channel" in the Cut River Dam, the complaint fails to allege any genuine issue of material fact, and the County and Intervenor-Defendants are entitled to judgment as a matter of law, because a 2007 permit issued by EGLE requires that the 4.75 foot low flow channel remain open.

8. While (C)(10) motions are often not granted until after the close of discovery, such motions can be granted where, as here, discovery is unnecessary for the disposition of this limited factual issue.

CONCLUSION AND RELIEF REQUESTED

EGLE respectfully requests that the Court grant summary disposition in EGLE's favor and dismiss this matter in its entirety under MCR 2.116(C)(8), and additionally dismiss a limited portion of this matter under MCR 2.116(C)(10).

INTERVENOR-DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

This action presents the Plaintiffs' second attempt to sue the Board of Commissioners of the County of Roscommon (the County) for failing to live up to an impossible standard of performance. The crux of the Plaintiffs' complaint is that the County is charged with maintaining the Court-ordered normal lake level for Higgins Lake, but the measured level of Higgins Lake sometimes deviates slightly from that normal lake level. This complaint suffers from the same deficiency as the Plaintiffs' prior effort to have the County held in contempt: it is premised entirely on a misunderstanding of what a normal lake level is.

Part 307, Inland Lake Levels, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.30701 *et seq.*, empowers Michigan circuit courts to establish "normal levels" for inland lakes. As set forth more fully below, a normal lake level is not an exact elevation that cannot be deviated from at all—indeed, such a level would be impossible to maintain due to the natural fluctuations of inland lakes. Rather, a normal lake level is a term defined in the statute that necessarily includes some variation.

Simply put, failing to prevent the level of a large inland lake from deviating at all from the normal lake level is not illegal. By suing the County for allowing any deviation from the normal lake level, however slight, the Plaintiffs have failed to

state a claim on which relief can be grated. Summary disposition is, therefore, appropriate under MCR 2.116(C)(8).

Additionally, the Plaintiffs have erroneously accused the County of failing to apply known best practices and available technology in its management of Higgins Lake. Specifically, the Plaintiffs allege that the County should be required to adopt measures recommended in an engineering report that would raise the level of Higgins Lake. This allegation by the Plaintiffs fails both legally and factually.

First, there is no legal requirement that the County adopt specific practices recommended in an engineering report. In fact, the Court cannot compel the County to adopt such practices because the separation of powers doctrine precludes a court from commandeering the discretionary decision making of executive branch officials. Therefore, by asking the Court to order the County to exercise its discretion in a specific way, the Plaintiffs have failed to state a claim on which relief can be granted, and summary disposition is once again appropriate under MCR 2.116(C)(8).

Second, as the Court is well aware, one recommendation of the engineering report (closure or restriction of a "low flow channel" in the Cut River Dam) would violate the terms of a permit issued by EGLE's predecessor agency. There is no genuine issue of material fact as to whether the EGLE permit forbids that portion of the relief sought by the Plaintiffs, and the County and Intervenor-Defendants are entitled to judgment as a matter of law on that issue. Partial summary disposition is, therefore, also appropriate under MCR 2.116(C)(10).

ARGUMENT

I. Summary disposition is appropriate under MCR 2.116(C)(8) because the Plaintiffs have failed to state a claim on which relief can be granted.

In their complaint, the Plaintiffs allege that the County has violated the law, such that a writ of mandamus is necessary, because there has been some deviation from the Court-ordered normal level of Higgins Lake.

The Plaintiffs repeatedly state that the County has "failed to abide" by the 1982 lake level order, failed "to employ known best practices and available technology to properly and/or at least more properly maintain the actual level of Higgins Lake," "been generally *non-compliant* with the Legal Lake Level Order during the normal (summer) months," "committed considerable daily violations," and even that the County is "intentionally causing the mid to later summer lake levels to repeatedly drop below the level mandated by the Legal Lake Level Order to the detriment of the users of Higgins Lake, including each Plaintiff." (11/30/19 First Amended Complaint, ¶¶ 10, 11, 14, 15, 17, 18, and 19, emphasis in original.)

In support of these allegations, the Plaintiffs offer exhibits that show that the level of Higgins Lake, as measured by the United States Geological Survey, sometimes varies a fraction of an inch, or even a few inches, up or down from the Court-ordered normal lake level. (11/30/19 Complaint Exs. E, F, G, and M.)

These minute variations are illegal, the Plaintiffs allege, because Part 307 requires that, once a court has established a normal lake level, "the delegated authority of the county or counties in which the lake is located *shall* maintain *that*

lake level." (11/30/19 Complaint, ¶¶ 25 and 27, emphasis in original.) The Plaintiffs further allege that the County "has the clear legal duty, pursuant to Part 307, to maintain or have its delegated authority maintain the lake level of Higgins Lake during the summer months at 1154.11 feet above mean sea level." (11/30/19 Complaint,¶ 28.)

As set forth more fully below, this argument is fatally flawed because Michigan law specifically allows some deviation from a normal lake level. The complaint is entirely premised on the misguided notion that *any* deviation from a normal lake level is illegal. There is no legal authority to support that position; in fact, there is clear legal authority to the contrary. By suing the County for something that is not illegal, the Plaintiffs have failed to state a claim on which relief can be granted, and this case must be dismissed in its entirety pursuant to MCR 2.116(C)(8).

A. Standard of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119 (1999), citing *Wade v Dep't of Corrections*, 439 Mich 158, 162–163 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. *Id.* at 120, citing MCR 2.116(G)(5).

B. The Plaintiffs have failed to state a claim on which relief can be granted because the conduct that they accuse the County of—failing to maintain the level of Higgins Lake perfectly, with no deviation whatsoever—is not illegal.

As the Plaintiffs correctly note, Part 307 authorizes Michigan circuit courts to establish normal levels for inland lakes, and provides that the appropriate delegated authority (in this case the County) shall provide for and maintain that normal level. MCL 324.30707(5); MCL 324.30708(1); MCL 324.30702(3).

Part 307 defines "normal level" 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. A normal level shall be measured and described as an elevation based on national geodetic vertical datum.

MCL 324.30701(h).

As a preliminary matter, the definition of "normal level" does not include anything related to recreation. Yet the Plaintiffs allege that the injury they suffer is that, due to the County's alleged failure to maintain the normal lake level, the Plaintiffs "are not able to enjoy the full extent of recreational and water-based activities" on the lake. (11/30/19 Complaint, ¶ 20.) The complaint contains no allegation that the County's maintenance of the normal lake level has harmed "the public health, safety, or welfare," "the natural resources of the state," or "the value of property around the lake." In other words, the Plaintiffs have sued the County for an alleged failure to do something (maintain the level of Higgins Lake in a way that allows the Plaintiffs to recreate as they wish) that is not contemplated within the statute.

Additionally, nowhere in Part 307 does it say that a "normal level" is an exact level that must be maintained at all times, to the fraction of an inch, without any deviation. In fact, as noted by the County in its brief in support of its motion for summary disposition, Michigan appellate courts have made clear that the opposite is true.

The Michigan Court of Appeals has held as follows:

> The purpose of the Inland Lake Levels Act is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public. Read as a whole, the act essentially authorizes counties to make policy decisions as to the levels of their inland lakes, and build and finance dams as necessary to maintain the desired lake levels. It cannot reasonably be argued that the purpose of the act is to also create or protect individual rights as to inland lake levels. The purpose of the act is clearly on the public welfare and not on individual riparian rights. The act does not create a civil cause of action for individuals who are dissatisfied with the county's exercise of authority.

In re Van Ettan Lake, 149 Mich App 517, 525 (1986).

The Court of Appeals has further held that Part 307 "does not define 'normal level' to include a minimum and maximum level." *Baldwin v Barry County Drain Comm'r*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 1998 (Docket No. 201604), p 3 (copy attached as Ex A).

The *Baldwin* case, although unpublished, is particularly persuasive here because its facts are very similar to the facts of this case. *Baldwin* involved a 1969 order under the Inland Lake Levels Act (since recodified as Part 307), which established both a minimum and maximum level for Pine Lake in Barry County. *Id.*, at 1. The 1969 order of the Barry County Circuit Court established the normal level of Pine Lake at 890.5 feet above mean sea level, and further provided that the

minimum level not fall below 890 feet, and the maximum level not rise above 981 feet. *Id.* Unsurprisingly, reality intervened, and the Barry County Drain Commissioner was unable to maintain the level of Pine Lake within one foot of the normal lake level due to flooding. *Id.* This, also unsurprisingly, caused a number of individuals to join together and sue the County for failing to abide by the normal lake level. *Id.*

The Barry County Circuit Court initially held that the 1969 lake level order was too old to be enforced. *Id.* This ruling was reversed by the Court of Appeals, and the matter was remanded for consideration of the merits. *Id.* On remand, the Barry County Circuit Court removed the minimum and maximum limits, and left the normal lake level at 890.5 feet, subject to seasonal variations and precipitation. *Id.* The plaintiffs appealed that ruling, arguing, among other things, that Part 307 requires the establishment of minimum and maximum levels that cannot be deviated from. *Id.*

In rejecting this argument, the Court of Appeals held, as noted above, that Part 307 does not authorize the setting of minimum and maximum levels, that it allows courts to allow for seasonal variation and precipitation, and that it does not provide a private cause of action for disgruntled property owners to protest the policy decisions of delegated county authorities. *Id.*, citing *Van Ettan Lake*, 149 Mich App at 525–526 and *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 537 and 544 (2004).

Exactly like the plaintiffs in *Baldwin*, the Plaintiffs here misinterpret what a normal lake level is. And, exactly like the *Baldwin* plaintiffs, the Plaintiffs here have pursued a private cause of action in which they seek to compel the County to satisfy an impossible standard for which there is no legal support. This Court should join the Court of Appeals in rejecting these arguments.

Finally, the Plaintiffs ask the Court to remedy the County's failure to maintain Higgins Lake at the normal lake level by simply issuing a writ of mandamus directing the County "to meet its legal obligation to keep and maintain the water of Higgins Lake to the level mandated by the Legal Lake Level Order throughout the entire year." (11/30/19 Complaint, ¶ 32.b.) The Court may take judicial notice of the fact that lake levels fluctuate unavoidably, and therefore such an order would be impossible to comply with.

C. The Plaintiffs have failed to state a claim on which relief can be granted because there is no legal requirement that the County adopt the recommendations of the Spicer Group report or comply with the Plaintiffs' request for undefined "operational practices."

In addition to alleging that the County has failed to maintain the level of Higgins Lake at 1154.11 feet above mean sea level, the Plaintiffs also allege that the County has failed to "employ known best practices and available technology" in maintaining the normal lake level. (11/30/19 Complaint, ¶ 11.) To remedy this, the Plaintiffs ask the Court to order that the County "implement of (sic) the Spice (sic) Group's recommendations and/or establish guidance and operational practices for

the devices used to control the lake level of Higgins Lake." (11/30/19 Complaint, ¶ 32.c.)

As ably set forth in the County's brief in support of its motion for summary disposition, the Court lacks the authority to order the County to implement the Spicer Group's recommendations. Michigan law is clear that courts may not preemptively order members of the executive branch (such as county commissioners) to take discretionary actions. *Warda v City Council of Flushing*, 472 Mich 326, 336–337 (2005). Additionally, the power of the courts to issue writs of mandamus is limited to the power to require government officials to perform clearly-required legal duties, but not to require that those duties be performed in a particular manner. *State Bd. of Education v Houghton Lake Community Schools*, 430 Mich 658, 666–667 (1988).

This principle that the judicial branch cannot effectively commandeer the executive branch is based on the separation of powers doctrine. *Cahalan v Wayne County Bd. of Comm'rs*, 93 Mich App 114, 121 (1979), citing Const 1963, art 3, § 2; *Detroit v Circuit Judge of Wayne County*, 79 Mich 384, 387 (1890).

Here, the Plaintiffs ask the Court to order the County to perform a discretionary duty in a specific manner (complying with the 1982 lake level order by implementing the Spicer Group's recommendations). By asking the Court to issue an order that is outside the Court's authority, the Plaintiffs have failed to state a claim on which relief can be granted.

Additionally, the Plaintiffs ask the Court to order the County to "establish operational practices for the devices used to control the level of Higgins Lake." (11/30/19 Complaint, ¶ 32.c.) Here, the Plaintiffs have once again failed to state a claim on which relief can be granted. Nowhere in the complaint do the Plaintiffs allege that the minor deviations in the level of Higgins Lake are caused by a lack of operational practices, or an improper operation of the Cut River Dam. There is no indication in the complaint that, if the County simply operated the Dam differently, that would remedy the Plaintiffs' concerns. Moreover, the Plaintiffs do not specify what these "operational practices" should say or how they might provide the relief that the Plaintiffs seek.

Simply put, the relief sought by the Plaintiffs is not available. By asking the Court to order the County to take specific, discretionary acts and to dictate how the County complies with the 1982 lake level order, the Plaintiffs have failed to state a claim on which relief can be granted, and summary disposition is appropriate pursuant to MCR 2.116(C)(8).

II. With regard to the Plaintiffs' request that the Court order the County to implement the recommendations of the Spicer Group, summary disposition is appropriate under MCR 2.116(C)(10) because there is no genuine issue of material fact, and the County and Intervenor-Defendants are entitled to judgment as a matter of law.

In addition to the arguments premised on MCR 2.116(C)(8) set forth above, it is EGLE's position that summary disposition is also appropriate under MCR 2.116(C)(10) with regard to the Plaintiffs' request that the Court order the County to implement the recommendations of the Spicer Group.

It is undisputed that one of the main recommendations of the Spicer Group is closure or restriction of the "low flow channel" in the Cut River Dam. (11/30/19 Complaint, Ex H, pp 13–14.) As the Court is aware, that low flow channel is required by a permit issued by EGLE (then known as the Michigan Department of Environmental Quality) in 2007. (Ex B.) As set forth more fully below, the existence of this permit forbids the closure or restriction of the low flow channel.

Ordinarily, the fact that the Defendant is legally forbidden from providing the relief sought by the Plaintiffs would mean that the Plaintiffs had failed to state a claim on which relief could be granted, and summary disposition would be appropriate under MCR 2.116(C)(8). However, as noted above, a (C)(8) motion must be based only on the pleadings. Here, because the 2007 permit was not attached as an exhibit to the complaint, it is not part of the pleadings and a (C)(8) motion is unavailable. EGLE therefore brings this limited portion of its motion under MCR 2.116(C)(10).

A. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood,* 461 Mich 109, 119 (1999), citing *Wade v Dep't of Corrections,* 439 Mich 158, 162–163 (1992). In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue

regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*, citing MCR 2.116(C)(10), (G)(4) and *Quinto v Cross & Peters Co*, 451 Mich 358 (1996).

B. The County cannot be compelled to close the "low flow channel" in the Cut River Dam, because doing so would violate the terms of a validly-issued permit.

The 4.75 foot low flow channel is required by a permit issued by EGLE in 2007. (Ex B, pp 6 of 7 and 7 of 7.) Part 307 does not empower courts to excuse compliance with other laws, including the permits and permitting requirements of other parts of the Natural Resources and Environmental Protection Act. MCL 324.30723; *Tawas Lake Improvement Ass'n v Iosco County Bd. of Commissioners*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2003 (Docket No. 237007), pp 3–4 (copy attached as Ex C).

In *Taws Lake Improvement Association*, the Court of Appeals held that one must obtain *both* a court order establishing a normal lake level *and* any necessary permits from EGLE (then DEQ), stating:

> The separation of powers exists "to preserve the independence of the three branches of government." Some overlap in powers is contemplated. Under the NREPA, the circuit courts can still determine inland lake levels, though their ultimate power to enforce their orders is curtailed by the DEQ's power to protect natural resources. However, neither branch is prohibited from exercising their authority. "If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of another, a sharing of power may be constitutionally permissible." Here, the grant of power to determine lake levels is limited and specific (the power may be exercised in concert with the DEQ's power to protect natural resources), and the grant does not encroach on or aggrandize DEQ's powers or vice versa.

Id., p 4 (internal citations omitted).

Because the 4.75 foot low flow channel is required by the 2007 EGLE permit, the Court cannot order that it be closed or restricted. Summary disposition is, therefore, appropriate under MCR 2.116(C)(10) with regard to the Plaintiffs' request that the Court order the County to implement this portion of the Spicer Group's recommendations.

C. While (C)(10) motions are commonly not granted prior to the opportunity to conduct discovery, the undisputed facts of this case present an exception to that general practice.

Generally, summary disposition under MCR 2.116(C)(10) is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190 (1996), citing *Dep't of Social Services v Aetna Casualty & Surety Co.*, 177 Mich App 440, 446–447 (1989). However, summary disposition is not premature if the discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition. *Id.*

Here, there is no chance that the Plaintiffs can discover any factual evidence to challenge the 2007 EGLE permit, because any challenge to the validity and effectiveness of the permit had to be brought within 60 days of the permit's issuance, and is therefore time barred.

All final decisions of administrative agencies, including decisions to issue permits, are subject to judicial review. Const 1963, art 6, § 28. There are, generally, two kinds of administrative agency decisions: those which an aggrieved person has the right to challenge in a contested case hearing, and those for which

there is no right to a contested case hearing. *Morales v Michigan Parole Bd*, 260 Mich App 29, 33 (2004).

Agency decisions where there is a right to a contested case hearing are governed by the Michigan Administrative Procedures Act, MCL 24.201 *et seq*. A contested case hearing is essentially a trial before an administrative law judge, which results in the issuance of a final decision and order, also known as the final agency decision. MCL 24.271–278; MCL 24.285. The final decision and order resulting from a contested case hearing may then be appealed to the relevant circuit court. MCL 24.301–306. Contested case hearings to challenge EGLE permitting decisions must be brought within 60 days of the issuance of the permit. Mich Admin Code, R 792.10303(2).[1]

Agency decisions for which there is no right to a contested case hearing are governed by the Michigan Revised Judicature Act, and may be appealed directly to the relevant circuit court. MCL 600.631. Such challenges must be brought within 21 days of the agency decision. MCR 7.104(A)(1).

Here, the 2007 permit that authorized modifications to the Cut River Dam (and required the 4.75 foot low flow channel) was issued under Parts 31, Water Resources Protection, and Part 301, Inland Lakes and Streams, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.3101 *et seq*. and MCL 324.3101 *et seq*. (Ex B, p 1 of 7.) This permit was issued on March 12, 2007.

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[1] In 2007, at the time the subject permit was issued, the same 60 day requirement existed but was codified under Mich Admin Code, R 324.21(2), which has since been repealed and replaced by the rule cited above.

(*Id.*) Such permits may be challenged in a contested case hearing under the Administrative Procedures Act. MCL 324.30110(2) and (3); Mich Admin Code, R 281.843(4). Such a hearing had to have been filed within 60 days of the permit's issuance on March 12, 2007. Mich Admin Code, R 281.843(4); Mich Admin Code, R 792.10303(2).

An action may not proceed in circuit court unless administrative remedies have first been exhausted. *W.A. Foote Memorial Hospital v Dep't of Public Health*, 210 Mich App 516, 521 (1995).

The doctrine of exhaustion of administrative remedies requires that, where an administrative agency provides a remedy, an aggrieved party must seek such relief before petitioning a court of law. *Cummins v. Robinson Twp.*, 283 Mich App 677, 691 (2009); *Bonneville v. Michigan Corrections Org.*, 190 Mich App 473, 476 (1991). Where a plaintiff has not exhausted his or her administrative remedies, the plaintiff's claim is not ripe for review." *Hendee v. Putnam*, 486 Mich 556, 573 (2010).

The Court of Appeals further held that "[c]ollateral estoppel applies to unappealed administrative determinations that are adjudicator in nature and where . . . a method of appeal is provided." *Id.* at 12, citing *Champion's Auto Ferry, Inc. v Public Service Commission*, 231 Mich App 699, 712 (1998).

In sum, the 2007 permit was not challenged within 60 days of its issuance and, therefore, may not be challenged now. This means that the Plaintiffs are,

essentially, stuck with the permit as it exists, and there is no possibility that discovery could uncover any factual basis for challenging this requirement.

CONCLUSION AND RELIEF REQUESTED

The Plaintiffs have sued the County for something that is not illegal, and sought relief that is both outside the scope of the Court's authority to grant and outside the realm of possibility for the County to implement. By seeking a writ of mandamus directing the County to put a stop to minor, natural lake level fluctuations, the Plaintiffs have asked the Court to order the County to avoid the unavoidable. The County could just as easily stop the sun from rising or the wind from blowing as it could stop the level of Higgins Lake from rising and falling a matter of a few inches from day to day. For these reasons, and as set forth above, the Plaintiffs have failed to state a claim on which relief can be granted, and summary disposition is appropriate under MCR 2.116(C)(8).

Additionally, to the extent that the complaint seeks a writ of mandamus compelling the County to block or restrict the low flow channel in the Cut River Dam, such relief is plainly forbidden by the 2007 EGLE permit that requires this low flow channel to exist and remain open. On this limited issue, there is no genuine issue of material fact, and the County and Intervenor-Defendants are entitle to judgment as a matter of law under MCR 2.116(C)(10).

For these reasons, EGLE respectfully requests that the Court grant the motions for summary disposition filed by both EGLE and the County, and dispose of this matter in its entirety.

Respectfully submitted,

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