



Public Corporation Law Quarterly

Legal Lake Levels: Issues and Procedures

Winter 2011, No. 1

c o n t e n t s

legal lake levels: issues and procedures-1	•
chairperson's corner-2	•
opinions of attorney general bill schuette-5	•
state law update-6	•
federal law update-8	•
winter seminar-9	•
legislative update-10	•
i'll bet you didn't know (or maybe you forgot)-11	

By Tony Groves of Progressive AE

Introduction

One of the most beautiful images of Michigan is that of a serene lake shore. But that image is shattered when shoreline homes are flooded, or when lake levels drop and boats are stranded. When lake levels are perceived as being either too low or too high, there is often an outcry for the level to be controlled, usually by constructing a dam or some other lake level control device. The procedure for determining the optimum lake level and for designing and financing the construction of a dam is by establishing a legal lake level.

Legal lake levels in Michigan are established under provisions of Part 307, Inland Lake Levels, of the Natural Resources and Environmental Protection Act (NREPA), PA 451 of 1994, as amended (MCL 324.30701 – 324.30723), hereinafter referred to as the “Act.” What is often referred to as a “legal level” is defined as a “normal level” in Section 30701(h) as follows:

“Normal level” means the level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake.

Legal levels are established by circuit court order, but first, a study is conducted to determine what the legal level should be. If a legal level is established, the court may also create a special assessment district to finance project costs and maintenance. The court usually designates the county drain commissioner (or in counties with no drain commissioner, the county road commission) to operate and maintain the lake level control structure. Establishment of a legal level is described in more detail as follows.

Preliminary Steps

A lake level determination can be initiated by either a motion of the county board of commissioners *or* by petition to the county board of 2/3 of owners of land abutting the lake.¹ Before proceeding on a motion or petition filed, the county board may require a preliminary study by a licensed professional engineer. In accordance with Section 30703(2) of the Act,

- (2) A preliminary study shall include all of the following:
 - (a) The feasibility of a project to establish and maintain a normal level of the inland lake.
 - (b) The expediency of the normal level project.
 - (c) Feasible and prudent alternative methods and designs for controlling the normal level.
 - (d) The estimated costs of construction and maintenance of the normal level project.
 - (e) A method of financing initial costs.
 - (f) The necessity of a special assessment district and the tentative boundaries if a district is necessary.
 - (g) Other information that the county board resolves is necessary.

The county board may require up to \$10,000 from petitioners to cover preliminary study costs.

If, based on the results of the preliminary study, the county board of commissioners finds it expedient to have a legal lake level established, it directs the prosecuting attorney or other legal counsel to initiate lake level proceedings in the circuit court. The court can be petitioned to determine a legal lake level and to establish a special assessment district, if the county board determines by resolution a special assessment district is necessary.

The Circuit Court Hearing

In accordance with the Act, once a civil action has been filed to establish a legal level, the court must hold a public hearing. Notice of the hearing must be published in a newspaper of general circulation in the county (or counties in which the lake is located) once each week for three weeks prior to the date of the hearing. Notice must also be given by first-

class mail at least three weeks prior to the date of the hearing to all of the following: property owners within the tentative special assessment district, the governing body of each political subdivision in which the lake is located, and the governing body of each affected political subdivision. In addition, the prosecuting attorney or legal counsel must serve notice on the MDNRE at least 21 days prior to the date of the hearing.

There are a number of issues that the court must consider in its determination of a legal lake level for an inland lake. Section 30707(4) of the Act states:

- (4) In a determination of the normal level of an inland lake, the court shall consider all of the following:
 - (a) Past lake level records, including the ordinary high-water mark and seasonal fluctuations.
 - (b) The location of septic tanks, drain fields, sea walls, docks, and other pertinent physical features.
 - (c) Government surveys and reports.
 - (d) The hydrology of the watershed.
 - (e) Downstream flow requirements and impacts on downstream riparians.
 - (f) Fisheries and wildlife habitat protection and enhancement.
 - (g) Upstream drainage.
 - (h) Rights of riparians.
 - (i) Testimony and evidence offered by all interested persons.
 - (j) Other pertinent facts and circumstances.

The court hearing is where the “rubber hits the road.” Often, a lake level determination is a delicate balancing act between competing and often divergent interests. People tend to be very passionate about lake level issues and the court proceedings often seem to generate more heat than light. The more factual information that is available to the court regarding potential environmental impacts, technical feasibility, and costs, the better. In order to provide sufficient findings for the court to render a sound lake level decision, the preliminary study may need to address items (a) through

Legal Lake Levels

Continued from page 3

(h) above, in addition to engineering, feasibility, financing, and cost issues.

Lake level proceedings culminate in an order from the court setting the legal lake level and establishing a special assessment district, if necessary. Once a legal lake level has been established, the court has continuing jurisdiction and may provide for a departure from the legal level to accomplish the purposes of the Act. While only the county board or the MDNRE can bring an initial action to set a legal lake level, interested parties have standing to invoke the court's continuing jurisdiction (*Yee v Shiawassee County Board of Commissioners*, 251 Mich App 379; 651 NW2d 756 (2002); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Association*, 264 Mich App 523 (2004)). Michigan has several hundred lakes with legally-established lake levels.

The Act provides for the establishment of multiple levels in some situations (*Wortelboer v Benzie County*, 212 Mich App 208, 213; 537 NW2d 603 (1995)). Often, both a winter and a summer lake level are established, with the winter level lower than the summer level. This approach provides storage capacity in the lake to help minimize problems with high water during the spring melt.

Sometimes, when lake levels are low, property owners will request that the delegated authority drill augmentation wells or pump water to the lake from another source. While such projects are contemplated under the Act, these decisions are discretionary and the delegated authority is *not* mandated to take such action. In fact, in this day and age, lake augmentation will receive considerable regulatory scrutiny, and acquiring a construction permit from the Michigan Department of Natural Resources and Environment (MDNRE) would likely be expensive and difficult.

The Special Assessment District and Hearing on Roll

Lake level projects and ongoing maintenance are generally financed through establishment of a special assessment district and the collection of special assessments. In accordance with the Act, special assessments may be levied against privately-owned parcels, political subdivisions of the state, and state-owned lands under the control of the MDNRE.

With respect to privately-owned parcels, special assessment districts for lake level projects generally include those properties that directly benefit from the establishment and maintenance

of a legal lake level. In most cases, this will include all properties abutting the lake and back lot properties with deeded or dedicated lake access. The Act also allows at-large assessments against municipalities and certain state-owned lands. Under the Act, the delegated authority has considerable discretion in determining benefit and how assessments will be apportioned. The delegated authority will prepare a special assessment roll that lists all properties in the special assessment district and the amount of the assessment proposed to be levied against each.

In addition to the hearing in circuit court, a separate public hearing must be held on the assessment roll. Notice of the hearing must be published twice in a newspaper that circulates within the special assessment district with the first publication at least ten days prior to the date of the hearing. In addition, notice must be mailed first-class to each property owner in the special assessment district at least ten days prior to the hearing. The mailed notice must include a statement that appearance and protest at the hearing either in person or by letter is required in order to appeal the amount of the special assessment.

Before construction is begun on a lake level project, the Act requires that the county board of commissioners approve the cost and special assessment roll by resolution. The special assessment roll is final and conclusive unless appealed in a court of competent jurisdiction within 15 days after county board approval.

There are many engineering, environmental, and legal issues that must be addressed in a lake level proceeding. Given the myriad issues and costs associated with lake level projects, one can ill afford a procedural flaw in a lake level proceeding. Lake level projects often require experienced engineering and legal counsel. 🏢

About the Author

Tony Groves is the Water Resources Practice Leader in the Civil Engineering Division of Progressive AE, a Grand Rapids engineering and architectural firm. Tony has 25 years of experience working with municipalities across the state on water resources projects.

Endnotes

- 1 The Michigan Department of Natural Resources and Environment (MDNRE) may also initiate a civil action in circuit court to have a legal lake level determined.