



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of an Application by Margaret
Zerwekh to Abandon and Remove the Nemahbin
Roller Mill Dam

Case No.: IP-SE-2008-68-67868

and

An Order for Drawdown of the Impoundment
Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDERS AND PERMIT

Pursuant to due notice including publication, hearing was held on December 10-11, 2008, at Waukesha, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge, presiding. Pursuant to Wis. Stat. § 31.185(4), the Division deferred action on the request for abandonment for 120 days to allow for any "municipalities or other persons or associations" to acquire ownership of the dam. The 120 day waiting period expired on April 10, 2009, and the Division was not made aware of any such acquisition by any group or entity. The Division formally notified all parties and interested persons that the 120 day period had expired on April 13, 2009. The record closed on April 17, 2009, which was the last date to respond to an ex-parte letter submitted on April 7, 2009.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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Margaret E. Zerwekh
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Upper Nemahbin Lake Management District, by

Tim Mentkowski
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Named petitioners formerly represented by Attorney Paul Kent by,

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RULING ON MOTION TO DELAY DECISION

At the close of the hearing record, as well as in subsequent correspondence after the hearing from the City of Delafield, there were requests to delay issuance of the decision past the 120 day statutory waiting period. These requests are denied. The four month statutory period provides ample time for a decisive action to be commenced, if not always finalized, with respect to a change of dam ownership or effort to repair and or reconstruct the dam. As of the close of the record in this matter on April 17, 2009, no formal action to change the ownership of the dam has been started, nor is there any indication that such an action is imminent. Further, as set forth below in the Findings of Fact, DNR Dam Safety Engineer Bill Sturtevant was persuasive that concerns about dam owner liability in the event of a further failure argued against any further delay beyond the 120 day statutory waiting period. In addition to reasonable concerns about downstream liability, Sturtevant noted, the dam is very close to Ms. Zerwekh's home. Finally, environmental and water quality concerns argue for getting the project started during the growing season to facilitate re-vegetation. The motion to delay is, accordingly, denied.

FINDINGS OF FACT

1. On October 3, 2004, Margaret E. Zerwekh filed an Application for a Permit to Abandon and Remove the Nemahbin Roller Mill Dam with the Wisconsin Department of Natural Resources (DNR).
2. On June 18, 2008, the DNR issued Findings of Fact, Conclusions of Law and Order for Drawdown of the Impoundment Located on the Bark River in the City of Delafield, Waukesha County, Wisconsin.
3. On June 30, 2008, Raffi Shirikian, Lynne Olson, Gayle Gaborsky, Douglas and Joanne Prittie, Larry and Elizabeth Michels, Michael and Ann Gagliano, Alfred and Susan

Wagner, and Neil and Eileen Mooers filed a Petition for a Contested Case Hearing relating to the drawdown order. On July 16, 2008, the DNR granted the request for hearing.

4. On July 18, 2008, the Upper Nemahbin Lake Management District filed a Request for a Contested Case Hearing relating to the abandonment and removal of the Nemahbin Roller Mill Dam. On August 4, 2008, the DNR granted the request for hearing.

5. On August 7, 2008, the DNR forwarded both matters to the Division of Hearings and Appeals for hearing.

ABANDONMENT ADOPTED FINDINGS

6. The Nemahbin Roller Mill Dam is located on the Bark River in the NW ¼ of the NE ¼ of Section 19, Town 7 North, Range 18 East, in Waukesha County. The dam is approximately 400 feet long and has a structural height of 14 feet.

7. The Bark River is a navigable waterway. It is identified as a “Fish and Aquatic Life Water” of the state in NR 102 Wisconsin Administrative Code and supports a warm water sport fishery.

8. The Nemahbin Roller Mill Dam was originally constructed around 1839. The dam was used to power a sawmill and later a feed and flourmill. The current owner obtained the dam in 1949, began restoring the powerhouse, and by 1980 was using it to produce electricity.

9. On October 3, 2004, the owner of the Nemahbin Roller Mill Dam, Margaret Zerwekh, applied to abandon the dam.

10. The Department conducted sediment sampling within the Nemahbin Roller Mill Dam impoundment on June 14, 2006. The results of the sampling showed that arsenic was present at levels higher than typically found in Southeast Region waterways, but below the Probable Effect Concentration. No other appreciable contaminant levels were identified.

11. On June 3, 2008, the Department of Natural Resources issued a press release announcing the availability of a draft Environmental Assessment on the abandonment and removal of the Nemahbin Roller Mill Dam. The notice stated that written comments should be provided to the Department of Natural Resources by July 3, 2008.

12. During a period of high water, the headrace gate failed on June 11, 2008, rendering the dam’s only low level drain inoperable. The Department issued a safety drawdown on June 18, 2008.

13. The Nemahbin Roller Mill Dam does not meet the design standards in Administrative Code NR 333, Dam Design and Construction Standards, nor does it meet the definition of a compliant dam in NR 116, Wisconsin’s Floodplain Management administrative code.

14. The dam, in its present condition, does not have sufficient spillway capacity, is unsafe, and is a danger to life, health and property.

ADDITIONAL FINDINGS OF FACT

15. The applicant has carried her burden of proof sufficiently to receive the dam abandonment permit, subject to the conditions specified by the DNR and additional conditions that the petitioners have demonstrated are reasonable and necessary to safely abandon the dam.

16. The DNR has carried its burden of proof with respect to the drawdown order.

17. DNR Water Management Specialist Andy Hudak coordinated preparation of an extensive Environmental Analysis (EA) of the proposed abandonment of the Roller Mill Dam. (Ex. 8a) The environmental review concluded that the overall impact of the dam removal would have a positive impact upon the Bark River.

Hudak provided testimony that supported the conclusions of the EA, and specifically opined that dam removal would not have a detrimental impact upon “public rights in navigable waters” within the meaning of § 31.185(5).

Specifically, removal of the dam will reintegrate upstream and downstream fish populations on the Bark River, opening up additional habitat for fish and other aquatic life species that have been blocked by the dam.

Hudak concluded as follows:

“Reductions in sedimentation will cause improvements in the quality of physical habitat and convert the substrate back to its natural condition of a sand and cobble stream bottom. Most benthic invertebrates require this rocky substrate. These invertebrates are an important food source for fish. Many fish species also prefer these rocky bottom conditions for spawning and feeding. Native species and most sport fish exhibit lowered vitality and productivity under the stresses of increased turbidity, lowered water quality, and scarcity of suitable habitat. Other, generalist types of species, such as carp, are unaffected or actually flourish despite these adverse effects and often dominate the fish community in impoundments.

The removal of the Nemahbin Roller Mill dam will improve dissolved oxygen levels and decrease the water temperature in this reach of the Bark River. The removal will also eliminate the artificial warming caused by the impoundment. These effects should have positive impacts on fish and aquatic fish.”

18. Any adverse impacts associated with this project are expected to be short-term in nature. These adverse impacts include turbidity in the waterway, soil disturbance and human activity near the dam site. These adverse impacts will be only those which are unavoidable and occur despite control measures. Unavoidable turbidity effects should not occur during the

spawning period when fish are most vulnerable. There should be no significant impacts in terms of temperature.

Short-term adverse impacts associated with the conversion of the Millpond into a free-flowing stream may affect wildlife which currently use the pond, including ducks, herons, turtles and frogs, muskrats, and raccoon. There are substantial areas of wetland adjacent to the project area along the Bark River that will provide adequate habitat for wildlife displaced from the Millpond during dam removal. The adverse impacts may affect some individuals, but will have no significant long-term impact on the overall numbers, the reproductive capability, or the success and stability of the species or regional populations as a whole.

Long-term effects on the riparian and aquatic system should be highly beneficial. Improvements will occur in physical characteristics, which in turn will create ecological and biological benefits. The Millpond will revert back to a natural sandy-cobble substrate characteristic of the Bark River, providing additional habitat for riverine forms of aquatic life. (Ex. 8a)

To ensure that the transition from short-term adverse impacts to the long term benefits is as smooth as possible, the final plans should include objective standards for re-vegetation over the intermediate period, which will likely be several growing seasons. Some seeding of areas has occurred, but the existing ground cover needs to be enhanced with a final planting plan that emphasizes native plant species that provide habitat value. (Thompson; Montgomery)

19. DNR dam safety engineer Bill Sturtevant testified that he has been involved in more than 50 dam abandonment permits and that the Department has gained insights into sequencing and final construction issues. A slow drawdown allows for consolidation of sediments, gradual re-vegetation, settling of sediments particularly in wetland areas, and floodplain controls. (Sturtevant) Sturtevant testified that the DNR will provide considerable support in downstream monitoring efforts.

20. Sturtevant was persuasive that concerns about dam owner liability in the event of a further failure argued against any further delay beyond the 120 day statutory waiting period. In addition to reasonable concerns about downstream liability, Sturtevant noted, the dam is very close to Ms. Zerwekh's home. Finally, environmental concerns argue for getting the project started during the growing season to facilitate re-vegetation.

21. Removal of the dam will not have a detrimental impact upon wetlands. The wetland area near the site is likely to increase after the Roller Mill dam is fully removed. (Reed) The wetland functional values, particularly for water quality protection and surface water runoff storage and filtering, will also be enhanced. (Reed) Wetland scientist Alice Thompson testified on behalf of dam removal opponents. She expressed concern that there would be a net loss of wetland acreage because the former pond itself was largely a wetland and that it had high functional value for recreational and aesthetic uses. (Ex.224) Further, species dependent upon open water pond habitat would suffer a loss of habitat area. This loss must be balanced with the improved fishery values and improved habitat for fish and mollusks and other invertebrates

discussed below. Finally, Sturtevant opined that wetland areas in other dam removal projects ultimately provided new and enhanced recreational opportunities along the river.

22. The complete removal of the dam will have a positive impact upon fishery values. (Beyler) The drawdown has resulted in some significant short term sediment release. However, the overall impact of the drawdown is likely to be positive over the long-term as the free flowing river allows numerous fish species to pass. Ms. Beyler provided undisputed expert testimony that fish habitat values are likely to improve after dam removal, particularly in the half-mile section near the impoundment. (Id.) Further, dam removal will also improve habitat and opportunities for mussels and other freshwater mollusks, as will the expected improvement in water quality. (Id.) Under controlled conditions, sediment is especially likely to be deposited in quieter and shallower areas and may actually improve habitat values for some species. (Id.)

23. It would be fundamentally unfair to require the applicant to clean up and monitor the entire Bark River below the dam. (Sturtevant) However, the petitioners have demonstrated that there is a significant risk of the proliferation of harmful invasive plant species after dam removal. The Division concludes that the permit should contain a new condition which requires monitoring for invasive species and for sedimentation, limited to on-site areas directly subject to the control of the applicant. (Condition 8)

The DNR testified at hearing that it would reasonably expect to undertake monitoring on off-property areas after full dam removal has been accomplished. It is expected that the City of Delafield will also be kept informed of (and included, with City approval) in some of these efforts in the areas owned by the City, including the riparian area near Cushing Memorial Park that lies at the eastern edge of the former mill pond area.

24. Given the proximity of Upper Nemahbin Lake a short distance downstream, it is important to minimize sediment transport to the extent that is possible. Some sediment release is to be expected and is part of the natural process of a riverine system. However, all care should be taken to avoid a massive release of sediment that would have a detrimental impact upon Upper Nemahbin Lake water quality.

25. This order is to allow abandonment of the dam. Given the expense of drafting detailed plans, the DNR does not require final dam removal plans until a decision has been made on whether or not the dam can be abandoned. (Sturtevant) Preliminary engineering design plans for the removal of the dam have been prepared by Interflure, Inc., a well known river restoration design firm. (Ex. 111)

26. The final dam removal plans shall address in detail all of the following and shall be subject to approval by Department staff:

- Drawdown Plan
- Material Removal Plan
- Erosion Control Plan
- Sediment Stabilization Plan

- Planting Plan
- Floodplain Analysis
- Stream bank Stabilization Plan
- Existing and Proposed Grades
- Construction and Post-Construction Sequencing
- Site specific analysis
- On-site post-construction monitoring, including but not limited to : invasive species control, objective re-vegetation standards, sedimentation stabilization and other physical or biological conditions requested by Department staff (Id; Exs. 8a and Ex. 222; Hudak; Sturtevant; Montgomery)

DISCUSSION

There is no question that the loss of the Nemahbin Pond will be difficult for the petitioners who have organized to oppose the dam abandonment. They spoke eloquently and with conviction about how their families and friends have enjoyed the pond for many years, as well as of their sincere desire to contribute financially to reconstruction of the dam if the applicant chose to pursue it. However, Ms. Zerwekh, for very sound reasons of her own, has not chosen to do so. Instead, she has maintained her right to pursue abandonment of the dam which she and her late husband have heroically maintained for nearly sixty years. After all of those years, Ms. Zerwekh is understandably tired of the responsibility of maintaining the dam and of protecting her assets against its potential liabilities.

Ms. Zerwekh is also looking forward to restoring the river to its natural state. But her reasons for pursuing abandonment are not really at issue in this case. The only issue is whether or not the abandonment meets state standards for doing so. Ms. Zerwekh has established that it does, so long as it is undertaken in accordance with the conditions described below.

The experts for the opponents raised reasonable concerns about the release of accumulated sediment, the impact on wetlands and the ability of the applicant to bear the high cost of doing the dam removal in an environmentally responsible manner. There is no question that some sediment will be released during final dam removal. It is expected that the final plans will minimize any short-term detrimental impact upon water quality in downstream areas.

However, the great weight of the evidence was that the long-term effects of dam removal on public rights in the riparian and aquatic system should be highly beneficial. Given the likely long term benefits of dam removal, the balancing of public rights in public waters clearly supports issuance of the permit to abandon the dam. Further, Ms. Zerwekh has operated the dam in a highly responsible way that benefited the public interest for many years. There is every reason to expect that she will undertake the dam removal in the same manner.

Based upon the record made at the hearing, the Division has added three new conditions to the original DNR permit. First, a requirement for the dam owner to monitor her 15-acre parcel to protect against introduction of invasive species, to control sediment release, and to monitor any other physical or biological condition deemed a concern by DNR staff. (Sturtevant) Second,

a specific requirement for a new planting plan which includes objective performance standards (i.e. targeted percentage of cover) and which emphasizes native species with habitat value. (Thompson & Montgomery) Finally the final permit contains a requirement for construction (Hudak) and post-construction (Montgomery) sequencing and final plans.

While it is outside the scope of this review of the draw down order and dam abandonment permit, it is hoped that the parties and interested entities, including if necessary the City of Delafield, will work cooperatively to resolve any issues related to preserving or establishing riparian rights for the properties along the former Mill Pond. To the extent practicable, the final plans should make every effort to maintain existing riparian Bark River access for the affected properties.

The conditions set forth below are reasonable and necessary to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43 and 31.185 to hear contested case relating to permits to abandon dams and cases relating to drawdown orders pursuant to Wis. Stat. § 31.19(5).

2. Wisconsin Stat. § 31.185(4):

Prior to the hearing the department shall have its staff make its own investigation of the dam and, on the basis of such investigation, shall make recommendations as to the type of requirements, if any, which it would impose on the applicant under sub. (5) as a condition to granting the permit. Such recommendations shall be presented at the hearing. If no one registers opposition to the application at the hearing, the department shall grant the permit, subject to such conditions as it deems necessary under sub. (5). If someone registers opposition to the abandonment at the hearing and such opposition is not withdrawn, the department shall defer action on the application for a period of 120 days after the hearing. Within a reasonable time after the expiration of such period, the department shall deny the permit, or grant the permit, subject to such conditions as it imposes under sub. (5), unless, within such 120-day period, one or more municipalities or other persons or associations have agreed to acquire ownership of the dam and have furnished satisfactory proof of intent to comply with s. 31.14 (2) or (3).

The 120 day waiting period has run as of April 10, 2009. No municipalities or other persons or associations have agreed to acquire ownership of the dam.

3. As a prerequisite to the granting of a permit under this section, the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property. Wisconsin Stat. § 31.185(5)

The conditions set forth below are necessary to accomplish the objectives described above.

4. A dam abandonment is a Type 2 action pursuant to NR 150.03(f)(7)(a). The DNR prepared an Environmental Assessment (Ex. 8) and has complied with the procedural requirements of WEPA in this matter.

ORDERS

WHEREFORE, IT IS HEREBY ORDERED, that the dam be declared abandoned, and that the removal of the dam be permitted to the owner specified above;

IT IS FURTHER ORDERED, that the owner of the Nemahbin Roller Mill Dam must develop final plans and specifications for the removal of the dam subject to the permit conditions specified below and approval by DNR staff:

CONDITIONS

1. The dam must remain in a drawn down condition until plans for the removal have been approved.
2. The owner will obtain the services of a Professional Engineer (PE) registered in the State of Wisconsin to develop the required plans and specifications for the removal of the dam and restoration of the Bark River.
3. The plan must be submitted within six months of the date of this order.
4. The plan must include best management practices and techniques to remove or stabilize existing sediment deposits and control transportation of material to the maximum extent practicable.
5. Construction site erosion control technical standards and best management practices must be followed.
6. The plans must include the complete removal of all concrete, metal and wood portions of the dam and the removal of portions of the earthen embankment to the extent necessary to pass the regulatory flood.
7. Demolished dam materials must be disposed of properly.
8. On-site monitoring plans for invasive species, control of sediments and any other physical or biological conditions requested by DNR staff.

9. A planting plan that emphasizes native species with habitat value and that includes objective standards of re-vegetation performance.

10. Construction and post-construction sequencing and final plans.

Dated at Madison, Wisconsin on April 21, 2009.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.