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Via Email

April Storms
City of White Cloud
12 North Charles Street
White Cloud, MI 49349

Dear April:

Re: White Cloud Dam

The purpose of this email memorandum is to summarize the relevant facts and controlling law related to the White Cloud Dam. After being built in 1872, it is our understanding that the Dam has failed on three occasions: first in 1910, then a second time in 1975, and again in 1986; high water overtopped the dam in 2014, 2017, 2018, and 2019; and failing stoplogs caused the lake level to drop in 2021 and 2024. (<https://www.mlive.com/environment/2025/06/michigan-small-town-fights-order-to-lower-lake-behind-risky-old-dam.html>.)

As a result of recent overtopping events, EGLE ordered the City to complete a feasibility study. The purpose of the feasibility study was to determine what type of rehabilitation may be necessary. The feasibility study included the completion of a more robust inspection of the Dam than those required in the regular inspections completed since it was rebuilt after the 1986 failure (e.g. soil borings, etc.). Using two funding grants from EGLE, the City commissioned the feasibility study, which was completed in February of this year: https://www.cityofwhitecloud.org/wp-content/uploads/2025/05/White-Cloud-Feasibility-Study_FINAL_02.14.2025.pdf. That study found that "The White Cloud Dam is an aging piece of infrastructure" with "multiple deficiencies" that needed to be addressed. (Feasibility Study, p 56.) The study identified essentially two potential options: repair the dam or remove it. Costs for removing the dam were estimated at \$9.3-\$12.7 million, whereas repair would be significantly more expensive, with estimates ranging as high as \$18.6 million over the next 50 years (with those costs increasing significantly once adjusted for up to 50 years of inflation). (Feasibility study, p 56-57.)



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In response to this feasibility study, EGLE issued a letter on April 1, 2025, to the City noting that the report identifies “significant issues at the dam” that may require “immediate risk reduction measures” while a long-term plan for the dam is being developed. (See correspondence between the City and EGLE, available at this link, p 61 of 91: <https://www.cityofwhitecloud.org/wp-content/uploads/2025/05/05.19.25-Spec.-Council-Mtg.-Resident.pdf>.) EGLE noted that the feasibility study found that the dam does not possess sufficient capacity to pass a 200-year storm event without overtopping, and even a 100-year storm event would nearly overtop the dam with all of the stoplogs removed. (Correspondence, p 61 of 91.) It also noted that the feasibility study “raises significant concerns with the stability of the dam.” (Correspondence, p 61 of 91.) Based on these findings, EGLE ordered the City to develop a high-level plan and schedule with deadlines by which it would take short-term and long-term remedial actions, plan for interim risk reduction measures (short term actions to reduce the risk of dam failure), and finalize a long-term plan to remedy the issues with the dam. (Correspondence, p 62 of 91.)

The City consulted with its dam safety engineer and, based on that consultation, responded to EGLE’s letter on April 15. (Correspondence, pp 47-50 of 91.) The City’s response indicated that it would host a community forum in June to discuss its engineer’s recommendations, finalize its decision on interim risk reduction measures by August 31, and submit a finalized long-term action plan by November 3, 2025. (Correspondence, p 48 of 91.) The City’s response included a letter to the City from its engineer which recommended an immediate drawdown of the impoundment (White Cloud Lake). (Correspondence, pp 55-60.)

Michigan law requires that, if a dam owner’s engineer finds a condition that endangers a dam, EGLE is required to order the dam owner to take actions necessary to alleviate the danger. MCL 324.31518(7). Based on that requirement, on April 18, EGLE issued an order requiring that the City take action on an expedited schedule. (Correspondence, pp 43-45.) Specifically, EGLE ordered the City to apply for a permit to draw down the impoundment by 6 to 7 feet within two weeks and then initiate the drawdown when authorized to by EGLE. The new order also significantly expedited the City’s timelines for developing schedules and plans for short-term and long-term remedial measures.

If a dam owner does not initiate a drawdown when directed by EGLE, the law allows EGLE to conduct the drawdown itself and then charge the dam owner to recoup its costs, including filing a lawsuit if necessary. MCL 324.31521(1). EGLE has signaled its intent to go this route if the City does not conduct the drawdown voluntarily.

In response to EGLE, the City consulted its legal counsel as well as outside counsel with experience in Michigan’s dam safety laws. The simple truth is that, if the City does not comply, it could face

significant legal liability. In addition to facing a potential lawsuit if EGLE conducts the drawdown itself, the City could also face liability for violating EGLE's dam safety order. MCL 324.31524(1), (3). The penalties for violating Michigan's dam safety statute or an order issued by EGLE under that statute can include fines of up to \$10,000 *per day* of violation and can result in a court ordering the dam owner to perform the action ordered by EGLE. MCL 324.31525(1), (3). Additionally, violating the dam safety law or a dam safety order issued by EGLE can constitute a crime – a misdemeanor for the first violation and a felony for any subsequent violation. MCL 324.31525(5). Finally, in the event of a dam failure, the liability is very significant. In addition to the penalties under the dam safety law, dam failures typically result in liability under Michigan's water resources protection law and its inland lakes and streams law, which also carry potential civil and criminal penalties. MCL 324.3115; MCL 324.30112.

On the other hand, Michigan law is clear that the City is unlikely to be exposed to liability for drawing down the impoundment per EGLE's order. Michigan law is clear that, absent an express easement, a dam owner is not required to maintain or operate its dam in a manner that benefits property owners who benefit from the impoundment created by the dam. See *Goodrich v McMillan*, 217 Mich 630 (1922) (holding that, absent "peculiar circumstances," there is no right to require a dam owner to maintain an artificial condition of a body of water); *Pere Marquette R. Co. v Siegle*, 260 Mich 89, 93 (1932) ("There is no question but that defendants are not required to operate the dam for plaintiff's benefit"); *Terlecki v Stewart*, 278 Mich App 644, 660 (2008) (the right to operate a dam such that it flows water over another's land "does not extend to a reciprocal right to the servient estate to have the artificial water level maintained" and gives the other property owner/s "no right to insist on the exercise of the easement"). Therefore, absent what the Michigan Supreme Court called "peculiar circumstances" (usually an express written agreement requiring the dam owner to maintain an artificial water body in a certain way), the City is not legally required to maintain the level of White Cloud Lake as it has historically. And, even if such a written agreement did exist, it would be rendered void because it conflicts with Michigan law which, as set forth above, requires that the City draw down the impoundment. *Michelson v Voison*, 254 Mich App 691, 694 (2003) ("Contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void").

In our review, it is clear that the City, through City Manager April Storms, has exhausted all possible efforts to mitigate or prevent this situation. Unfortunately, the fact is that maintaining White Cloud Dam without a drawdown is impossible at this point. Michigan law requires that the drawdown take place to minimize the risk of a dam failure while the City develops its long-term path forward. To refuse to draw down the dam at this point would only result in EGLE performing the drawdown itself and then billing the City for it, and could result in the City having to pay fines.

Based on this, the City is required to draw down the impoundment while it determines the best next steps. To assist in facilitating the drawdown, we have spoken with EGLE as to a more cost effective and timely approach to the drawdown. The drawdown can occur as follows:

- EGLE will issue the drawdown permit upon confirmation that a company experienced with mussels has been retained to assist with activities necessary to assist with the drawdown. No further engineering coordination is necessary to obtain the EGLE permit.
- I have significant experience SreamsideEco, and they provided a quote to coordinate and oversee all efforts to rescue and relocate stranded native mussels and fish during anticipated 7-day drawdown schedule (+/- 1 ft of drawdown per day), inclusive of coordinating with EGLE to provide extra staff, etc., as conditions dictate of not to exceed \$15,000. EGLE will provide any additional staffing necessary to rescue/relocate stranded native mussels and fish.
- In speaking with EGLE and StreamsideEco, the drawdown will begin on Thursday, June 26th with the first stoplogs removed on Wednesday, June 26th to avoid any potential liability issues.
- White Cloud DPW staff will be available assist with the operation of the dam/drawdown during these activities (this can be coordinated with Streamside ECO).
- A condition of the permit will include a wetlands assessment that will be due by no later than October 1. Upon your request, I will be pleased to obtain a quote from StreamsideECO for these services.

Please contact me should you have any further questions.

Sincerely,



STACY L. HISSONG
MEMBER

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SLH/jas

Enclosure