



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

---

In the Matter of the Application of Richard Resch  
for a Permit to Place a Wind Turbine on an  
Existing Solid Pier on Green Bay, Town of Green  
Bay, Brown County, Wisconsin

---

Case No. IP-NE-2010-5-05480

**FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER**

Pursuant to due notice, hearing was held at Green Bay, Wisconsin on January 24, 2012, Jeffrey D. Boldt, administrative law judge presiding.

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

Richard Resch, by

Attorney Jodi L. Arndt  
Liebmann, Conway, Olejniczak & Jerry, S.C.  
P. O. Box 23200  
Green Bay, WI 54305-3200

Department of Natural Resources, by

Attorney Jane Landretti  
DNR  
P. O. Box 7921  
Madison, WI 53707-7921

Robert G. Bush  
3062 Bay View Drive  
Green Bay, WI 54311

Julie Rice  
5759 North Shore Acres Road  
New Franken, WI 54229

## FINDINGS OF FACT

1. Richard Resch, P. O. Box 1800, Green Bay, Wisconsin, 54308, filed an application with the Department of Natural Resources (Department) on December 12, 2010, for a permit to place a wind turbine (Windspire) on an existing circular solid pier on Green Bay. The proposed project is location in the NE ¼ of the SE ¼ of Section 14, Township 25 North, Range 22 East, Town of Green Bay, Brown County.

2. On July 7, 2011, the Department denied the application from Richard Resch. On August 2, 2011, the Department received a petition for a contested case hearing from Attorney Jodi L. Arndt on behalf of Richard Resch. On October 6, 2011, the Department granted a contested case hearing pursuant to Wis. Stat. §§ 30.209 and 227.42 and Wis. Admin. Code §§ NR 2.03 and 310.18.

3. On January 21, 2011, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

4. Green Bay is navigable in fact at the project location. On the base of an existing permitted circular pier on Green Bay, the applicant proposes to install a Windspire vertical axis small wind turbine. The product ranges in height from the 23 foot high Windspire Extreme, to the 30 foot tall Windspire Standard 1.2. (Ex. DNR 10) The turbine is gray or off white in color and is approximately 4.1 feet wide and 13 feet vertical in its power generating rotor unit. (Ex. 4) Based upon an average wind velocity of 11 miles per hour, the turbine can generate up to 2,000 kwh annually. (Id.) All power generated by the Windspire turbines are tied into the existing local power grid. (Ex. 4)

5. The addition of the proposed wind turbine structure on top of the existing structure and deposit will be “detrimental to the public interest” in the waters of Green Bay because it would have a detrimental impact upon natural scenic beauty. (Brand) DNR area water management specialist Jon Brand provided largely un-rebutted expert testimony that the introduction of the large metal turbine structure would have a detrimental impact upon the natural beauty of the area from both the public waters looking toward the shore and from the shore looking toward the waters. Brand noted that this is one of the last areas of the bay in the Green Bay area that has a mostly natural character, and therefore the structure is particularly out of place. Numerous neighbors agreed with both points and testified that their view of the natural character of the bay’s scenic beauty would be damaged by the placement of the large steel structure. Nearby neighbor Ms. Rice was persuasive that the project is out of character with the natural views of the water which she and her family currently enjoy from the near-shore area, from the water, and even from inside her home. (See: Ex. 44)

Brand also opined that the structure would meet the meaning of term “visually intrusive” as defined in Wis. Admin. Code NR 326. The white or gray color of the metal structure would stand out against the deciduous tree cover and other natural features of this area of the bay.

6. Further, Brand expressed particular concern about the potential detrimental cumulative impact of the placement of numerous such large metal structures along the shores of Green Bay. He created a 'photo-shopped' depiction of what the shore might look like with numerous similar structures placed along the bay. (Ex. 7) While this exhibit may overstate that detrimental impact because it does not show structures being placed upon existing piers, there is no question that the introduction of numerous such structures would have a detrimental impact upon the public interest in the natural beauty of the bay.

7. The Windspire turbine appears to be a great source of sustainable and non-emitting electric energy. Compared to many wind turbines, it is compact in size and apparently its design has less of an impact on birds and waterfowl than classic wind turbine rotors. It appears to be a great product, and it is commendable that Mr. Resch appears to be motivated by a sincere desire to reduce both his electric bills and his carbon footprint. However, this relatively pristine area of the bay is simply not the right location to place such a large metal structure, whatever its purpose. Notably, most of the pictures of the turbines presented by the applicant depicted the structure placed in more urbanized settings or near more developed shorelines. (Exs. 25-30)

## DISCUSSION

Nearly forty years ago the Wisconsin Supreme Court held that: "Specific structures may be determined to be detrimental to the public interest on the ground that they impair natural beauty. This is a proper basis for denial of a permit. The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy. It is entirely proper that that natural beauty should be protected as against specific structures that may be found to mar that beauty." *Clafin v. DNR*, 58 Wis.2d 182, 191, 206 N.W.2d 392 (1973)

This permit review fits squarely within the line of cases beginning with *Clafin*. The Department of Natural Resources has a duty to consider the impacts of a structure on natural scenic beauty and properly denied this permit request on the basis of the detrimental impact of this large structure on views of the bay from the water and from the near shore area. A preponderance of the credible evidence made clear that this otherwise promising and environmentally-friendly product is too large and visually intrusive and out of character to be placed on the applicant's pier given the relatively undeveloped nature of the bay in this area.

## 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) The applicant has not carried his burden of demonstrating that the project would not be “detrimental to the public interest.”

3. The structure or deposit would not “materially obstruct navigation” within the meaning Wis. Stat. § 30.12(3m)(c)1.

4. The structure or deposit will be “detrimental to the public interest” within the meaning Wis. Stat. § 30.12(3m)(c)2 because it would have a detrimental impact upon natural scenic beauty and would be visually intrusive in this relatively undeveloped area of the bay. See: *Clafin v. DNR*, 58 Wis.2d 182, 191, 206 N.W.2d 392 (1973)

5. "Visually intrusive" means clearly standing out from the shoreline background because of color or reflectivity when viewed from out on the water during the time when leaves are on deciduous trees. Wis. Admin. Code NR 326.03(13). The metal structure and gray and off-white color would stand out from the shoreline background in this area of the bay

6. 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.

7. 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 Department’s decision to deny the permit be AFFIRMED and the petition for review be dismissed.

Dated at Madison, Wisconsin on February 23, 2012.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 264-9885

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.