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Friend of the Court



STATE OF MICHIGAN

COUNTY OF OTSEGO  
46<sup>th</sup> CIRCUIT COURT  
87-A DISTRICT COURT  
OTSEGO COUNTY PROBATE COURT  
[www.circuit46.org](http://www.circuit46.org)

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July 22, 2011

Ms. Susan DeFeyter  
Clerk of the Court  
Otsego County Circuit Court  
225 West Main St.  
Gaylord, MI 49735

RE: MDEQ v Golden Lotus  
Circuit Court No.: 09-12933-CE

Dear Ms. DeFeyter:

Enclosed for filing, please find the following:

Opinion and Order RE: Intervening Plaintiff's Motion to Clarify and Enforce  
Interim Order  
Proof of Service

Copies have been served on all parties.

Sincerely,

A handwritten signature in cursive script, appearing to read "Katherine Whitman".

Katherine Whitman  
Assignment Clerk/Judicial Secretary

Enclosure

cc: Pamela Stevenson  
Peter Gustafson  
William Schlecte  
Harry Ingelson

**STATE OF MICHIGAN  
IN THE 46<sup>th</sup> CIRCUIT COURT  
COUNTY OF OTSEGO**

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MICHIGAN DEPARTMENT OF  
ENVIRONMENTAL QUALITY, *et al*,

Plaintiff,

and

MICHIGAN CHAPTER TROUT UNLIMITED  
and PIGEON RIVER COUNTRY ASS'N,

Case No: 09-12933-CE  
Hon. Dennis F. Murphy

Intervening Plaintiffs,

-v-

GOLDEN LOTUS, INC.,

Defendant.

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**OPINION AND ORDER RE: INTERVENING PLAINTIFF'S  
MOTION TO CLARIFY AND ENFORCE INTERIM ORDER**

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*Introduction*

Plaintiff Michigan Department of Environmental Quality ("MDEQ") originally brought suit against Defendant Golden Lotus, Inc. ("Golden Lotus") regarding the failure of Defendant's dam, which is located on the Pigeon River. The parties, including Intervening Plaintiffs (TU/PRCA) Michigan Chapter of Trout Unlimited ("Trout Unlimited") and Pigeon River Country Association ("Pigeon River") eventually resolved their differences by signing a stipulation to enter an Interim Order. This consensual order provides for the 'removal of the dam'. Intervening Plaintiffs-TU/PRCA now bring this motion to clarify and enforce the Interim Order. They assert that the conceptual plan for dam removal submitted by Defendant Golden Lotus fails to comply with the plain

language of the Interim Order. Intervening Plaintiffs-TU/PRCA also assert that Dr. Bryan Burroughs has not been involved in the dam removal planning process as required by the interim order. Both Plaintiff-MDEQ and Defendant-Golden Lotus oppose Intervening Plaintiff's motion.

### ***Factual Background***

The Golden Lotus Song of the Morning Ranch Dam ("Pigeon River Dam"), which is located on land owned by Golden Lotus, has a history of malfunctioning and releasing great volumes of water into the lower Pigeon River. When a dam such as the one at issue in this case fails and releases water, the negative effects on the environment of the river are significant. Whenever this dam has failed in the past, a massive fish kill has resulted. State Plaintiff has, over the past several decades, attempted to reach a settlement with Golden Lotus which would provide for removal of the dam. In this suit, and after protracted and contentious negotiation, the parties entered into an Interim Order on April 5 of 2010. That order provides as follows: "Subject to and in accordance with the provisions of this Interim Order, Golden Lotus shall remove the private dam it owns and maintains on its property creating the impoundment on the Pigeon River known as the Lansing Club Pond, Corwith Township, Otsego County." Interim Order, ¶3. Additional text from the Interim Order is quoted in greater detail in Section (1) of the Law & Analysis Section in this Opinion.

The dam itself consists of a number of components which operate together to create the impoundment. These include an earthen embankment and concrete element with sections being older than 100 years. The earthen embankment is more than 200 yards in length and approximately 12 feet high and has a reinforced concrete spillway and

power house that was constructed in the 1950s. Additional emergency spillway tubes were constructed in 1990 to provide additional flood capacity. Intervening Pl.'s Ex. AA, Def.'s Ex. 7. The concrete element of the dam is a wall at the upstream base of the dam rising approximately two to three feet above the natural stream bed. There is also a gate structure, which may be opened to release water from the impoundment, as well as a set of turbines. Supporting the gate and turbines is a set of concrete abutments. A bridge spans the top of the gates and abutments, allowing traffic across the dam from one bank of the Pigeon River to the other. Finally, at the base of the dam, there is a concrete spillway that extends from the dam for forty feet downriver from the rest of the structure.

#### ***Standard of Review - Rules of Construction***

Intervening Plaintiffs' motion requests that this Court review and interpret an order reached by consent of the parties. Judgments entered pursuant to the agreement of parties are of the nature of a contract. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). The goal of interpreting a contract is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement. *Dobbelaere v Auto-Owners Ins. Co.*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Contractual terms must be construed in context and in accordance with their commonly-used meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Where contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). A court must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of

the contract surplusage or nugatory. *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 468; 663 NW2d 447 (2003).

### ***Law and Analysis***

Intervening Plaintiffs-TU/PRCA assert that the Interim Order requires Defendant to ‘remove the dam’, and that Defendant-Golden Lotus’ plan for dam removal does not satisfy this requirement. Specifically, Intervening Plaintiff argues that the Interim Order requires Golden Lotus to remove the spillway structure, the concrete wall, and other bottom structures at the base of the existing powerhouse – these are structures that all parties agree would be left in place if Defendant’s application for a permit under parts 301 and 315 of the Natural Resource and Environmental Protection Act (“NREPA”) is granted. Essentially, the question put before the Court is: Does Defendant-Golden Lotus’ permit application conform to the language of the stipulated Interim Order?

### ***The Permit Application does not satisfy the requirement of “dam removal” within the meaning of that term as used in the Interim Order.***

Intervening Plaintiffs assert that the Interim Order requires Defendant to remove all of the structures comprising the dam. These structures include the spillway and concrete wall. Defendant’s permit application does not provide for the removal of these structures. Defendant asserts that its permit application provides for the removal of the components of the dam which retain the impoundment. Defendant and Plaintiff both maintain that removing these components will cause the impoundment to drain. They both argue that the partial removal provided for in its permit application satisfies the ‘dam removal’ requirement of the Interim Order.

*(1) The text of the Interim Order is not ambiguous*

The Interim Order provides as follows, “Subject to and in accordance with the provisions of this Interim Order, Golden Lotus shall remove the private dam it owns and maintains on its property creating the impoundment<sup>1</sup> on the Pigeon River known as the Lansing Club Pond, Corwith Township, Otsego County.” Interim Order, ¶3. The order also states that Defendant is to provide a Conceptual Plan for removal of the dam to the State Technical Review Team. Interim Order, ¶4. That Conceptual Plan is subject to the review of the Review Team and Bryan Burroughs. Interim Order, ¶5. After reviewing the Conceptual Plan, the Review Team shall notify Defendant in writing of information which it deems necessary and appropriate for the submission of the application for permits to remove the dam. *Id.* After such review, Defendant will then submit a completed Joint Application for dam removal to the DNRE and Burroughs in accordance with the NREPA and the Interim Order. Interim Order, ¶7.

The Interim Order does not contain an explicit or special definition or meaning of the phrase ‘dam removal’. There are also no instructions or details within the Interim Order that describe exactly what must be done to the dam in order for it to be considered to have been removed. However, both the plain language of the term ‘dam removal’ and the entire context of the Interim Order clearly references and incorporates the statutory meaning of the terms ‘dam’ and ‘removal’, as defined in Part 315 of the NREPA. It is important to note that the parties did not assign any special definition to these terms that were distinct or different from the definitions in the referenced statutes, including Part 315.

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<sup>1</sup> The term ‘impoundment’ means water held back by a dam, dike, floodgate, or other barrier. MCL 324.30101(h).

*(2) The meaning of 'dam removal' is clear and statutorily defined*

In multiple instances in the Interim Order, the phrase 'dam removal' is accompanied by reference to that removal taking place in accordance with Part 315 (among others) of the NREPA. The Interim Order specifically provides that the dam removal project will require DNRE permits pursuant to Parts 301, 303, 315, 31, and 305 of the NREPA. Interim Order, ¶3. The Interim Order requires the Review Team to notify Defendant of information the Review Team believes to be necessary for the filing of a permit for dam removal pursuant to parts 31, 301, 303, 305, and 315 of the NREPA. Interim Order, ¶5(b). The Interim Order also requires DNRE (now MDEQ) to notify Defendant in writing of any additional information required to process a complete permit application for the dam removal project as provided by the Interim Order and parts 31, and 31, 301, 303, 305, and 315 of the NREPA, and the applicable rules and regulations promulgated pursuant to those Parts. Interim Order, ¶6. The Interim Order, and the parties to that order, clearly and plainly incorporated the statutory definition of dam removal by reference when the document provided that removal of the Pigeon River dam would take place pursuant to Parts 31, 301, 303, 305, and 315 of the NREPA.

Resolution of the main issue presented by Intervening Plaintiff's Motion does not require determining the subjective intent of the parties because the Interim Order is not ambiguous. As stated earlier, the goal in interpreting a contract is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement. *Dobbelaere v Auto-Owners Ins. Co.*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Only where the language of the order, statute, or contract is unclear does one resort to a subjective intent analysis.

Because the plain wording of the stipulated Interim Order states that removal of the dam would be undertaken in accordance with the requirements of the aforementioned statutes, the court must examine those statutes to ascertain the plain meaning of the term “dam removal” or “removal of the dam”. Part 315 of the NREPA provides definitions for the terms ‘dam’ and ‘removal’. ‘Dam’ is an artificial barrier, *including dikes, embankments, and appurtenant works*, that impounds, diverts, or is designed to impound or divert water or a combination of water and any other liquid or material in the water. MCL 324.31502(6) [emphasis added]. ‘Removal’ means the physical elimination of a dam or impoundment. MCL 324.31505(1).

Plaintiff argues that the term ‘removal’, as it appears in §315 can refer to the removal of the impoundment. However, the text of the Interim Order as a whole does not support the argument that mere removal of the impoundment satisfies the requirement of ‘dam removal’. This is not the plain meaning of the phrase ‘dam removal’. Where contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties’ intent as a matter of law. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). Court orders are to be construed using the same rules one would use to construe statutes and contracts. The Interim Order requires that Defendant *seek and obtain a permit* for ‘dam removal’ pursuant to Section 315. Furthermore, a permit under Section 315 is *not* required for the removal of an impoundment. Clearly, removal of the physical components of the dam itself is required. In other words, ‘dam removal’ means dam removal.

The only activities that require the issuance of a permit under § 315 are construction of a new dam, enlargement of a dam or an impoundment, repair of a dam,



alteration of a dam, *removal of a dam*, abandonment of a dam, or reconstruction of a failed dam. MCL 324.31509(1). If this Court were to interpret the Interim Order's use of the word 'removal' as referring only to the drawdown of an impoundment, such an interpretation would not only be contrary to the plain language of the order, it would also render all references to securing a permit under §315 as surplusage. Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Ins. Group Agency, Inc.*, 468 Mich 459, 468; 663 NW2d 447 (2003). Thus, courts must not construe language in a statute, contract, or order in a manner that is either contrary to or negates a document's plain language. Applying this rule to the text of the Interim Order, the specific use of the phrase 'dam removal', in conjunction with the corollary requirement that a permit be obtained, means that references to removing the dam plainly mean dam removal as those terms are defined under §315.

In summary, 'removal' refers to the removal of the dam, and the term 'dam' as it is used in MCL 324.31502(6) clearly includes all appurtenant structures and embankments. The plain language of the Interim Order is that Defendant Golden Lotus must remove the appurtenant structures of the Pigeon River Dam, including the spillway and concrete wall, in order to comply with the terms of the Interim Order.

***(3) There is no preemptive right to maintain a bridge***

The Interim Order requires that Defendant include within its conceptual plan for removal a description of any proposed modifications to the existing bridge structure; and a conceptual plan and description for replacement of the bridge if it is determined that it must be removed and replaced as part of the dam removal process. Interim Order, ¶4.

Defendant asserts that the Interim Order gives it the preemptive right to maintain the bridge traversing the dam, so that removal of the dam must be accomplished without damaging the necessary support structures for maintenance of the bridge. Defendant also argues that its permit application for removal conforms with this interpretation of the Interim Order by removing all components of the dam that are not essential to the maintenance of the bridge.

The plain text of ¶14 of the Interim Order provides as follows, “Golden Lotus shall be entitled to maintain the current bridge; or, if in the opinion of a qualified, licensed engineer it must be removed as part of the contemplated *dam removal* project, Golden Lotus shall be entitled to construct a comparable bridge across the Pigeon River at the same or nearest feasible location.” [emphasis added] This provision of the Interim Order does not grant Defendant an unqualified right to maintain the bridge. The text of the order explicitly addresses the possibility that the bridge may have to be removed to accomplish ‘dam removal’. The text of this passage also does not unequivocally ensure that the bridge will remain in place, but it does ensure that the bridge will remain in place *unless* the “removal of the dam” would render it structurally unsound. In the event that the bridge cannot remain intact, Defendant would be guaranteed the right to rebuild the bridge.

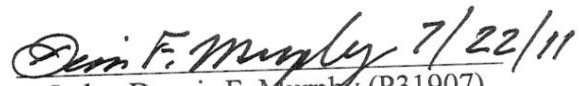
In the course of claiming a preemptive right to maintain the bridge, Defendant argues that that ¶4 and ¶14 of the Interim Order modify the meaning of ‘dam removal’, because those sections contemplate a scenario where the bridge may remain in place after the dam is removed, and the bridge is an ‘appurtenant structure’ to the dam. According to Defendant’s argument, if the statutory definition of ‘dam’ is adhered to in the Interim

Order, then ¶4 and ¶14 are rendered surplusage because the appurtenant bridge must be removed no matter what. It is important to address this argument in detail particularly because of its effect on the meaning of ‘dam’ and ‘removal’ – the key terms at the heart of this dispute over the meaning of the interim Order.

When interpreting a consent order, this Court will read the order as a whole and give effect to every provision contained therein. ¶4 and ¶14 provide that the bridge will remain in place unless an engineer determines that it must be removed along with the dam. The Court does not read ¶4 and ¶14 as being inconsistent with the definition of ‘dam’ and ‘removal’ found in Part §315 of the NREPA. Indeed, ¶4 and ¶14 essentially provide that, *if* the bridge can exist independently of the dam and remain structurally sound – that is, if it is *not* appurtenant to the dam – it may remain in place and in use; however, if it must be removed - if it *is* an appurtenant structure - then Defendant will be allowed to replace it. This interpretation of the text of ¶4 and ¶14 is more logical and consistent both with the text of §315 of NREPA and with the text of the Interim Order which refers to that statute. Defendant’s argument is based on the assumption that the bridge is appurtenant to the dam, but appurtenance of the bridge to the dam is not presumed by the text of the Interim Order. Whether or not the bridge is, or is not, an appurtenant structure, is simply not relevant and not addressed in the text of the Interim Order. In sum, the nature of the bridge’s appurtenance to the dam does not affect the meaning of ‘dam’ and ‘removal’ as those terms are used in the Interim Order. Clearly, Paragraphs 4 and 14 of the Interim Order do not modify the meaning of the term ‘dam removal’ in the manner argued by Defendant and do not relieve Defendant of its duty to remove the entirety of the dam under the terms of the Interim Order.

### *Conclusion & Order*

All parties have submitted well-written briefs in support of their respective positions. The Court recognizes the importance of this matter to all parties and especially the cost differences to Defendant. Clearly, removal of the Pigeon River Dam will be more costly than removal of the impoundment. However, it is equally clear that the terms of the Interim Order require nothing less than 'dam removal' and dam removal means a complete removal of the Pigeon River Dam. It bears noting that if the parties intended the phrase "dam removal" to have a meaning distinct from the statutory language to which the Order refers, then the parties could have simply provided their own special definition within the text of the order. As presented to the Court, the Interim Order clearly states that dam removal must take place pursuant to specific sections of the NREPA. Since those sections clearly define the terms 'dam' and 'removal', this Court is bound to interpret the Interim Order in accordance with those statutes and the definitions within the statutes. Accordingly, it is ordered that Intervening Plaintiff's Motion to Clarify the Interim Order is granted with respect to the meaning of 'dam removal'. Defendant must revise its conceptual plan for dam removal such that it conforms to the provisions of this Opinion and Order.

  
Judge Dennis F. Murphy (P31907)  
46<sup>th</sup> Circuit Court, Otsego County

STATE OF MICHIGAN  
46<sup>TH</sup> CIRCUIT COURT FOR OTSEGO COUNTY

Michigan Department of Environmental  
Quality, et al,

Plaintiff,

and

Case No.: 09-12933-CE  
Honorable Janet M. Allen

Michigan Chapter Trout Unlimited and  
Pigeon River Country Ass'n,

Intervening Plaintiffs,

vs

Golden Lotus, Inc.,

Defendant.

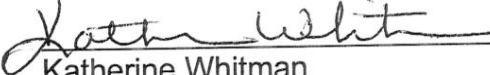
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PROOF OF SERVICE

On July 22, 2011, I sent, by first class mail, a copy of the Opinion and Order RE:  
Intervening Plaintiff's Motion to Clarify and Enforce Interim Order dated July 22, 2011, to  
all attorneys of record.

I declare that the statements above are true to the best of my information,  
knowledge and belief.

7/22/11

  
Katherine Whitman  
Assignment Clerk/Judicial Secretary  
46<sup>th</sup> Circuit Court