

## ***MDEQ Required to Approve Permits for Bridge Projects***

The Michigan Court of Appeals has ruled that where a county road commission applied to the Michigan Department of Environmental Quality for permits to replace certain bridges and culverts, the applications should have been granted because the proposed projects did not adversely affect riparian rights or the public trust.

In 1996, the Oceana County Board of Road Commissioners (the Board) filed a permit application with the Michigan Department of Environmental Quality (MDEQ) proposing to build a bridge crossing the south branch of the Pentwater River at 136<sup>th</sup> Avenue in Elbridge Township in Oceana County, Michigan. The Board later filed a separate application proposing to replace the existing bridge crossing Carlton Creek at 92<sup>nd</sup> Avenue in Grant Township in Oceana County, Michigan. After the MDEQ denied both permit applications, the Board contested the denials and was granted an administrative hearing.

Following the three-day hearing, the administrative hearing referee entered his proposals for decision in January 1999. The three proposals determined, based on the record:

1) that neither the south branch of the Pentwater River nor Carlton Creek had ever been capable of floating logs and, therefore, neither was navigable;

2) that riparian rights, agriculture, commerce and industry, and wildlife would not be affected, and;

3) that the installation of twin arch culverts would not materially affect fish or fisheries.

The referee further concluded that because the streams were not navigable, they did not fall within the public trust directive, which provides that the State must hold natural resources as a public trust and, therefore, the proposed project would not adversely impact the public trust.

Additionally, the referee found that the proposed projects would not have an adverse impact on riparian rights, recreation, fish or wildlife, aesthetics, local government, commerce, or industry.

In February 1999 MDEQ's attorney requested that the Director of the MDEQ render the final decision in each of the contested cases because of their policy significance. As a result, in April 1999, Director Russell J. Harding (Harding) heard oral arguments regarding objections to the proposed decision. In a decision entered April 15, 1999, Harding issued the MDEQ's final determination and order. More specifically, Harding adopted the Board's proposed findings of fact. Harding also concluded as a matter of law that because neither stream was navigable, they were not impressed with the public trust and, therefore, the public trust was not adversely affected. Harding also concluded that riparian rights would not be adversely affected by the proposed projects. However, Harding went on to express his concerns that the proposed projects "would result in a significant adverse impact to the high quality fish and fish habitat present in the Carlton Creek and the south branch of the Pentwater River." Additionally, Harding noted that clear span bridges provided a reasonable alternative to the installation of twin arch culverts, and thus denied the Board's applications to install the culverts.

The Board then petitioned for review in the Oceana County Circuit Court in May 1999, arguing that the MDEQ did not have discretion to deny the permits where it had clearly concluded that the proposed projects did not adversely affect riparian rights or the public trust. The Board then moved for reversal in June 1999, which the MDEQ challenged. The circuit court granted the Board's motion for reversal in August 1999, finding that neither stream was navigable, and that neither project would adversely affect riparian rights or the public trust. According to the circuit court, the plain language of MCL 324.30106 required the MDEQ to

issue the requested permits when riparian rights and the public trust were not adversely affected. MDEQ's leave to appeal was subsequently granted.

On appeal, the MDEQ contended that the circuit court erred in its interpretation of §30106 of the Natural Resources and Environmental Protection Act (NREPA), which governs the MDEQ's issuance of permits regulating inland lakes and streams. Specifically, MCL 324.30102 requires that permits be obtained for certain activities concerning inland lakes and streams, and sets forth the procedure for granting a permit, which provides as follows:

The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. The department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state.

After reviewing the above statutory language, the circuit court determined that the MDEQ was required to issue the requested permits because the MDEQ clearly found that neither proposed project would affect riparian rights or the public trust. The appeals court was not convinced that the circuit court applied erroneous legal principles or grossly misapplied the standard for evaluating the MDEQ's factual determinations. Under prior court decisions, the appeals court may only reverse the circuit court's decision if it is left with a definite and firm conviction that the circuit court made a mistake. In this case, the appeals court was not.

In his April 1999 decision, Harding concluded that riparian rights and the public trust were not adversely affected by the proposed projects. The circuit court found these factual determinations to be supported by competent, material, and substantial evidence on the record. Therefore, the circuit court determined that the MDEQ was required to issue a permit under § 30106. Based on the record, the appeals court was satisfied that

the circuit court's decision was not clearly erroneous, and that the MDEQ was, therefore, required to issue the permits.

S. Lee Johnson