STATE OF MICHIGAN

COURT OF CLAIMS

ERIC OSTERGREN; CITIZENS FOR HIGGINS LAKE LEGAL LEVELS, INC.; and STEVE RICKETTS,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY,

Defendant.
_____/

OPINION AND ORDER

Case No. 24-000110-MZ

Hon. Brock A. Swartzle

Defendant, Michigan Department of Environment, Great Lakes, and Energy (EGLE), requests that this Court grant summary disposition in its favor under MCR 2.116(C)(4), (C)(8), and (C)(10), and also award sanctions under MCL 600.2591. As explained below, plaintiffs lack standing and defendant's motion for summary disposition on that ground will be granted. Defendant has not shown that sanctions are warranted here.

I. BACKGROUND

Plaintiffs sued to obtain a judgment "declaring the relevant portions of Parts 307 and 315 of the *Natural Resources and Environmental Protection Act*, Public Act 451 of 1994 (Act) are unconstitutional pursuant to Article VII, Section 12 of the 1963 Constitution . . . to the extent [EGLE] refuses to formally concede to this Court that the need for permits thereafter are not applicable to a new or rebuilt dam at the Cut River/ Higgins Lake." In addition, plaintiffs seek an order enjoining EGLE "from enforcing or acting pursuant to the relevant portions of Parts 307 and

315 unless and until the Michigan Constitution is amended otherwise." Per Stipulated Order signed by this Court on September 5, 2024, the parties resolved the constitutional challenge as to Part 315 by declaring that the "Higgins Lake Level Control Structure and any impoundment at The Cut River and Higgins Lake in Roscommon County are not regulated by Part 315 of the [Act]."

The only claim that remains is the alleged constitutionality of Part 307, which reads as follows:

> Plans and specifications for a dam constructed or maintained under this part shall be prepared by a licensed professional engineer under the direction of the delegated authority. The plans and specifications shall be approved by the department before construction begins. The department shall review and approve or reject the plans and specifications within 30 days after they are received by the department. If the plans and specifications are rejected, the department shall propose changes in the plans and specifications that would result in their approval by the department. Bids for doing the work may be advertised in the manner the delegated authority directs. The contract shall be let to the lowest responsible bidder giving adequate security for the performance of the contract, but the delegated authority may reserve the right to reject any and all bids. The county may erect and maintain a dam as a work relief project in accordance with the law applicable to a work relief project. [MCL 324.30718.]

Plaintiffs allege that Part 307 violates Article VII, Section 12 of our state Constitution, which reads as follows:

> A navigable stream shall not be abridged or dammed without permission granted by the board of supervisors of the county as provided by law, which permission shall be subject to such reasonable compensation and other conditions as may seem best suited to safeguard the rights and interests of the county and political subdivisions therein. [1963 Const, art VII, § 12.]

Plaintiffs are individuals who own property with access to Higgins Lake and a nonprofit organization with the purpose described in the First Amended Complaint of "promot[ing] and defend[ing] the legal lake levels on Higgins Lake." At the time the complaint was filed, plaintiff Eric Ostergren was an elected commissioner of the Roscommon County Board of Commissioners; however, as of the date of this Opinion and Order, he is no longer listed as a board member on

Roscommon County's website. See Roscommon County Michigan, Board of Commissioners, <https://www.roscommoncounty.net/202/Board-of-Commissioners> (accessed October 3, 2025).

On February 24, 1982, the Roscommon County Circuit Court established the legal lake levels for Higgins Lake via Part 307 by court order (1982 Legal Lake Level Order). On May 7, 2021, the Roscommon County Circuit Court issued a declaratory judgment stating that "it is the legal and ministerial duty of the Defendant Board of Commissioners of the County of Roscommon (County) to maintain the water level of Higgins Lake at the level(s) established within the 1982 lake level order as previously issued by this Court. . . for and during both the summer and winter periods as provided therein. The Court further declares that for Defendant County to deviate from said established level(s) and directives within the 1982 lake level order, a proper legal proceeding to accomplish such must be first undertaken." The named-plaintiffs in this lawsuit were also named-plaintiffs in the court action resolved by this 2021 declaratory judgment.

Despite these earlier orders, plaintiffs allege that "Roscommon County and its delegated authority have regularly and systematically failed to abide by the 1982 Legal Lake Level Order for huge percentages of the year" and that Higgins Lake is "currently out of compliance" with this order. Plaintiffs further allege that "the main reason or one of the main reasons for systematic and regular noncompliance is due to the failure to properly regulate the flow and discharge of waters from Higgins Lake into the Cut River where a dam, which has largely failed, is located." Plaintiffs believe that a new dam is needed, and "the major impediment to this is the onerous, one time-consuming, costly, and near impossible arbitrary permitting process required by [EGLE] under what it believes are its duties under Parts 307 and 315 of the [Act]."

On May 13, 2024, Roscommon County—through its authorized agent, Chase Shepke—applied for a permit from EGLE allegedly under Part 301 of the Act for the purpose of seeking

approval for modifications to the existing Cut River Dam. Per letter dated October 11, 2024, EGLE informed Shepke that the county's application was considered withdrawn and closed because more than fifty days had passed since a letter was sent by EGLE asking for additional information. Plaintiffs raise no dispute regarding this permit process. They do not allege that EGLE acted unreasonably or unlawfully in this process. Nor is there any allegation that Roscommon County Board of Commissioners sought a permit under Part 307 or plans to do so. In fact, in its reply to plaintiffs' response to the motion for summary disposition, EGLE stated that Part 307 does not require the permit.

EGLE seeks summary disposition on plaintiffs' claims on the following grounds: (1) plaintiffs lack standing; (2) Part 307 does not apply because (a) it has no permitting requirement, and (b) no permit application has been filed; and (3) Part 307 is constitutional. For the reasons explained below, the Court agrees that plaintiffs lack standing.

II. ANALYSIS

EGLE asserts that summary disposition is appropriate under MCR 2.116(C)(4) because plaintiffs lack standing. Standing is not a matter of jurisdiction in Michigan courts, however, so defendant's argument is better considered under MCR 2.116(C)(8) and (C)(10). Because the Court has considered matters outside the four corners of the pleadings, the Court considers this motion under MCR 2.116(C)(10). *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 544; 904 NW2d 192 (2017).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 160; 934 NW2d 665 (2019). The Court considers all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.*

A motion under MCR 2.116(C)(10) may be granted when there is no genuine issue of material fact. *Id.*

A. STANDING

Michigan's prudential standing doctrine directs a trial court to assess whether a litigant's interest in the lawsuit is sufficient to ensure sincere and vigorous advocacy. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (*LSEA*). Generally speaking, a litigant "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights and interests of third parties." *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) (cleaned up).

There are several sources of standing relevant here. Initially, if a party has a legal cause of action, then that party has standing to sue and the case may proceed. *LSEA*, 487 Mich at 372. In the absence of a legal cause of action, the party must look elsewhere for authority to sue. For instance, a party might have third-party standing provided under a specific legislative grant. Or, a party might have a special injury or right, or a substantial interest, that warrants standing under *LSEA*. See also *Mich Republican Party v Donahue*, ___ Mich App ___, ___ ; ___ NW3d ___ (2024) (Docket No. 364048); slip op at 6. Finally, a party might have standing to bring a declaratory-relief action under MCR 2.605.

Plaintiffs have not pointed to any legal cause of action or viable theory of third-party standing. Nor have they pleaded allegations sufficient for a declaratory action under MCR 2.605.

As for a special injury or right, or a substantial interest, plaintiffs point to their rights as owners of property near or with access to Higgins Lake and with respect to the non-profit plaintiff, an organizational interest in promoting and defending the legal lake levels on Higgins Lake. Plaintiff Ostergren claimed an interest in his then-position as a member of the Roscommon Board

of Commissioners, but he is no longer a member of the Board. While riparian rights constitute a legal interest recognized under Michigan law, *Dyball v Lennox*, 260 Mich App 698, 705-706; 680 NW2d 522 (2004), there is no allegation that EGLE has interfered with, or even threatened to interfere with such rights. This case is unlike *Trout Unlimited, Muskegon — White River Chapter v City of White Cloud*, 195 Mich App 343, 348-349; 489 NW2d 188 (1992), in which a riparian landowner and a nonprofit corporation with the purpose of protecting cold-water resources had standing to challenge the legality of a new dam construction that was anticipated to cause damage to his property. There was an "actual controversy" between the plaintiff-landowners and the governmental entity which owned the dam and which had taken several steps to acquire funding and approvals for construction of the dam being challenged. That is not the situation here.

EGLE is not alleged to own or control the dam. Plaintiffs' claims, in fact, are based on the allegation that the authority and duty to protect plaintiffs' riparian rights rest with the Roscommon County Board of Commissioners and that one or more unnamed members of that Board is not acting to protect plaintiffs' rights because of the belief that EGLE will impose an onerous permitting process if the county moves forward in maintaining or building a dam.

Plaintiff Eric Ostergren's declaration, included with plaintiffs' response, illustrates this. He declares that "Roscommon County and its delegated authority have regularly and systematically failed to abide by the 1982 Legal Lake Level Order for huge percentages of the year, particularly during the summer months" because an unnamed commissioner "believe[s] (wrongly)" that EGLE will require "the securitization of costly permits under Parts 307 and 315 of the [Act] before a new or replacement dam can be installed." In sum, plaintiffs allege a legal interest that has been hindered by the Roscommon County Board of Commissioners, not EGLE. Any interest in EGLE's duties under Part 307 or otherwise is hypothetical, at best. Plaintiffs have

not alleged, much less demonstrated, a legal interest sufficient to demonstrate an actual controversy involving EGLE. Plaintiffs thus lack standing to bring this lawsuit.

B. SANCTIONS

In its motion for summary disposition, EGLE requests sanctions under MCL 600.2591. This statute mandates the assessment of "costs and fees incurred by the [prevailing] party" upon a finding that "a civil action or defense to a civil action was frivolous." MCL 600.2591(1).

The fact that EGLE prevailed on its motion does not render plaintiffs' claims frivolous, nor does "every error in legal analysis constitute[s] a frivolous position." See *Kitchen v Kitchen*, 465 Mich 654, 662-663; 641 NW2d 245 (2002). Rather, frivolity is determined "using an objective standard considering the claim at the time it was asserted," keeping in mind that the purpose of sanctions "is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 321; 14 NW3d 472 (2023). The current record does not provide a basis for finding that plaintiffs filed this lawsuit with an improper purpose or without sufficient investigation and research. While the Court agrees with EGLE that plaintiffs lack standing, there is no allegation that plaintiffs proceeded knowing that their claims were invalid or without legal or factual support for the same.

III. CONCLUSION

For the reasons explained above,

IT IS ORDERED THAT EGLE's motion for summary disposition under MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED THAT EGLE's motion for costs and fees under MCL 600.2591 is DENIED.

IT IS FURTHER ORDERED THAT Plaintiffs' request for a declaratory judgment is DENIED.

IT IS SO ORDERED. This is a final order that disposes of the last remaining issue and closes the case.

Date: October 3, 2025

Hon. Brock A. Swartzle
Chief Judge, Court of Claims