

STATE OF MICHIGAN
IN THE 46th JUDICIAL CIRCUIT
COUNTY OF OTSEGO

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,
and STEVEN E. CHESTER,
Director of the Michigan
Department of Environmental Quality,

No. 09-_____ -CE

Honorable

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES
and REBECCA HUMPHRIES,
Director of the Michigan
Department of Natural Resources

Plaintiffs,

v

Golden Lotus, Incorporated

Defendant.

COMPLAINT

There is no other civil action between these parties arising out of the same transaction or occurrences as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a Judge.

1. This is a civil action seeking injunctive relief to require the Defendant, Golden Lotus, Incorporated (GLI), to eliminate illegal discharges of sediment-laden water from the GLI-owned dam to the Pigeon River. Further, the Plaintiffs are seeking to obtain injunctive relief requiring the Defendant to mitigate for the value of the loss of public resources and recreational opportunities along with the costs associated with rehabilitating the Pigeon River to conditions that existed prior to the release of sediment including removal of the dam owned by the Defendant. The Plaintiffs are also seeking to require the Defendant to reimburse the Plaintiffs for all costs associated with this enforcement action and statutory fines and attorney's fees.

2. Plaintiffs bring this action pursuant to Part 31, Water Resources Protection; and Part 301, Inland Lakes and Streams, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.3101 *et seq.*, and MCL 324.30102, and the administrative rules promulgated thereunder. Part 31 provides that the Department of Environmental Quality shall protect and conserve the water resources of the state and the Great Lakes, which are or may be affected by any type of contamination. Part 301 provides in part that a person shall not fill bottom land, diminish, or structurally interfere with the natural flow of an inland lake or stream without first obtaining a permit from the department.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to Section 3115(1) of Part 31 of the NREPA, being MCL 324.3115(1) and Section 30112(1) of the NREPA, being MCL 324.30112(1) and pursuant to Section 605 of the Revised Judicature Act (RJA), MCL 600.605 which provides that circuit courts have original jurisdiction to hear and determine all civil claims and remedies except where otherwise provided by statute.

4. This Court has personal jurisdiction over the Defendant pursuant to Sections 711 and 715 of the RJA, MCL 600.711, MCL 600.715. Venue is appropriate pursuant to MCL 324.30316(1) and MCL 324.3115(1).

PARTIES

5. Plaintiff, the Department of Environmental Quality (DEQ), is a principal department within the Executive Branch of the State of Michigan. It is responsible for enforcing compliance with the provisions of the NREPA, being 1994 PA 451, as amended, MCL 324.101 *et seq.* and the rules promulgated thereunder.

6. Plaintiff, Steven E. Chester, is the Director of the DEQ: the state agency mandated to provide for the protection of the natural resources of the state from pollution, impairment, and destruction, MCL 324.101, MCL 324.301, MCL 324.501, Executive Orders 1973-2, 1976-8, and 1995-18.

7. Plaintiff, the Department of Natural Resources (DNR), is a principal department within the Executive Branch of the State of Michigan. It is responsible for protecting and conserving the natural resources of this state, being 1994 PA 451, as amended, MCL 324.107, *et seq*, and the rules promulgated thereunder.

8. Plaintiff, Rebecca Humphries, is the Director of the DNR the state agency mandated to provide for the protection and conservation of the natural resources of this state, MCL 324.503, MCL 324.48702

9. Defendant, GLI, is the sole owner of the Song of the Morning Ranch located at 9607 East Sturgeon Valley Road, Vanderbilt, Otsego County, and adjacent to an impoundment of the Pigeon River.

GENERAL ALLEGATIONS

10. The Pigeon River is a clear, navigable stream located in Otsego and Cheboygan County that has been designated a natural river under Part 305, Natural Rivers, of the NREPA, 1994 PA 451, as amended MCL 281.761 *et seq*; MSA 11.501. The Pigeon River is known for its quality trout fishery and recreational opportunities to the public.

11. The Song of the Morning Ranch Dam is the most significant dam located on the Pigeon River. It was built in 1957 after a portion of the original earthen dam failed causing a massive flood and extensive damage to the trout habitat.

12. The Defendant has owned and operated the Song of the Morning Ranch dam and the impoundment, which is approximately 40 acres in size, since May 26, 1969. The function of

the dam is to control the water level in the impoundment which is accomplished by allowing water to pass through two underflow gates and released down stream.

13. An earlier failure of the dam occurred in 1984 when the dam gates malfunctioned and operational errors were committed resulting in a massive fish kill in the Pigeon River. The DNR ordered the Defendant to make repairs and dam upgrades mandated through the September 26, 1988, Consent Judgment File No. 84-2871-CE filed in this Court. (See Addendum)

14. It is the responsibility of the Defendant to ensure that the operation and maintenance of the dam is overseen by a staff person who is trained in dam maintenance and safety and who is charged with the responsibility of implementing an approved dam safety and management program. This responsibility was mandated initially by the September 26, 1988, Consent Judgment File No. 84-2871-CE filed in this Court.

15. On or about June 22, 2008, a significant increase in discharge of water from the dam caused water levels in the impoundment to drop, drastically increasing the downstream flows to the Pigeon River and transporting massive amounts of sediment downstream.

16. The drop in the impoundment's water levels apparently triggered the dam's operating system alarms. In the early morning of June 23, 2008 around 3:00 a.m., the Defendant's staff, which are responsible for the day-to-day operations of the dam, turned off the alarms.

17. At approximately 6:00 a.m. on the morning of June 23, 2008, the Defendant's staff observed that the impoundment had been drained. In an attempt to raise water levels in the impoundment, the gates were closed. The Defendant's act of closing the gates prevented all flow from the impoundment to the Pigeon River.

18. These drastic increases and decreases in flows to the Pigeon River were recorded by a United States Geological Survey (USGS) gauging station located just downstream of the dam near Sturgeon Valley Road.

19. At no point during the alleged malfunction of the dam or in closing the dam gates did the Defendant report the discharges resulting from the event to the DEQ or the DNR.

20. At approximately 9:30 a.m. on June 23, 2008, a DNR research biologist observed that the USGS gage at Sturgeon Valley Road indicated that there was almost no flow in the river and initiated inquiries to determine if there was a gage malfunction or if operation of the dam was the cause of the extreme high and low flow levels recorded.

21. During the afternoon of June 23, 2008, flow levels at the USGS gage were near normal levels and the DNR had observed that the river had turned black in color. The Defendant was contacted by the DNR by telephone and the Defendant acknowledged that there had been a malfunction at the dam.

22. On June 24, 2008, the DEQ received a complaint from the DNR of low flow and dead fish in the Pigeon River. The DNR informed the DEQ's Gaylord Field Office that there was an operational failure at the dam at the Song of the Morning Ranch that caused extreme, unnatural flow fluctuations and resulted in an extensive amount of accumulated sediment and organic material within the impoundment of the dam to be washed downstream in the Pigeon River.

23. On June 24, 2008, the DEQ conducted a site investigation and observed that the Pigeon River had turned black with sediment and organic material which was also deposited throughout the river and along the river banks. Dead fish were also observed. Attempts were made to interview the Song of the Morning Ranch dam operator who was not present at the time

the DEQ staff arrived around 4:00 p.m. in the afternoon. The DEQ staff informed another employee of the Defendant that DEQ staff would return the next business day.

24. On June 25, 2008, the DEQ conducted an in-stream water quality monitoring investigation and repeated this investigation on June 30, 2008.

25. Electro fishing surveys conducted on June 24 - 25, 2008 by the DNR revealed that nearly all trout as well as many other fish species within several miles of the dam were killed. During the remainder of June and during July 2008, trout populations were estimated in over eight miles of the Pigeon River. Trout populations in 2008 were dramatically lower than the levels observed in previous years in river reaches downstream of the dam. Reduced trout abundance was observed as far downstream as Pigeon River Road, which is 21 miles downstream of the dam.

26. On June 25, 2008, the DEQ interviewed the Defendant's dam operator who verified that a problem had been experienced with the dam on the evening of June 22, 2008, resulting in a drastic decrease of the impoundment's water levels releasing sediment-laden water to the Pigeon River. The Defendant's dam operator also verified that the dam's gates were closed on June 23, 2008, to raise the impoundment's water level that subsequently cut off all flow of water to the Pigeon River.

27. On August 12, 2008, the DEQ sent a Violation Notice to the Defendant advising the Defendant that the discharge from the dam resulted in an extensive discharge of water, sediment and organic matter from the impoundment which also resulted in drastic flow fluctuations in the Pigeon River downstream of the dam in violation of Section 30102(d) of Part 301, Inland Lakes and Streams, of the NREPA. Additionally, the DEQ advised the Defendant that the discharge was a violation of Section 3109 of Part 31, Water Resources Protection, of the NREPA because a person shall not directly or indirectly discharge into waters of the state a

substance that is or may become injurious to the state's designation uses. The DEQ required the Defendant to respond in writing by September 15, 2008, to explain the circumstances of the discharge and a corrective action plan attending to the statutory violations. The Defendant requested and was granted a 30-day extension to respond to the DEQ.

28. The acute effects of the discharge of oxygen-demanding sediment laden water and organic matter compounded by the drastic water level fluctuations from extremely high to nearly zero flow caused a catastrophic fish kill within the Pigeon River. The long-term devastation caused by the discharge includes increased sedimentation through the river system.

29. Many of the large trout killed were four or more years old. Therefore, it will be many years before abundance of these larger individuals can be restored.

30. The continued presence of the dam and the impoundment increases the temperature of the Pigeon River above levels that would naturally occur in the absence of the dam. This temperature increase thereby reduces the oxygen capacity of the river and the total habitable area of the river negatively impacting coldwater fish species such as trout.

31. The continued presence of the dam and the impoundment alters the natural flow of the river both in the impoundment and the Pigeon River and is a barrier to upstream fish migration.

32. The continued presence of the dam operation as a peaking facility results in extreme variability in flow discharge in the river. Specifically, the operation of this dam results in increased turbidity at high flow and exposes submerged habitat at low flows.

33. The continued presence of the dam causes further accumulation of silt and organic matter in the impoundment behind the dam increasing the risk of impairment and devastation to the Pigeon River as occurred during the 1957 and 1984 massive and uncontrolled discharges, and the recent occurrences of June 2008.

COUNT I

34. Plaintiffs reallege and incorporate by reference paragraphs 1-33 as though fully set forth herein.

35. Part 31 of the NREPA Section 3109 (1) provides as follows:

A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:

- (a) To the public health, safety, or welfare.
- (b) To domestic, commercial, industrial, agricultural, recreational or other uses that are being made or may be made of such waters.
- (c) To the value or utility of riparian lands.
- (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to the growth propagation.
- (e) To the value of fish and game.

36. The Defendant's gross mismanagement of the Song of the Morning Ranch dam resulted in a massive and uncontrolled discharge of sediment-laden water and drastic flow fluctuations in the Pigeon River. The massive amount of sediment-laden water along with drastic flow fluctuations, as alleged in Paragraphs 8 through 31, were in fact and in the future may be injurious to public health, fish, plants, aquatic life, and other designated uses of the waters of the state, and therefore is a violation of Part 31.

37. The continued presence of the dam and the impoundment reduces the overall quality of the fishery, disrupts navigation, and reduces the water quality in the Pigeon River.

COUNT II

38. Plaintiffs reallege and incorporate by reference paragraphs 1-37 as though fully set forth herein.

39. Section 30102 of Part 301 mandates that:

Except as provided in this part, a person without a permit from the department shall not do any of the following:

....

(d) Create, enlarge, or diminish an inland lake or stream.

(e) Structurally interfere with the natural flow of an inland lake or stream.

40. Defendant failed to effectively manage the dam to control the impoundment's water levels resulting in diminishing the impoundment as alleged in Paragraphs 8 through 39 without first acquiring the necessary permits and is in violation of Section 30102.

RELIEF REQUESTED

WHEREFORE, Plaintiffs request that the Honorable Court grant the following relief:

- A. Declare and adjudge that the Defendant's conduct in violation of Parts 31, and Part 301 of the NREPA and corresponding rules;
- B. Grant a permanent injunction enjoining or restraining Defendant from polluting, impairing, or destroying water, air, or other natural resources of the State of Michigan;
- C. Requiring removal of the Song of the Morning Ranch Dam by Defendant;
- D. Requiring Defendant mitigate for the value of the public's resources lost because of the discharge;
- E. Requiring Defendant mitigate for lost value of the public recreational opportunities;
- F. Requiring Defendant to pay costs associated with rehabilitating the Pigeon River to conditions that existed prior to the release of sediment, up to and including the removal of the dam owned by the Defendant;

- G. Impose a civil fine not less than \$2,500 and up to \$25,000 against Defendant for each instance of violation as provided within MCL 324.3115(1);
- H. Impose a civil fine against Defendant of not more \$5,000 per day of each day of violation as provided within MCL 324.30112(2);
- I. Order Defendant to pay the attorney fees and costs of surveillance and enforcement incurred by the Plaintiffs as well as future costs of surveillance and enforcement incurred by Plaintiffs and demanded by March 1 of each calendar year until a Notice of Termination is granted by Plaintiffs; and
- J. Award Plaintiffs such other relief as may be deemed just and proper.

Respectfully submitted,

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