

STATE OF MICHIGAN  
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

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THE PETITIONS OF TOM BOERNER *et al*,  
And the MENOMINEE INDIAN TRIBE OF  
WISCONSIN,

Appellants,

v

DEPARTMENT OF ENVIRONMENT  
GREAT LAKES AND ENERGY,

Appellee.

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OPINION AND ORDER

CASE NO. 20-75-AA

HON. WANDA M. STOKES

At a session of said Court  
held in the city of Mason, County of Ingham,  
this 22 day of April, 2021.

PRESENT: HON. WANDA M. STOKES

This matter comes before the Court on Menominee Indian Tribe of Wisconsin's ('MITW') Motion for Reconsideration regarding this Court's May 28, 2020 Order denying MITW's Motion to Allow Taking of Additional Evidence in light of the January 4, 2021 Wetlands Permit Final Decision and Order. Upon review, and the Court having been apprised of the facts and otherwise being fully informed regarding the issues, it now **GRANTS MITW's Motion for Reconsideration and REMANDS** this case for further hearing as more fully outlined below.

**FACTS**

The MITW appeals the decision of the Department of Environment, Great Lakes, and Energy's ("EGLE") dated November 26, 2019 granting a Nonferrous Metallic Mining Permit for a mining project near the Menominee river. EGLE approved this project to operate for seven years, and the project involves conventional open pit mining that requires drilling, blasting, excavating

and backhoeing land along with the loading of long haul trucks. The project also requires the construction of major facilities, including the mine pit, a waste rock management facility, a plant to process oxide ores, and a waste-water treatment plant.

The project's location falls within 150 yards of the Menominee River. The MITW, a federally recognized Native American tribe, occupies the land around the river and proposed project site. The MITW argues that this project would destroy a number of tribal resources and cultural sites, and the MDEGLE should deny the permit.

Two and a half years after EGLE's issuance of the mining permit, EGLE issued a wetlands permit to Aquila ("Wetlands Permit"). MITW challenged both permits before the Michigan Office of Administrative Hearings (MOAHR) Administrative Law Judge Daniel Pulter ("ALJ").

On January 24, 2020, the MITW filed their motion to allow taking of additional evidence. The motion alleges that the ALJ failed to consider material, substantial and relevant evidence despite repeated requests. They also charged that relevant evidence was inadvertently omitted from the record in the contested case hearing by Appellant but included in the administrative record for the mining permit. The evidence the MITW sought to introduce included:

4. ...
  - a. Relevant and material evidence related to EGLE Water Resources Division ("WRD") review of the groundwater model submitted with the mining permit application and relied upon by the ALJ to determine that the proposed project permitted would not pollute, impair or destroy water resources, including, but not limited to:
  - b. Transcripts of testimony of EGLE WRD employees Kristi Wilson, Eric Chatterson, Jill Van Dyke and Mike Pennington from the 2019 contested case hearing on Wetlands permit WRP011785 for the Back Forty Project;
  - c. Findings of Fact and Conclusions of Law dated April 30, 2018 authored by the same WRD employees listed in paragraph 4(b);

- d. Wetland Permit Number WRP011785 for the Back Forty Project offered as evidence by Appellant as Exhibit P-218 in the contested case on the mining permit;
- e. Any other relevant evidence included in the transcripts and exhibits presented in the contested case hearing on the wetlands permit for the Back Forty Project that is material and related to the groundwater model, site characteristics, geologic characteristic, analysis of contaminants and other conditions, features, or processes relevant to and regulated under NREPA part 632;
- f. Evidence from the wetlands permit application for the Back Forty Project that the applicant abandoned certain portions of the project under a feasible and prudent alternatives analysis;
- g. Amended Mining Permit MP 01-2016 issued on December 12, 2019, and any relevant parts of that application; and
- h. The Guidelines for Public Archaeology in Wisconsin inadvertently omitted from the record in the contested case hearing.

This Court denied Appellant's Motion to Allow Taking of Additional Evidence on May 28, 2020. The Court held that the record reflected that the ALJ received and heard testimony regarding both the mining and the wetlands permit application process. The ALJ concluded that the information pertaining to the wetlands permit was not relevant to a determination made for the mining permit, and since the materials being sought pertained to wetlands and waters of the state, such evidence is material only to the wetlands permit process, and immaterial to the mining permit.

On January 4, 2021, the ALJ issued a Final Decision and Order ("Wetlands Permit FD&O") **denying the wetlands permit**. Appellants argue that the Wetlands Permit FD&O shows that WRD employees' testimony at the Wetlands Permit hearing and Dr. Hyndman's testimony at the Mining Permit hearing, when taken together, corroborate one another and form critical factual determinations relevant to both permits. Therefore, this Court's determination that the evidence from the Wetlands Permit hearing was immaterial to the Mining Permit was palpable error. On reconsideration, Appellant asks this Court to order remand to the ALJ and allow consideration of the Final Decision and Order in the Wetlands Permit, the testimony of the WRD employees' during

the Wetlands Permit hearing, as well as the Findings of Fact and Conclusions of Law of the same employees.

### **STANDARD OF REVIEW**

MCR 2.119(F) provides that a motion for reconsideration may be granted when the moving party demonstrates palpable error that misleads the court and the parties, and that a different disposition of the case would result but for the error. A motion for reconsideration that “merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted.” MCR 2.119(F)(3). This rule further grants the trial court considerable discretion to correct mistakes. *Macomb County Dept. of Human Services v. Anderson*, 304 Mich App 750, 755; 849 NW 2d 408 (2014). Whether to grant a motion for reconsideration is within the discretion of the trial court, *Cole v Ladbroke Racing Mich, Inc.*, 241 Mich App 1, 8; 614 NW2d 169 (2000); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

### **ANALYSIS**

MCL 24.305 provides that an appellate court may order the taking of additional evidence when “an inadequate record was made at the hearing before the agency or... the additional evidence is material, and that there were good reasons for failing to record or present it in the proceeding before the agency.”

#### **I. Materiality of the Evidence**

Appellant contends that evidence from the Wetlands Permit contested case hearing was material to the Mining Permit contested case hearing. Specifically MITW alleges that the ALJ’s Wetlands Permit FD&O shows that WRD employees’ testimony along with an expert’s testimony at the mining hearing corroborate one another and inform critical factual determinations relevant

to both permits. Therefore, Appellant contends that the testimony from WRD employees should be allowed into evidence on the mining permit, not just the wetlands permit.

During the Mining Permit hearing, Plaintiff's expert, Dr. David Hyndman, testified that the groundwater model in the mining permit was improperly calibrated, resulting in a difference of 10 feet between the model's prediction and the demonstrated conditions on the ground. He also testified that Aquila underestimated hydraulic conductivity, ignored site conditions in calculating the site water balance, and used improper methods to determine the amount of contaminant transport through groundwater, which likely meant the model underestimated contamination. Dr. Hyndman also testified that Aquila's use of a "steady-state" model, as opposed to a "transient" model that would have reflected seasonal changes in the water table and site conditions, was inappropriate and did not accurately show the project's impacts to the water resources. Finally, Dr. Hyndman contested that Aquila's use of river conditions in the model to represent wetlands did not reflect site conditions and underestimated water impacts.

In the Wetlands Permit FD&O, the ALJ concluded:

"[T]he WRD had problems with the groundwater model. These concerns were raised before the Application was deemed administratively complete. The [WRD] first noted there were concerns with the boundary conditions of the model. Second, doubts were raised regarding the conductivities used in the model which significantly exceed the calibrated conductivities within the project area."

The ALJ also noted that WRD employee Jill Van Dyke testified that the groundwater model did not “represent what was going on at the site” and that this testimony was consistent with Dr. Hyndman’s testimony from the Mining Permit contested case hearing. However, in the Mining Permit FD&O, the ALJ ruled that Aquila’s experts’ opinions regarding the groundwater model’s predictions of water resource impacts were entitled to greater weight than Dr. Hyndman, and held that Dr. Hyndman’s criticisms of the model were “uncorroborated.”

The question then becomes whether Dr. Hyndman’s testimony regarding the groundwater model is material to the mining permit, and not just the wetlands permit. NREPA Part 632 requires that the applicant for a mining permit provide an environmental impact assessment (“EIA”) that describes the baseline conditions at the site of the proposed project, and the potential impacts on those conditions from the proposed mining project, including, but not limited to hydrology, among others. MCL 324.63205(2)(b). The EIA must analyze potential impacts to water resources, including groundwater occurrence that may impact or be impacted by mining activities, hydraulic conductivity, depth to groundwater, groundwater recharge areas, a complete water balance accounting for precipitation, infiltration, runoff, stream flows, groundwater and surface water quality and predicted seasonal variances of the listed parameters, among other factors involving water. Mich Admin Code R 425.202(2)(d)-(o). The mining permit must then show that all methods and techniques that will be utilized in the mining operation are capable of accomplishing their stated objectives in protecting the environment and public health. MCL 324.63205(2)(c)(ii).

In its January 4, 2021 Final Decision and Order on the Wetlands Permit, the ALJ found that evidence regarding the water model was relevant to making a final determination regarding the Wetlands Permit. In making such a determination, the ALJ considered testimony from the WRD employees in the Wetlands hearing and Dr. Hyndman in the mining hearing. The ALJ also

found that the WRD employees' testimony corroborated Dr. Hyndman's testimony, something that the ALJ found lacking in the Mining Permit FD&O. Under these circumstances it would be error to find that evidence presented in the Wetlands permit case was immaterial to the Mining permit case.

**II. Appellant had Good Reasons for Failure to Record or Present Evidence in front of the Agency**

MCL 24.305 provides that a Court may order the taking of additional evidence by the agency if the Court finds an inadequate record was made before the agency, or that the additional evidence is material, and by showing that there were good reasons for failing to present the additional evidence before the agency. *Northwestern Nat. Casualty Co. v. Ins. Comm'r*, 231 Mich App 483, 496; 586 NW2d 564, 569 (1998).

Appellant could not present the evidence of the WRD employees' testimony, the "Findings of Fact and Conclusions of Law" dated April 30, 2018, and the Final Decision and Order in the Wetlands Permit hearing for a number of reasons. First, the Final Decision and Order in the Wetlands permit was not available until January 4, 2021, the testimony of the WRD employees was not available until 2019, and their proposed Findings of Fact and Conclusions of Law was not written or publicly available until midway through the Mining Permit contested case hearing. Further still, MITW could not present said evidence because the ALJ ruled that evidence from the Wetlands Permit application was not admissible in the Mining Permit contested case, largely because the permit was not finalized and a decision was not reached on the Wetlands Permit. In such a ruling, the ALJ ruled: "just the fact that that permit says something doesn't have for that additional reason any relevance to this contested case because that permit could change drastically by the time that s final permit is issued." Since the final decision and order denying the Wetlands Permit issued after the Mining Permit, testimony from the WRD employees was not available until

well through the Mining Permit hearing. The ALJ's refusal to hear information regarding the mining permit partially because the application process was not yet completed support a finding of good cause for not presenting the evidence to the agency.

### **CONCLUSION**

In the January 4, 2021 Final Decision and Order in the Wetlands Permit contested hearing, the ALJ utilized Dr. Hyndman's testimony from the mining permit to corroborate testimony from WRD employees in the Wetlands Permit contested hearing. This demonstrates that the Wetlands Permit evidence MITW seeks to add to the Mining Permit record is material to the Mining Permit. Furthermore, MITW had good reason for failing to present such evidence during the mining permit hearing as the WRD employees' testimony and findings of fact were not available until after or well through the mining permit hearing, and the ALJ declined to allow partial evidence from an incomplete process. Therefore, this Court is compelled to allow for the expansion of the record to facilitate the consideration of all relevant and material evidence.

**THEREFORE, IT IS ORDERED** that Appellant MITW's Motion for Reconsideration is **GRANTED**.

**IT IS FURTHER ORDERED** that the testimony of WRD employees Jill Van Dyke and Eric Chatterson proffered at the contested case hearing on the Wetlands Permit is material to the ALJ's factual determinations related to the groundwater model in the Final Decision and Order in the mining permit contested case.

**IT IS FURTHER ORDERED** that the "Findings of Fact and Conclusions of Law" dated April 30, 2018, is material to the ALJ's factual determinations related to the groundwater model in the Final Decision and Order in the mining permit contested case.



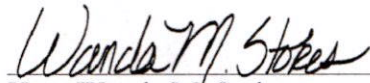
**IT IS FURTHER ORDERED** that the Final Decision and Order in the Wetlands Permit hearing dated January 4, 2021 is material to the ALJ's factual determinations related to the groundwater model in the Final Decision and Order in the mining permit contested case.

**IT IS FURTHER ORDERED** that the Mining Case is remanded to the ALJ where the record shall be augmented to include for consideration the aforementioned evidence related to the groundwater model, the project's potential impacts to water resources, and the decision on the Mining Permit.

**In accordance with MCR 2.602(A)(3) this Order disposes of the last pending claim and closes this case.**

4/22/2021

Date



Hon. Wanda M. Stokes  
Circuit Court Judge

#### PROOF OF SERVICE

I hereby certify that I provided a copy of the above ORDER to each attorney of record, or to the parties, by hand delivery, or by placing a true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail, on April 23, 2021.



Daniel Cermak(P84460)  
Law Clerk/Court Officer