



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

In the Matter of the Application of Art Beisang to
Place a Pier on the Bed of Lake Superior in the
Town of Russell, Bayfield County, Wisconsin

Case No. IH-12-07
(Permit No. IP-NO-2008-4-71964)

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Washburn, Wisconsin on May 9, 2012, Jeffrey D. Boldt, administrative law judge presiding. The parties requested oral closing arguments, which were heard on May 29, 2012.

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

Art Beisang
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North Oaks, MN 55127

Wisconsin Department of Natural Resources, by

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DNR
P.O. Box 7921
Madison, WI 53707-7921

Red Cliff Band of Lake Superior Chippewa Tribe (the Red Cliff Band), by

Attorney Jack A. Carlson
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122 West Bayfield Street
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FINDINGS OF FACT

1. Art Beisang has filed an application to place a pier on the bed of Lake Superior, located in the Town of Russell, Bayfield County, also described as part of the SE ¼ SW ¼ S20, T51N, R03W.
2. The project will consist of installing a rock filled crib pier on the bed of Lake Superior. The pier will be 62 feet long and 12 feet wide, with a 40 foot long “L” extension at the end of the pier.
3. A Public Hearing was held on April 19, 2009 at the Red Cliff Casino. The Public Hearing was held at the request of the Red Cliff Band of Lake Superior Chippewa (the Red Cliff Band). The Public Hearing was noticed in the Ashland Daily Press.
4. The project is located within the Red Cliff Reservation, between Buffalo Bay and Schooner Bay, and in an area historically subject to subsistence fishing by Red Cliff Band tribal members pursuant to treaty rights. Another historic use of area waters includes tribal commercial fishers who leave from Buffalo Bay to fish just offshore of the proposed pier location and in throughout the Apostle Islands National Lakeshore.
5. There are currently fairly significant shoreline erosion problems at and near the proposed pier placement site location. The near shore currents along this stretch of Lake Superior move from south to north. The existing dock at the nearby Dittman property, located immediately to the south, is accumulating excessive sediments which have required dredging on the south side of the Dittman dock. The bluff on the Beisang property is unstable at two locations. (See: Ex. 3, p.3-4) The DNR recognized these problems in the proposed permit it issued, and required that an engineering evaluation of erosion issues at the site be completed prior to construction of the pier and further requiring implementation of erosion mitigation plans recommended by the engineer within three years of installation of the proposed pier. (Ex. 34) However, at hearing, retired DNR water resources expert John Spangberg testified that it was unclear if the Department had jurisdiction to require such implementation because the two worst erosion problem areas on the bluff were not directly proximate to the proposed pier placement location.
6. The Red Cliff Band provided largely undisputed expert testimony relating to the likelihood of the build-up of sediment that would result from placement of the proposed pier at this site. (Exs. 3 and 6) Tribal Environmental Program Manager and Health Specialist Jacob Maas and Fisheries Manager Chad Abel took sediment samples using 2.5” PVC piping at 5 sampling locations in August, 2011. Layers of sediment were observed and recorded and then bagged and sent to Prof. Fitz at Northland College for lab analysis. They concluded that attempts to mitigate for the deposition of fine sediments through pass through designs would have little benefit because the source of the sediments is due to shoreline instability at the location of the proposed pier. (Maas; Abel; Ex. 3, p.13) Both tribal experts concluded, after an extensive and detailed review of the

project area and surrounding properties, that any pier placed in the area, regardless of design, would exacerbate existing shoreline sedimentation problems to the detriment of water quality and mussel habitat by inhibiting the area from obtaining a natural equilibrium of sediment deposition particularly in light of continuing erosion problems on the applicant's property. The applicant did not carry his burden of proof in demonstrating that the proposed pier will not have a detrimental impact upon sedimentation in and around the proposed pier.

7. During the course of US Fish and Wildlife and tribal efforts to identify aquatic species in and around the project area some unusual mussels, perhaps representing a new clade of Giant Floaters *Pygandon grandis*, were identified by Minnesota DNR Malacologist Bernard Seitman. There are no endangered or threatened species of mollusks in the immediate project area. However, increases in sedimentation in water bodies are often cited in scientific literature as a primary reason for declines in mussel populations. (Ex. 3, p.15)

8. There was no testimony that the project would have any adverse impact upon the commercial fishery or upon fishery values as a whole. However, the public waters near the project site have been part of an area which tribal members have historically used for subsistence net fishing. This historic use is an important consideration when analyzing the project in terms of the balancing of public and private rights under the public trust doctrine.

Numerous tribal members expressed detailed concerns about the perceived impact of previous piers on subsistence tribal fishers. Mr. Defoe testified that he is a member of the fish clan, a family band within the tribe which takes particular responsibility for maintaining the fishery in historic tribal waters. George Newago testified that he has been fishing area waters for 45 years, and would often set nets right near the proposed pier location. Further, he noted that his own subsistence fishing provided fish for up to 20 tribal families. Mr. Newago emphatically made the point that there was a marked decline in the subsistence fishing after piers were placed near Roy's Point. His own take went from an average of 100 to 150 pounds of fish in a night down to less than 10 pounds after the pier was placed in recent year. Mr. Defoe confirmed that he and others had experienced the same marked decline near the recently installed piers near Roy's Point.

DNR Lake Superior Fisheries Manager Peter Stevens testified that there has been no aggregate loss in the total catch by subsistence fishers in the area after placement of the piers. However, Stevens did offer a plausible theory for that may explain why tribal fishers may have experienced the localized decline in areas proximate to newly placed piers. Fish may simply be orienting themselves to the pier rather than to the shore and this may mean that they are present but outside the area where the subsistence nets are placed. (Stevens) While this would not result in a decline of the fishery as a whole, it seems apparent that it might likely have a detrimental impact upon the historic use of the public waters for subsistence fishing by tribal members authorized by treaty to use nets in near shore areas.

The applicant has not carried his burden of demonstrating that placement of the proposed pier will not have a detrimental impact upon subsistence net fishery users and values at the proposed project site.

9. Placement of the pier would result in some detrimental impact to natural scenic beauty but not sufficient to warrant denial of the permit for this reason alone. The project area is largely undeveloped. Former DNR Area Water Management Specialist John Spangberg testified credibly that the DNR has focused its efforts with respect to natural scenic beauty on keeping the red cliff areas (from which the tribe takes its name) as pristine as possible. Further, that the proposed project site did not include any of these red cliffs and this contributed to his conclusion that direct impacts to natural scenic from the proposed pier were not a sole and sufficient basis to deny the permit. The applicant has carried his burden of proof on this point.

10. Former DNR water resources expert John Spangberg testified that there had been a large increase in the number of piers placed in this area around Lake Superior but that there has been some drop off since the 2008 economic downturn. Prior to the Great Recession, pier placement had increased exponentially. He noted that so many piers were placed on Madeline Island that many locals now referred to it as Porcupine Island because of the unsightly piers that jutted out from its edges. There may well be some detrimental cumulative impacts to natural scenic beauty from a new proliferation of individual piers in this relatively undeveloped area of Lake Superior. (Abel; Maas) However, for purposes of the instant hearing, there was not a sufficient showing by the Red Cliff Band that there were likely to be numerous new pier applications in the proposed project area to warrant denial of the permit solely on the basis of likely detrimental cumulative impacts.

11. The applicant has not carried his burden of establishing that the proposed pier project would be not detrimental to the public interest in navigable waters.

12. The structure or deposit would not “materially obstruct navigation” within the meaning Wis. Stat. § 30.12(3m)(c)1. There was no testimony that proposed pier would materially impede any existing navigational uses in the project area. (Spangberg)

13. The proposed project has been evaluated under the Wisconsin Environmental Policy Act (WEPA), and it has been determined that the grant or denial of the permit would not be a major state action under WEPA. (Ex.34)

DISCUSSION

The applicant for a Chapter 30 permit has the burden of proof in a contested case proceeding. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 587, 412 N.W.2d 505, 508 (Ct. App. 1987) In the instant case, the applicant has simply not carried his burden of demonstrating that the project would not be “detrimental to the public interest” with respect to three issues.

The Red Cliff Band raised five significant issues and presented expert testimony relating to: 1.) likely detrimental impacts relating to increased sedimentation significant enough to require maintenance dredging especially given, 2.) existing erosion problems at the site; and further, 3.) a likely localized detrimental impact on the historic public use by tribal members for subsistence net fishing; 4.) detrimental impacts on aquatic species; finally, 5.) the likely cumulative impacts to natural scenic beauty from a proliferation of similar piers in the area. There was insufficient testimony on behalf of the applicant to overcome any of the first three detailed concerns raised by the tribe. Nor did the Department's proposed permit condition #13 give adequate assurance that existing erosion problems at the site would be remedied any time soon. The Red Cliff Band did not offer a sufficient basis to conclude that there was likely to be a proliferation of new piers sufficient to prove its case relating to detrimental cumulative impacts. The only aquatic species which the tribe demonstrated would be detrimentally impacted by the project was a localized impact to mussel populations from the increased sedimentation in and around the pier site.

It should also be noted that the project appears to be at odds with the tribe's shoreline zoning regulations. (Ex. 12) The Division does not have jurisdiction to sort out whether or not the tribe has specific legal authority to regulate piers within reservation lands. In general the placement of piers is governed by state law and Chapter 30, Stats. However, what is clear is that relevant local zoning ordinances can be considered for purposes of establishing the public interest in public waters under Chapter 30. In *Sea View Estates Beach Club, Inc. v. DNR*, 223 Wis. 2d 138, 588 N.W.2d 667 (Ct. App. 1998), 97-3418, the Wisconsin Court of Appeals held that an ALJ could consider local zoning ordinances in connection with the public interest balancing under the public trust doctrine.

However, unlike the County zoning ordinance in *Sea View*,¹ the tribe's zoning documents were not put into the record in this matter and the ALJ does not have the

¹ The Court of Appeals held: *Although the standards for issuing a permit under § 30.12(2), STATS., do not specifically include compliance with local zoning ordinances, we are not convinced that the DNR or an ALJ may not review local ordinances in making permit determinations pursuant to § 30.12(2). Rather, we hold that the ALJ properly considered the ordinance in an effort to establish the public interests at stake.*

In Sterlingworth, we noted that the policy factors demonstrating the public interest included "the desire to preserve the natural beauty of our navigable waters, to obtain the fullest public use of such waters, including but not limited to navigation, and to provide for the convenience of riparian owners." Sterlingworth, 205 Wis.2d at 724-25, 556 N.W.2d at 796 (quoting Hixon v. Public Serv. Comm'n, 32 Wis.2d 608, 620, 146 N.W.2d 577, 583 (1966)).

As suggested by the ALJ, such public interest concerns mirror the purposes of the ordinance, which include: (1) maintaining the safe and healthful conditions of the water, (2) protecting spawning grounds and aquatic life, (3) controlling the placement of structures and land uses, (4) preserving shore cover and natural beauty, and (5) promoting the general attractiveness and character of the community environment. See WAUKESHA COUNTY, WIS., SHORELAND &

benefit of knowing whether the specific purposes of the ordinance are consistent with the ‘factors demonstrating the public interest’ identified by the Wisconsin Court of Appeals in *Sea View Estates* and *Sterlingworth*. Accordingly, the Division does not rely upon the ordinance for purposes of determining whether the project is consistent with the public interest.

But a preponderance of the evidence made it clear that project proponent has not carried his burden of proof in demonstrating that there would not be a detrimental impact to the public interest in the public waters at the site.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) and Chapter 30.12 (3m) to hear contested cases and issue necessary Orders relating to individual permit requests.
2. The applicant for a Chapter 30 permit has the burden of proof in a contested case proceeding. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 587, 412 N.W.2d 505, 508 (Ct. App. 1987)
3. The applicant has not carried his burden of demonstrating that the project would not be “detrimental to the public interest” within the meaning of § 30.12(3m)(c)2.
4. The applicant has not shown that the structure would not be detrimental to the public interest in public waters because of the likelihood of a build-up of sediment at the project site.
5. The applicant has not shown that the structure would not be detrimental to the public interest in public waters because of the likelihood of detrimental impacts to subsistence net fishing undertaken pursuant to treaty rights.
6. The applicant has not demonstrated that there would not be detrimental cumulative impacts to the public interest in natural scenic beauty if numerous piers are placed in nearby relatively undeveloped areas.
7. The structure or deposit would not “materially obstruct navigation” within the meaning Wis. Stat. § 30.12(3m)(c)1.
8. The structure or deposit will not materially reduce the flood flow capacity of a stream within the meaning Wis. Stat. § 30.12(3m)(c)3.

FLOODLAND PROTECTION ORDINANCE § 1.02 (1995) (hereinafter ORDINANCE).

Thus, we conclude that the ALJ appropriately considered the ordinance in its determination of the public interest.

9. The proposed project has been evaluated under the Wisconsin Environmental Policy Act (WEPA), and it has determined that the grant or denial of the permit would not be a major state action under WEPA.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the application for a permit be DENIED, as the applicant has not carried his burden of proof that the project complies with statutory requirements.

Dated at Madison, Wisconsin on July 27, 2012.

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.