STATE OF MICHIGAN

COURT OF CLAIMS

RALPH ALLGAIER,

Plaintiff,

v

Case No. 26-000078-MZ

MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Hon. James Robert Redford

Defendant.
_____/

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND ORDERING PLAINTIFF TO FILE AN AMENDED COMPLAINT

Plaintiff, Ralph Allgaier, filed this lawsuit against defendant, the Michigan Department of Natural Resources (the DNR), after a neighboring property owner constructed a permanent boardwalk and dock on DNR-owned lakeshore property next to plaintiff's property on Indian Lake, in Livingston County. The DNR moves for summary disposition under MCR 2.116(C)(7) and (8) at the outset of the case, arguing that plaintiff's claims are untimely under the Court of Claims Act (COCA), MCL 600.6431(1), or, alternatively, that plaintiff has failed to state a claim on which relief may be granted. The Court GRANTS IN PART and DENIES IN PART the motion for summary disposition and ORDERS that plaintiff shall file an amended complaint within 21 days of this opinion and order.

I. BACKGROUND

Plaintiff and his wife own lakeshore property on Indian Lake. Patrick and Shelby Quin (the Quins) own a nearby property that does not border the lakeshore but borders a DNR-owned lakeshore property. The DNR property is part of a wildlife management area. In the spring of 2022, the Quins began constructing a boardwalk and dock over the DNR-owned property allowing direct access from their property to the lakeshore. There is no dispute for purposes of this lawsuit that construction of the boardwalk and dock ended, at the latest, sometime in 2023 or that the Quins have periodically moored their watercraft on the dock area since that time.

Plaintiff contends that the boardwalk has obstructed his lake views and is causing harm to the surrounding protected wetland environment. He does not complain of any physical damage to his own property. Plaintiff asserts that he complained about the structures to the Michigan Department of Environment, Great Lakes, and Energy (EGLE) on or about August 3, 2022. He asserts that EGLE did not make a final decision on how to handle the situation until May 6, 2025, ultimately deciding not to pursue removal of the structures. As discussed later, there is some evidence that the DNR was involved in EGLE's decision, although the record has yet to be developed in discovery.

Plaintiff sued the Quins and the DNR in the Livingston Circuit Court on March 2, 2026, and the action was transferred to this Court in mid-April 2026.[1] The original complaint identified

[1] Plaintiff previously filed a February 18, 2026 lawsuit in this Court, Docket No. 26-000031-MZ, against the Quins and the DNR, raising identical claims arising from the same set of circumstances. This Court, Chief Judge GADOLA presiding, issued a show-cause order in relation to whether this Court had jurisdiction over the Quins. In response, plaintiff voluntarily dismissed that lawsuit and filed this matter in the circuit court on March 2, 2026.

the Quins and the DNR as defendants and alleged claims for (1) declaratory relief against all defendants requesting that the Court declare that the structures are unlawful, (2) nuisance against the Quins, (3) injunctive relief against the Quins, (4) injunctive relief against the DNR for "explicitly or implicitly authoriz[ing] or allow[ing]" the Quins to engage in unlawful activity, and (5) violation of the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq.*, a provision of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, against all defendants, including the DNR, for failing to prevent or abate the alleged statutory violation. The Quins filed an answer to the complaint shortly before the claims against the DNR, only, were transferred to this Court. The case against the Quins remains pending in the Livingston Circuit Court.

On April 14, 2026, the same day the case was transferred, the DNR moved for summary disposition under MCR 2.116(C)(7) and (8). The DNR argued that plaintiff failed to comply with the notice and verification requirements in the COCA because he did not file a verified claim or notice of intent (NOI) within a year of the accrual of the claim, and his complaint was not verified, thus entitling the DNR to summary disposition under MCR 2.116(C)(7). The DNR also argued that plaintiff's claims against it accrued when construction was complete, which occurred sometime between April 2022 and March 2023. Thus, the DNR contended that the notice period expired at least two years before plaintiff filed this claim considering when the Quins' boardwalk and dock was constructed.

The DNR further argued that plaintiff's claims fail on the pleadings because EGLE—and not the DNR—regulates wetlands and administers the wetlands permitting process under NREPA, MCL 324.30301(1)(a). The DNR also contended that plaintiff cannot plead distinct claims for

declaratory and injunctive relief because these concepts are remedies and not distinct causes of action. The DNR noted that plaintiff failed to allege facts supporting a violation of the MEPA against the DNR, specifically as it relates to whether environmental effects exist rising to the level of an impairment under the MEPA.

A week after the DNR moved for summary disposition, on April 21, 2026, plaintiff filed an amended complaint, which included a verification as required under MCL 600.6434(2) and added EGLE as a defendant. Plaintiff cited MCR 2.118(A)(1) as legal authority for filing the amended complaint as a matter of course instead of requesting leave of this Court to do so. In the amended complaint, plaintiff addressed the alleged deficiencies in his original complaint by raising claims for (1) breach of mandatory statutory duty and ultra vires conduct against the DNR (Count I), (2) breach of mandatory statutory duty and ultra vires conduct against EGLE (Count II), and (3) violation of the MEPA against both the DNR and EGLE (Count III). Plaintiff removed the causes of action for declaratory and injunctive relief and instead included injunctive and declaratory relief as requested remedies.

Plaintiff also responded to the DNR's motion for summary disposition, arguing that his amended complaint mooted the notice and verification issues, as well as the DNR's argument about declaratory and injunctive relief being remedies. Regarding timeliness, plaintiff argued that the decision whether to pursue the violation was ongoing for several years. He noted that on March 6, 2024, EGLE issued a Violation Notice to the Quins on the basis that the regulated wetlands were located on DNR property and that the boardwalk was constructed without a valid permit. Nevertheless, EGLE did not insist on removal at that time. Instead, on May 6, 2025, EGLE issued a second Violation Notice, which plaintiff argued was a final disposition of EGLE's

enforcement file because it was the first communication in which EGLE indicated that it did not intend to pursue the matter any further. Plaintiff added that even if the notice period technically expired, this Court should apply the harsh-and-unreasonable-consequences exception to the notice requirement or apply the continuing-wrongs doctrine, thus allowing his claim to proceed.

On the merits, plaintiff argued that the DNR has statutory duties as both landowner/riparian owner and public trustee to take certain actions to protect the wetlands area, such as pursuing a trespass action or seeking injunctive relief requiring removal of the structures. Plaintiff argued that the DNR has promulgated administrative rules, Mich Admin Code, R 299.922(f) and (w), and R 299.926, each of which prohibit the construction of the dock and boardwalk in this instance and require the DNR to take enforcement action. Regarding his claim for ultra vires activity, plaintiff contended that the DNR engaged in ultra vires activity by "formally ratifying" EGLE's decision not to remove the structures. Moreover, plaintiff argued that he successfully pleaded a MEPA claim in his first-amended complaint, which specifies the environmental impacts that are likely to be caused by the structures.

The DNR replied, arguing, in relevant part, that EGLE's May 6, 2025 letter cannot be imputed on the DNR for purposes of determining the accrual date. The DNR attached e-mail correspondence to its reply brief between plaintiff and EGLE. The DNR argued that EGLE notified plaintiff that it would not require removal of the dock back in September 2024 (which, as discussed later, the DNR argued it confirmed via e-mail in January 2025), so the claim accrued in this time frame, at the latest. The DNR also argued that this Court should not consider plaintiff's amended complaint under MCR 2.118(A)(1) as a matter of course because the DNR's motion for summary disposition was not a "responsive pleading" as contemplated under MCR 2.110(A)(1).

The DNR contended that the proposed amended complaint fails to state a claim for breach of statutory duty or ultra vires activity because the DNR has discretion when determining how to enforce its own rules. Finally, the DNR argued that plaintiff has not pleaded a MEPA claim because he did not articulate why his claim met certain factors for establishing a MEPA claim outlined in the appellate caselaw.

The DNR also filed a notice regarding plaintiff's verified first-amended complaint, arguing that plaintiff's amended complaint was not properly filed under MCR 2.118(A)(1) because that court rule only applies when the adverse party files a responsive pleading. However, the DNR did not move to strike the amended complaint. Because the briefing thoroughly addresses the issues, the Court dispenses with oral argument under Court of Claims LCR 2.119(E)(3).

II. ANALYSIS

A. STANDARD OF REVIEW

The DNR moves for summary disposition under MCR 2.116(C)(7) and (8). "Summary disposition is appropriate pursuant to MCR 2.116(C)(7) when the moving party is entitled to immunity granted by law." *Forton v St Clair Co Pub Guardian*, 339 Mich App 73, 82; 981 NW2d 103 (2021) (quotation marks and citation omitted). The Court examines the affidavits, depositions, admissions, and other documentary evidence to determine whether the movant is entitled to immunity as a matter of law. *Id.*

In contrast, a motion under MCR 2.116(C)(8) examines the legal sufficiency of the claims raised in the complaint on the basis of the factual allegations raised in the complaint. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). This Court must accept the factual allegations in the complaint as true and will decide the motion on the pleadings alone.

Id. at 160. The motion is granted if the claim is so clearly unenforceable as a matter of law that no factual development would justify recovery. *Id.*

To the extent the Court is required to interpret the statutes on which plaintiff bases his claims, the Court relies on the following statutory-interpretation principles:

> When interpreting a statute, [the] foremost rule of construction is to discern and give effect to the Legislature's intent. Because the language chosen is the most reliable indicator of that intent, [a court will] enforce clear and unambiguous statutory language as written, giving effect to every word, phrase, and clause. If the statutory provision at issue is clear and unambiguous, it must be enforced as written, and no judicial construction is permitted or required. [*Lockport Twp v Three Rivers*, 319 Mich App 516, 520; 902 NW2d 430 (2017) (quotation marks and citations omitted; first alteration in original).]

B. AMENDED COMPLAINT

The Court first addresses the DNR's argument that plaintiff improperly filed an amended complaint under MCR 2.118(A)(1). MCR 2.118(A)(1) provides, "A party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party, or within 14 days after serving the pleading if it does not require a responsive pleading." Otherwise, "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2). Under MCR 2.118(A)(2), leave to amend should be granted freely and denied only for particularized reasons, including undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007).

The DNR argues that its motion for summary disposition was not a pleading for purposes of MCR 2.110(A), which defines the term "pleading" to include only a complaint, cross-claim, counterclaim, third-party complaint, answer, or reply to an answer. See MCR 2.110(A). The

Court of Appeals has held that "[a] motion for summary disposition is not a responsive pleading under MCR 2.110(A)." *Village of Edmore v Crystal Automation Sys, Inc*, 322 Mich App 244, 261; 911 NW2d 241 (2017). The DNR relies on an unpublished Court of Appeals case, *Blade v Oakland Co*, unpublished per curiam opinion of the Court of Appeals, issued June 12, 2025 (Docket No. 371082), p 5, in which the Michigan Court of Appeals held, in an analogous scenario, that "[b]ecause a motion for summary disposition is not a responsive pleading, . . . plaintiff did not have an opportunity to file an amended complaint as a matter of right under MCR 2.118(A)(1)." The Court of Appeals cited 1 Longhofer, Mich Court Rules Practice (8th ed), § 2118.2 for the proposition that " '[a] party may . . . not respond to a motion under [MCR 2.116 or MCR 2.115] with an amended pleading designed to cure the defect revealed by the motion (assuming a responsive pleading has not also been filed and served more than 14 days before the proposed amendment).' " *Blade*, unpub op at 5, quoting 1 Longhofer, Mich Court Rules Practice (8th ed), § 2118.2.

This lawsuit was severed from the Livingston Circuit Court case. Following the transfer to this Court, the DNR moved for summary disposition on April 14, 2026, and the amended complaint identifies the DNR and EGLE as the proposed defendants. Thus, the operative "response" in this proceeding is the DNR's motion for summary disposition, which is the only pending response in this Court. Because the motion for summary disposition is not a pleading, plaintiff could not amend as a matter of course under MCR 2.118(A)(1).

Nevertheless, the Court construes plaintiff's argument in his response brief as a motion for leave to amend the complaint under MCR 2.118(A)(2), with the filed amended complaint serving as a proposed amended complaint. See *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647

(1997) (explaining that the trial court must allow the parties the opportunity to amend under MCR 2.118(A)(2) unless the amendment would be futile). The DNR has addressed the merits of the proposed amended complaint in its reply brief, so there is no apparent prejudice to the DNR from proceeding in this manner. However, considering there is no challenge to the content of the verification, the Court will deem the verification filed with the Court on April 21, 2026.

C. STATUTORY NOTICE

On the merits, the DNR argues that plaintiff's claim was untimely under the one-year notice period in MCL 600.6431(1), entitling the DNR to summary disposition on the basis of governmental immunity, because plaintiff did not file the complaint or an NOI within one year after the claim accrued. The dispute centers on whether plaintiff's claim accrued when the boardwalk and dock was first installed back in the 2022–2023 time frame, or when EGLE issued its final decision on May 6, 2025 that it would not pursue the removal of the dock, or whether the claim accrued sometime between those two periods. The parties also dispute whether plaintiff's prior verified complaint in Court of Claims Case No. 26-000031-MZ constituted a written claim or written NOI in the context of this lawsuit for purposes of the timeliness of the notice under MCL 600.6431(1).

The Court notes that both parties appear in agreement that this case does *not* involve a claim of property damage, for which a six-month notice period would apply under MCL 600.6431(4). Plaintiff alleges in his proposed amended complaint, "Plaintiff . . . has suffered particularized and unique injury from the degradation of the wetland buffer that protects his shoreline—an injury different in kind and degree from any injury suffered by the general public." However, plaintiff does not allege any current damage to his property or request monetary damages. He asserts, "No money damages are sought against the State of Michigan." Rather, he

is suing as a member of the public for vindication of the public's right in the state-owned lakeshore and for the potential for future injury to his shoreline. Accordingly, the Court will review this issue under the one-year notice period in MCL 600.6431(1).

The parties further agree that the catch-all accrual statute, MCL 600.5827, applies in this case. That statute provides, in relevant part, that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." The Michigan Supreme Court has clarified that this date "is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty." *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017) (quotation marks and citation omitted).

Although the Court recognizes this is a close question given that plaintiff was aware of the presence of the boardwalk and dock beginning sometime in 2022, the Court concludes that a question of fact exists on whether (and to what extent) the DNR was involved with EGLE's decision-making on whether to pursue enforcement of NREPA and order removal of the structures through the spring of 2025. Although the DNR was the owner of the property in question at all relevant times, it is not clear from the limited record when the DNR decided not to pursue removal of the structures, thus breaching its alleged duties.

Plaintiff asserts that he contacted EGLE about the boardwalk on August 3, 2022. EGLE sent a Violation Notice to the Quins on March 6, 2024, requesting information on any communication with the DNR regarding the structures. In the letter, EGLE notified the Quins that it received a complaint about the boardwalk construction (presumably from plaintiff). EGLE indicated it had sent an earlier Violation Notice in July 2022, and that communications between EGLE and the Quins were ongoing in 2024. The letter stated that EGLE did not intend to pursue

the matter further, provided that no additional work was done in relation to the boardwalk or to harm the protected wetlands. Plaintiff was not included on this communication, although an official from DNR was copied.

The DNR also attaches to its reply brief a chain of e-mail communications from 2022 through April 2025 between an e-mail address that is presumably associated with plaintiff and an individual associated with EGLE named Jeff Pierce. In the e-mail chain, Pierce mentions several times that he was consulting with a DNR official named Earl Flegler on the issue of the boardwalk. Plaintiff contacted Flegler several times via e-mail in late 2024 and early 2025, and Flegler did not respond until January 30, 2025, when he stated, in relevant part, that he was recommending that the DNR "not pursue the case *at this time*," thus suggesting the possibility of a different decision at a later time. (Emphasis added.)

However, after the Quins asked EGLE for guidance about obtaining an after-the-fact permit, Pierce contacted Flegler in April 2025, and Flegler indicated he would need to consult his legal team. The e-mails end abruptly with an April 11, 2025 e-mail, in which Pierce asked Flegler to call him about the matter. It is unclear at this time what additional conversations may have occurred before EGLE sent the May 6, 2025 letter. The e-mails support plaintiff's allegations that the DNR was involved in ongoing communications about the boardwalk and dock and was an integral part of EGLE's decision not to pursue the issue further possibly until May 6, 2025. See *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012). These factual issues are ripe for discovery and, if developed in plaintiff's favor, may result in a finding that the DNR breached its statutory duties within one year of when plaintiff filed a verified claim. See *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010) (explaining, in the context

of a motion for summary disposition under MCR 2.116(C)(7) that "if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate").

Accordingly, the Court DENIES the DNR's motion for summary disposition under MCR 2.116(C)(7) because factual development of the record is warranted. Denial is without prejudice to the DNR filing a motion for summary disposition under MCR 2.116 at a later time in accordance with the case scheduling/management order. Because the Court concludes that a question of fact exists on when plaintiff's claim accrued, the Court declines to address at this time plaintiff's alternative arguments about the continuing-wrongs doctrine or the hash-and-unreasonable consequences doctrine. The Court also declines to address at this time whether plaintiff's verified complaint in his February 2026 lawsuit constitutes a written claim or written NOI for purposes of this lawsuit. The Court will entertain a motion on that issue at a later time should the approximate two-month difference between the filing of the prior lawsuit and the verification filed in this case on April 21, 2026, remain relevant after discovery.

D. VALIDITY OF PLAINTIFF'S CLAIMS

The DNR also challenges the adequacy of plaintiff's pleadings in both the original and the proposed amended complaints under MCR 2.116(C)(8). The DNR argues that plaintiff's claims, even as proposed in the amended complaint, fail on the pleadings because (1) the DNR does not regulate wetlands or have authority to act under Part 303 of NREPA, (2) the statutes and administrative rules cited in the amended complaint do not give rise to a statutory duty on the part of the DNR that is subject to judicial review, (3) plaintiff does not allege ultra vires activity in his amended complaint to avoid application of governmental immunity, and (4) plaintiff has not pleaded a valid MEPA claim. The Court agrees in relation to the claims of breach of statutory

duty and ultra vires activity (and to the extent plaintiff invokes the common-law public-trust doctrine), but disagrees as it relates to the MEPA claim.

1. BREACH OF STATUTORY DUTY

Count I of the proposed amended complaint alleges a claim for breach of mandatory statutory duty and ultra vires conduct against the DNR. Plaintiff's proposed amended complaint addresses the DNR's argument in its motion for summary disposition that plaintiff cannot assert independent claims for declaratory and injunctive relief by recharacterizing those claims as asserting breach of a mandatory statutory duty and ultra vires conduct. Plaintiff's proposed amended complaint requests a declaratory judgment and injunctive relief as remedies, thus addressing the argument raised in defendant's motion for summary disposition. The Court will therefore examine the adequacy of Count I in the context of the claims in the proposed amended complaint.

Plaintiff acknowledges in his proposed amended complaint that EGLE administers and enforces Part 303 of NREPA, including the duty to require restoration of the wetlands that are impaired by unpermitted activities, citing MCL 324.30316(1). Thus, plaintiff concedes the argument raised in the DNR's motion for summary disposition as it relates to the regulator of Part 303 has merit. However, plaintiff argues that a variety of other statutes and administrative rules create an affirmative duty on the part of the DNR to mandate removal of the boardwalk and dock as landowner, riparian owner, and public trustee. He argues these duties are parallel to EGLE's duties under Part 303.

In particular, plaintiff alleges that MCL 324.503 and MCL 324.504 require the DNR to protect and conserve natural resources and to promulgate and enforce rules governing the use of

state-owned lands. He argues that MCL 324.504 imposes an affirmative duty on the DNR to administer and enforce its rules. Plaintiff further claims that the DNR has an independent statutory duty under MCL 324.2131 to manage and protect state-owned land and that MCL 324.2124 prevents the DNR from granting an easement over state-owned land designated as a wilderness or natural area. Plaintiff alleges the DNR breached its mandatory duties by ratifying EGLE's position in its May 6, 2025 letter not to pursue removal of the structures.

MCL 324.503 is a provision within NREPA relating to the DNR and provides, in relevant part:

> The department [referring to the DNR] *shall* protect and conserve the natural resources of this state; provide and develop facilities for outdoor recreation; prevent the destruction of timber and other forest growth by fire or otherwise; promote the reforesting of forestlands belonging to this state; prevent and guard against the pollution of lakes and streams within this state and enforce all laws provided for that purpose with all authority granted by law; and foster and encourage the protection and propagation of game and fish. [MCL 324.503(1) (emphasis added).]

MCL 324.503(2) adds, in relevant part, "The department has the power and jurisdiction over the management, control, and disposition of all land under the public domain, except for those lands under the public domain that are managed by other state agencies to carry out their assigned duties and responsibilities."

MCL 324.504 provides, in relevant part, "The department *shall* promulgate rules to protect and preserve lands and other property under its control from depredation, damage, or destruction or wrongful or improper use or occupancy." MCL 324.504(1) (emphasis added). Additionally, "The department is urged to promote public enjoyment of this state's wildlife and other natural resources by providing public access to lands under the control of the department for outdoor recreation activities dependent on natural resources, providing reasonable consideration for both

motorized and nonmotorized activities." MCL 324.504(4). MCL 324.504(9) provides, "The department *shall* issue orders necessary to implement rules promulgated under this section. The orders are effective upon posting." (Emphasis added.) Importantly, this statute relates to implementing administrative rules—not enforcing them.

MCL 324.504(14) provides, "A person who violates a rule promulgated under this section or an order issued under this section is responsible for a state civil infraction and *may* be ordered to pay a civil fine of not more than $500.00." (Emphasis added.) See also Mich Admin Code, R 299.929 ("In addition to any other penalty prescribed by law, violation of any of these rules *may* result in eviction from the state park, recreation area, access site, game or wildlife area, designated campground, or state-owned land for not less than 48 hours, or as defined by court order.") (emphasis added).

Plaintiff also cites MCL 324.30111, a provision of Part 301 of NREPA, which provides:

> This part does not deprive a riparian owner of rights associated with his or her ownership of water frontage. A riparian owner among other rights controls any temporarily or periodically exposed bottomland to the water's edge, wherever it may be at any time, and holds the land secure against trespass in the same manner as his or her upland subject to the public trust to the ordinary high-water mark.

The DNR argues that the use of the permissive word "may" in the relevant statutes and administrative rules support that the DNR has discretion on whether to act, which is not subject to judicial review. See, e.g., *Warda v City Council of the City of Flushing*, 472 Mich 326, 332; 696 NW2d 671 (2005) (holding that when a statute gives a governmental agency power to undertake a discretionary decision and provides no limits to guide the exercise of that discretion or judicial review of the exercise, the decision is not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional). *Warda* also involved a statute that gave the

governmental entity discretion using the word "may" without any limit or qualification, such as a reasonableness requirement. *Id.* at 332.

There is no dispute that the statutes outline some duties on the part of the DNR. However, those duties are discretionary in nature. None of the statues on which plaintiff relies articulates any standards that would enable judicial review of the DNR's exercise of its discretionary authority. MCL 324.504(9) provides, "The department *shall* issue orders necessary to implement rules promulgated under this section. The orders are effective upon posting." (Emphasis added.) But this provision appears to apply to orders used to implement (not enforce) rules, and it provides no guidance for when those orders are deemed "necessary." The most relevant part of the statute regarding enforcement, MCL 324.504(14), provides, "A person who violates a rule promulgated under this section or an order issued under this section is responsible for a state civil infraction and *may* be ordered to pay a civil fine of not more than $500.00." (Emphasis added.) This statute uses the permissive "may" instead of the required "shall," and provides no guidance or standards to facilitate judicial review, such as the use of the word "reasonable."

MCL 324.2131 also does not apply in this case because this statute relates to the sale of surplus or state-owned land. MCL 324.2124 limits the DNR's ability to grant an easement over state-owned land designated as a wilderness area, wild area, or natural area. See MCL 324.2124(a). No easement was granted in this case. Plaintiff also cites Mich Admin Code, R 299.922(f) and (w), which make it unlawful to "[p]lace or erect a fence or barrier, to install, construct or occupy a structure or modification to state-owned land, except an otherwise lawful ground blind or tree stand, or to enclose the land," and "[s]tore or leave a watercraft, fish shanty, or other property on state-owned land for more than 24 hours." However, this administrative rule

does not provide guidelines for how the DNR must regulate this activity. Plaintiff also cites Mich Admin Code, R 299.926, which prohibits additional activities within wildlife areas. Again, this rule does not outline any requirements on the part of the DNR or any limits on its discretionary powers.

In summary, plaintiff has not articulated any statute or administrative rule imposing limits or standards on the DNR's duties that would permit judicial review of the agency's discretionary decisions, and plaintiff does not assert that the agency violated his constitutional rights. Because this issue involves a question of law regarding the language of the statutes and administrative rules, no factual development could possibly justify recovery. Accordingly, plaintiff's proposed amended claim for breach of mandatory statutory duty fails to state a claim on which relief may be granted, and the proposed amendment to include this particular claim is DENIED as futile.

2. ULTRA VIRES ACTIVITY AND PUBLIC TRUST DOCTRINE

Plaintiff also incorporates in Count I of the proposed amended complaint a claim relating to ultra vires governmental activity. The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides that governmental entities are "immune from tort liability" for claims that arise from activities in which they are "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The only exceptions to this general rule are the exceptions expressly delineated in the GTLA and ultra vires activities, as well as constitutional torts. *Pohutski v Allen Park*, 465 Mich 675, 689-690; 641 NW2d 219 (2002). The Michigan Supreme Court has held that "governmental agencies are not entitled to immunity under the act for injuries arising out of ultra vires activity, defined as activity *not* expressly or impliedly mandated or authorized by law." *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989). "Generally, the omission of an act is not sufficient to elevate even intentional omissions of a duty, i.e., negligence, to an

ultra vires intentional tort. The commission of an act, rather than an omission, is required." *Marlin v Detroit*, 177 Mich App 108, 113; 441 NW2d 45 (1989).

Plaintiff asserts that several statutes mandated that the DNR take action to order removal of the boardwalk and dock yet failed to do so. This issue falls within the DNR's statutory duties, as detailed earlier. This case involves the omission of an act, not the commission of an act. The alleged omissions fall within the agency's exercise or discharge of a governmental function and do not constitute ultra vires governmental activity. Plaintiff therefore has not pleaded ultra vires governmental activity to avoid application of governmental immunity. He therefore fails to state a claim on which relief may be granted in relation to alleged ultra vires activity.

In his response brief, plaintiff also relies on the common-law public-trust doctrine to support that the DNR did not comply with its duty of care. This doctrine typically applies to larger bodies of navigable water, including the ocean and the Great Lakes. *Glass v Goeckel*, 473 Mich 667, 673-674; 703 NW2d 58 (2005). The Michigan Court of Appeals has articulated the doctrine as follows:

> American law has long recognized that large bodies of navigable water, such as the oceans, are natural resources and thoroughfares that belong to the public. In our common-law tradition, the state, as sovereign, acts as trustee of public rights in these natural resources. Consequently, the state lacks the power to diminish those rights when conveying littoral property to private parties. [*Id.* at 673.]

The Court distinguished between "littoral" property (property including the seas and their costs) with riparian property (property adjacent to rivers and streams). *Id.* at 672 & n 1. The Court explained that "[p]ursuant to this longstanding doctrine, when the state (or entities that predated our state's admission to the Union) conveyed littoral property to private parties, that property remained subject to the public trust." *Id.* at 674.

Plaintiff provides no legal basis for extending the public-trust doctrine to smaller, inland lakes, such as Indian Lake. Plaintiff instead cites to caselaw to support that the DNR cannot abdicate its obligations over state-owned public land by leaving the land in the control of private parties. But that is not what is occurring in this case. The DNR did not convey the public land in the hands of a private party—it decided (potentially in consultation with EGLE) not to require removal of a boardwalk and dock on state-owned lands. Plaintiff therefore has not pleaded a viable claim for violation of the common-law public trust doctrine. Therefore, the Court DENIES plaintiff's request to amend the complaint to include this claim because amendment would be futile.

3. MEPA CLAIM

The Court concludes that plaintiff has pleaded a viable MEPA claim in Count III of the proposed amended complaint. MCL 324.1701(1) provides:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against *any person* for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. [Emphasis added.]

The DNR is an entity that may be sued under MEPA. See generally, e.g., *Dafter Sanitary Landfill v Mich Dep't of Natural Resources*, 198 Mich App 499; 499 NW2d 383 (1993). To prevail on a MEPA claim, the plaintiff must make a prima facie showing that the conduct of the defendant has either polluted, impaired, or destroyed, or is likely to pollute, impair, or destroy, the air, water, or other natural resources of the State, or the public trust in the resources. *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 514; 684 NW2d 847 (2004), citing MCL 324.1703(1). The defendant can rebut the showing with contrary evidence or by raising an

affirmative defense as outlined in MCL 324.1703(1). *Preserve the Dunes*, 471 Mich at 514. Importantly, the statute does not require exhaustion of administrative remedies. *Id.*

The traditional test for determining whether a prima facie case exists is to examine "(A) whether a natural resource is involved, and (B) whether the impact of the activity on the environment rises to the level of impairment to justify the trial court's injunction." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 33 n 7; 576 NW2d 641 (1998) (quotation marks and citation omitted). The parties do not dispute that a natural resource is involved. But the DNR argues plaintiff has not pleaded factual allegations to support that the impact of the activity on the environment rises to the level of an impairment, specifically because plaintiff does not allege facts to support certain factors outlined in the caselaw, known as the *Portage* factors. In *Portage v Kalamazoo Co Rd Comm*, 136 Mich App 276, 282; 355 NW2d 913 (1984), the Court of Appeals set forth several factors regarding the second element of this test:

> (1) whether the natural resource involved is rare, unique, endangered, or has historical significance, (2) whether the resource is easily replaceable, (for example, by replanting trees or restocking fish), (3) whether the proposed action will have any significant consequential effect on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed), and (4) whether the direct or consequential impact on animals or vegetation will affect a critical number, considering the nature and location of the wildlife affected. The magnitude of the harm likely to result from the proposed action will depend on the characteristics of the resources involved.

In the past, the Court of Appeals examined these factors to determine whether the plaintiff pleaded a valid MEPA claim. See *Dafter Sanitary Landfill*, 198 Mich App at 504-505 (holding that because the "plaintiff failed to address any of these factors" and merely alleged conclusions without factual support, the trial court properly granted summary disposition). However, more recently, the Court has made clear that these factors are illustrative and are not mandatory, dispositive, or exclusive on the issue. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1,

On appeal of an order granting summary disposition, the Court of Appeals again recognized that the *Portage* factors " 'are not mandatory, exclusive, or dispositive.' " *Id.* at 3 (quotation marks and citation omitted). The Court held as follows in relation to *Portage*:

> [The defendant-appellant] specifically argues that the trial court's analysis relied entirely on the *Portage* factors; however, this argument does not align with the court's actual reasoning. The trial court explicitly acknowledged that the *Portage* factors were neither mandatory nor conclusive. Although the court used *Portage* as the framework for its analysis, it did not imply adherence to a rigid application of these factors. [The defendant-appellant's] critique of the *Portage* factors suggests that this Court exceeded its authority by establishing guidelines not present in the statute. Nonetheless, while *Portage* was decided before November 1, 1990, it has been reaffirmed by several published opinions issued after that date, such as *Dafter Sanitary Landfill*, 198 Mich App at 504. Therefore, despite WRA's objections, the *Portage* factors constitute stare decisis, and it was appropriate for the trial court to consider them. [*Id.* at 3-4.]

The Court of Appeals did not suggest in its reasoning that the plaintiff was required to outline the *Portage* factors in the complaint to state a valid MEPA claim. Rather, the Court of Appeals reaffirmed that the *Portage* factors are appropriate factors for the trial court to consider when ruling on the MEPA claim *on the merits*. The DNR cites no caselaw that requires a plaintiff to outline the *Portage* factors in his or her complaint. Because the *Portage* factors are not mandatory or dispositive, plaintiff did not need to outline each factor in his complaint to state a claim for relief under the MEPA.

III. CONCLUSION

The Court GRANTS IN PART and DENIES IN PART the DNR's motion for summary disposition and GRANTS IN PART and DENIES IN PART plaintiff's request for leave to amend the complaint as follows: Count I of plaintiff's proposed amended complaint does not state a valid claim for relief for breach of statutory duty, ultra vires activity, or breach of the common-law public-trust doctrine against the DNR. Therefore, this claim may not be included in the amended

42; 896 NW2d 39 (2016). Additionally, a MEPA case requires de novo review by the trial court, which cannot defer to an agency's decision. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 489; 608 NW2d 531 (2000).

Plaintiff's proposed amended complaint now outlines the alleged impact of the activity on the environment, which includes: (1) alteration of wetland hydrology, (2) destruction and fragmentation of the vegetation in the wetland, (3) impairment of the threatened plant habitat and species habitat, (4) compaction and disturbance of the wetland soils, (5) interference with the ecological functions in the wetland, (6) impairment of the public trust in the state-owned bottomlands, and (7) degradation of the buffer functions within the wetlands. Plaintiff's proposed amended complaint states a prima facie claim under the MEPA because it articulates the natural resources involved (inland lakes and wetlands located on DNR property) and alleges how the impact of the activity on the environment rises to the level of impairment to justify an injunction.

The DNR argues that the *Portage* factors "remain relevant when evaluating whether injunctive relief is appropriate under MEPA," and that the factors when applied to this case "do not support a MEPA claim." The DNR cites *Mich Electrical Transmission Co, LLC v Wildlife Recovery Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued December 30, 2024 (Docket No. 367092). *Mich Electrical Transmission Co* differs from this case in a material respect—that case involved a motion for summary disposition filed under MCR 2.116(C)(10) rather than a motion examining the adequacy of the pleadings under MCR 2.116(C)(8). *Id.* at 1. Thus, the issue was whether a genuine issue of material fact existed for trial and not whether the plaintiff pleaded a claim on which relief may be granted. See *id.*

complaint. However, Count III of plaintiff's proposed amended complaint states a valid MEPA claim against the DNR. Therefore, the DNR's motion for summary disposition is DENIED in relation to the MEPA claim, and plaintiff is permitted to include this claim in the filed version of the amended complaint. Denial is without prejudice to the DNR filing a motion summary disposition on the merits of the issue at a later time in accordance with the Court's case scheduling/management order.

The Court will permit plaintiff to include the proposed claims against EGLE in Counts II and III of the amended complaint and does not rule at this time on the adequacy of the pleadings or the merits of the claims as it relates to EGLE. To date, EGLE has not appeared in this matter. Therefore, the decision to grant plaintiff leave to amend the complaint is without prejudice to EGLE's ability to file an MCR 2.116 motion at a later time after it is served with the amended complaint. Plaintiff shall file an amended complaint in compliance with this opinion and order within 21 days and shall serve the amended complaint on EGLE.

IT IS ORDERED:

1. The DNR's motion for summary disposition is GRANTED IN PART and DENIED IN PART.
2. Plaintiff's April 21, 2026 amended complaint is STRICKEN from the record with the exception of the verification, which will be deemed filed on April 21, 2026.
3. Plaintiff's request to amend the complaint to include Count I of the proposed amended complaint, breach of mandatory statutory duty and ultra vires conduct, IS DENIED AS FUTILE.
4. Plaintiff's request for leave to amend the complaint to include a MEPA claim against the DNR, as it appears in Count III of the proposed amended complaint, and claims against EGLE is GRANTED.
5. Plaintiff shall file a verified amended complaint in compliance with this opinion and order within 21 days of the date of this opinion and order.

6. Plaintiff shall timely serve the filed amended complaint on EGLE in accordance with the Michigan Court Rules.

7. This order does not resolve the last pending claim or close the case.

Date: June 4, 2026

James Robert Redford
Judge, Court of Claims