

**STATE OF MICHIGAN
IN THE 46TH JUDICIAL CIRCUIT
COUNTY OF OTSEGO**

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,
and MICHIGAN DEPARTMENT OF
NATURAL RESOURCES, et al

Plaintiffs,

vs.

GOLDEN LOTUS, Incorporated,

Defendant,

and

MICHIGAN COUNCIL OF TROUT
UNLIMITED, a Michigan non-profit
Corporation, and PIGEON RIVER COUNTRY
ASSOCIATION, a Michigan non-profit
Corporation,

Intervening Plaintiffs,

vs.

GOLDEN LOTUS, Incorporated,

Defendant.

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Case No.: 09-12933-CE

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**MEMORANDUM IN SUPPORT OF MOTION TO CLARIFY AND
ENFORCE INTERIM ORDER**

On February 2, 2011, Golden Lotus submitted its application for a dam removal permit “as part of a mutually agreed upon Interim Order associated with the Otsego County Circuit Court Case No. 09-12933-CE(M).” (Exhibit A, p. 1.) The permit application tellingly describes the project purpose as “impoundment drawdown and removal of selected dam infrastructure.” (Exhibit A, p. 2.) The Order, however, requires the Golden Lotus dam to be removed, not partially taken out. Accordingly, the permit application is incomplete and does not comply with the Order.

I. THE INTERIM ORDER REQUIRES GOLDEN LOTUS TO REMOVE THE DAM

Paragraph 3 of the Order states that:

“ . . . 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 . . . ”

Paragraph 7(i) of the Order states that Golden Lotus’ permit application for dam removal “shall include”:

“(i) a design which ensures environmental and resource protection and enhancement in compliance with applicable laws and standards, and consistent with this Interim Order. . . .”

Golden Lotus, nonetheless, interprets the Order to mean that it can get by with only partial dam removal, leaving in place substantial spillway structures comprising the base of the

dam. (See Exhibit A, Attachment B Photos.) The unremoved dam infrastructure would include a concrete wall approximately 2-3 feet high above the natural river bottom, a concrete spillway extending downstream 40 feet, and other bottom structures at the base of the existing powerhouse. (See Exhibit A, Attachments A8 and B2, Exhibit F, Profile Drawing.)

Golden Lotus' rationale for this interpretation of the Order is that it has a preemptive right to maintain its bridge, which overtops the dam. This contention fails for two reasons.

First, the Order gives Golden Lotus no such preemptive right.

Paragraph 3 of the Order states in pertinent part that:

The DNRE agrees that *upon removal of the dam structure*, Golden Lotus will be allowed the continued use of the existing bridge or, if in the opinion of a Golden Lotus engineer, due to structural concerns with the existing bridge structure, a replacement bridge crossing. Golden Lotus shall apply for and be issued DNRE permits that authorize the construction and placement of a new bridge structure at or near the existing bridge location . . . (Emphasis added.)¹

Paragraph 4(a) states that:

"The Conceptual Plan shall, to the extent possible, provide a conceptual plan and description of any proposed modifications to the existing bridge structure; and a conceptual plan and description for replacement bridge if it is determined that it must be removed and replaced as part of the dam removal project."

In short, Golden Lotus is required under the Order to remove the dam (not just part of it) and if upon dam removal the existing bridge is structurally sound, with or without modification, it can be kept in place.

Second, Golden Lotus has conflated its obligation to remove the dam with its purported right to maintain the existing bridge. During ongoing discussions about the dam removal plan, questions were raised about Golden Lotus' intent to retain the bridge by the State's Technical

¹ Later in the Order, Paragraph 14 provides that: "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 the nearest feasible location . . ."

Review Team and by Dr. Bryan Burroughs, the Executive Director of MITU appointed under the Order as an integral participant in the dam removal review and approval process.

After engineering studies were conducted, Golden Lotus proposed to keep the bridge in place “as is.” Because the bridge opening is narrow, this would result in a “pinch point” and a narrower channel than desirable to restore the free flow of the river. Nevertheless, in the spirit of cooperation contemplated by the Order, the DNRE and the Intervening Plaintiffs were willing to investigate whether the narrow width would cause a water impoundment problem, or if the stream could still function properly with a narrow opening. The issue here, however, is not about the bridge. It is about the bottom of the dam. No matter how one attempts to stretch the meaning of the term “bridge” in conjunction with Golden Lotus’s obligation to remove the dam, the spillway structures at the base of the dam are unquestionably part of the dam infrastructure. This infrastructure is common to dam construction, not bridges – bridges are not constructed with cross stream barrier walls and concrete spillways. The permit application implicitly acknowledges that the proposed dam removal is incomplete by describing the project as “removal of selected dam infrastructure.” (Exhibit A, p. 2.)

In short, Golden Lotus has no preemptive right to maintain the bridge, and its right to continue use of the bridge is subordinate to its dam removal obligation. Moreover, the issue raised in this motion does not involve bridge removal – it involves removal of the base of the dam.

II. THE GOLDEN LOTUS PLAN FOR DAM REMOVAL WILL ACCOMPLISH ONLY PARTIAL DAM REMOVAL.

The Golden Lotus dam is approximately 12 feet high. The private bridge used as primary access to a portion of the property crosses the top of the dam. The upper portion of the dam consists of spill gates that hold back the water. The impoundment water is diverted by the dam into and down through a powerhouse that contains a turbine, and water then flows out the bottom

of the powerhouse and back into the river. At the upstream base of the dam, a concrete wall of unknown depth (or height) rises 2 to 3 feet above the natural streambed, and extends across the river interrupting the natural river flow.² From the top of this cross-wall, a concrete spillway extends 40 feet in length downstream to carry the water overflowing the dam. (See Exhibit A, Photos and Drawing 5c.) In engineering parlance, this spillway infrastructure is referenced to as the dam “invert.” At the end of the concrete spillway is a plunge pool, carved out of the river bottom over the years by the flow of water coming off the spillway.

The base of the dam, consisting of the upstream wall and spillway, constitute about twenty percent of the height of the dam above the natural river bottom. Accordingly, Golden Lotus’ plan and permit application will not accomplish dam removal – a portion of the dam will remain.

With this infrastructure in place, the impoundment behind the dam will not be completely drained. Rather, a smaller impoundment above the natural bottom of the river will remain for about ¼ mile behind the concrete wall. (Exhibit F, Profile Drawing.) Additionally, due to the slope and 40-foot length of the spillway structure, water velocities over the spillway are predicted to be 10.7 feet per second, nearly 2.5 times the rate of natural high water flow.

III. GOLDEN LOTUS’ DRAFT CONCEPTUAL PLAN CONTEMPLATED ASSESSMENT OF THE NEED TO REMOVE THE SPILLWAY STRUCTURES – ITS PERMIT APPLICATION OMITTS THIS ELEMENT.

The Order at paragraph 4 required Golden Lotus and its experts to:

“ . . . submit a Conceptual Plan for removal of the dam to the State Technical Review Team (“Review Team”) established by Plaintiffs (collectively referenced for convenience as the “DNRE”) and Intervening Plaintiffs (“Intervenors”) for review and approval . . .”

² Golden Lotus has provided no engineering assessment of the precise configuration and extent of this wall, which should have been part of the planning analysis. The permit application drawing of the primary spillway states “thickness of invert slab unknown.” (Exhibit A, drawing 5c.)

In May 2010, Golden Lotus submitted its draft Dam Removal Conceptual Plan (Exhibit B). That document addressed the spillway structures on page 2:

“Ultimately, the last stoplog will be removed. At this stage, the lake will be empty and the river will be flowing through the spillway and through the low level outlet in the powerhouse. At this stage, all of the gates and control equipment at the upstream end of the primary spillway can be removed. *The need or desire to remove the primary spillway invert and low level outlet at the powerhouse location can be fully assessed by viewing the stream at this location.* No further action at the emergency spillway will be necessary. (Emphasis added.)³

While this document represented Golden Lotus first attempt at the Conceptual Plan, and was never complete (as defined in ¶4 of the Order) or approved by the Intervening Plaintiffs, it nevertheless clearly contemplates an assessment of removal of the spillway structures in connection with drawdown of the impoundment. In sharp contrast, Golden Lotus current dam removal plan and permit application ignore the spillway structures. Various portions of the project narrative included in the permit application track the language of the original Conceptual Plan. However, the paragraph of the Conceptual Plan quoted above has been modified in the permit narrative to delete the sentence regarding assessment of removal of the spillway. (Exhibit A, Project Narrative, p. 5.) No study, plan, engineering analyses or assessment of the method or cost of removing the spillway structures is provided or contemplated.

In short, Golden Lotus’s permit application stops before completion, which would leave the dam partially in place.

IV. THE ORDER PROVIDES THAT DR. BURROUGHS (AND INTERVENING PLAINTIFFS) MUST APPROVE THE DAM REMOVAL PLAN. THEY HAVE NOT APPROVED THE PLAN, WHICH MAKES NO PROVISION FOR ASSESSMENT AND REMOVAL OF THE SPILLWAY STRUCTURES.

Paragraph 4 of the Order required Golden Lotus to submit its Conceptual Plan to the DNRE and Intervening Plaintiffs “for review and approval.”

³ The “emergency spillway” referenced in the last line is a separate spillway structure located some distance from the dam and is not at issue here.

Paragraph 5 provides that the Review Team and Dr. Burroughs will assist Golden Lotus and its experts in connection with “development of a comprehensive and reasonable dam removal plan for the purpose of preparation of the application(s) for the permit necessary to implement and complete the dam removal project contemplated by this Interim Order.”

Paragraph 12 provides that:

“Golden Lotus shall direct its experts to work closely with the Review Team, DNRE and Burroughs. Burroughs will actively participate in the dam removal planning, permitting and implementation process. Burroughs and Golden Lotus’ experts shall regularly consult with appropriate DNRE personnel regarding all aspects of the dam removal project, sediment management plan, and all other work contemplated by this Interim Order.”

Dr. Burroughs has discharged this responsibility by attending meetings, engaging in extended professional dialogue about the dam removal process, discussing engineering plans, data and analysis needed to formulate the plan, and offering constructive suggestions and, where warranted, criticism of Golden Lotus’ plans and proposals.

The problem is that the current plan and permit application do not complete the dam removal task. While the drawdown phase goes forward, Golden Lotus should be required to complete its dam removal obligations, by providing a further plan and permit application for removal of the spillway structures at the base of the dam.

The plan should include the engineering assessment needed to understand the physical nature and extent of the spillway structures, how they interface with surrounding walls and the river bottom, the means and methods to remove them, what modifications of the bridge, if any, would be required, and what cost would be involved. It is, of course, not possible to assess the removal of these structures without this basic physical, structural and analytical information – akin to what Golden Lotus’ experts have submitted regarding other aspects of the project. To date, however, this information has not been provided to the Review Team, Dr. Burroughs or the Intervening Plaintiffs. Golden Lotus should then provide and implement a plan to remove these

structures based upon the data and information developed. The dam removal planning remains incomplete, and needs to be finished.

It is neither unreasonable nor unduly burdensome to require Golden Lotus to meet these obligations. The dam is located on Golden Lotus property and is under its control; Golden Lotus engineers and consultants have spent more than a year analyzing, measuring, studying and preparing reports on various aspects of the dam removal process. Without question, they are in the best position to complete the assessment regarding removal of the spillway structures.

CONCLUSION

At its core, the Order contemplates a dam removal process to restore the Pigeon River to its natural, free flowing condition. This will not be achieved unless the entire dam is removed – not just the upper part of it.

The Intervening Plaintiffs submit that Golden Lotus plan and permit application fall short of its obligations under the Order, and respectfully request that the Court clarify the Order and direct Golden Lotus to complete its obligations.

Dated: February 11, 2011

WARNER NORCROSS & JUDD-LLP

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