

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

In the Matter of the Denial of the Application of
Gary Glojek to Place a Structure on the Bed of
Green Bay, Village of Ephraim, Door County

Case No. DNR-13-014

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Sturgeon Bay, Wisconsin on November 21, 2013, Jeffrey D. Boldt, Administrative Law Judge presiding.

The applicant requested the opportunity to submit a written comment on an exhibit but did not do so before the required time frame in December, 2013.

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

Gary Glojek, by

Attorney Gary Glojek
Glojek Limited
612 West Greenfield Avenue
West Allis, WI 53214

Department of Natural Resources, by

Attorney Michael J. Kowalkowski
Attorney Megan E. Correll
DNR – Legal Services
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. Gary Glojek, 6212 West Greenfield Avenue, West Allis, Wisconsin, applied to the Department of Natural Resources (the Department or DNR) to place a structure on the bed of Green Bay, Village of Ephraim, Door County, Wisconsin. The proposed project is located in the NW ¼ of the NE ¼ of Section 12, Township 31 North, Range 27 East, Village of Ephraim, Door County, Wisconsin. The applicant proposes to construct a 75 foot long groin that would be six feet wide at the top (above the water) and 21 feet wide on the bottom (on lakebed) to protect boats moored at a proposed pier that would be exempt. The groin is proposed to start approximately 45 feet waterward of the ordinary high water mark.

2. By letter dated February 12, 2013, the Department denied Gary Glojek's application.

3. On March 8, 2013, the Department received a petition for a contested case hearing from Gary A. Glojek.

4. On March 20, 2013, the Department granted the contested case hearing request. On July 12, 2013, the Division of Hearings and Appeals received the Request for Hearing from the Department.

ADOPTED FINDINGS OF FACT

1. Gary Glojek, 6212 W. Greenfield Ave., West Allis, WI 53214, filed an application with this Department on 10/02/2012, under section 30.12(3m), Wisconsin Statutes, to place a structure on the bed of Green Bay, located in the NW1/4 of the NE1/4 of Section 12, Township 13 North, Range 27 East, Village of Ephraim, Door County.

2. The applicant proposes to construct a 75 foot long groin that is 6 feet wide at the top (above the water) and 21 feet wide on the bottom (on lakebed) to protect boats moored at a proposed pier that would be exempt. The groin was proposed to start approximately 45 feet waterward of the ordinary high water mark. The applicant stated that because the parcel is landlocked, there is no access to install sewer lines, a well, or to construct a building. The proposed dredging would be the only access for safe transport of a barge to bring equipment to the site for construction. The dredging portion of the application is being approved in a separate contract.

3. Green Bay is navigable in fact at the project site.

4. The project will be detrimental to the public interest in the navigable waters, for the following reasons:

- a. The proposed project would have a detrimental impact upon neighboring riparian owners by contributing to erosion down-drift of the structure and to accretion up-drift. A categorical Environmental Assessment was prepared by the Department on solid piers and groins in Door County (EA). The EA concluded that "decreased sediment transport and sediment accumulation against solid piers are potential consequences of blocking long shore currents and littoral drift. If beaches are robbed of their sediment supply, the beaches erode and the land behind the beaches may erode. Erosion of a shore adjoining a groin or solid pier is only partly due to interference with the long shore transport of sediment. Waves reflecting from the groin or pier will cause a focusing of wave energy on the shoreline adjacent to the groin or pier on the windward side of the groin or pier. Whether there is focused wave energy, there is greater potential for erosion."

- b. One neighbor would experience increased erosion on their shoreline, and the neighbor on the other side would see an increase in lakebed material and nuisance deposits due to the groin.
- c. The proposed project would have a detrimental impact on native shoreline vegetation and would aid in the proliferation of undesirable exotic species. Based on the sites with and without piers studies in the (EA) and subsequent observations, sites with solid piers have more exotic species than undisturbed sites without piers.
- d. The proposed groin would have a detrimental impact on natural scenic beauty. The proposed area is relatively free of other manmade structures and is in a natural state. There are no structures in the adjacent waterway for approximately 2,280 feet east of the proposed site, and approximately 1,830 feet to the west. The proposed groin would extend 3 feet above the water level, which would increase during low water conditions.
- e. The cumulative effects of repeated projects along the shoreline would significantly impact the biological community in the littoral zone.
- f. The cumulative impacts of this type of structure in natural areas similar to the proposed site would have a detrimental impact on the public interest in Green Bay.
- g. The area proposed for dredging and solid pier construction activities near Ephraim represents an area of Green Bay that is important to the life history stages of several species of game and forage fish. Bottom substrate in this area typically consists of cobble, rock, and rubble substrate; habitat that is very important to one or more of the life history stages of several species of game and forage fish. Many species spawn in the shallow waters of the littoral zone in this vicinity and a variety of juvenile fish use these littoral waters as a nursery area, prior to moving offshore as they grow and mature. Both adult and young life stages of many fish species rely on vertebrate and invertebrate species found in this littoral zone as a food source.
- h. WDNR fish surveys indicate an array of fish species are known to utilize this general area of northern Door County including smallmouth bass, walleye, northern pike, rock bass, yellow perch and several minnow species. Most prominent among these species in this area are smallmouth bass. Smallmouth bass depend on near shore cobble, rubble, and gravel substrate for spawning; where they build nests. Once young-of-year smallmouth bass are further developed, they will leave the nests and many will seek out rocky habitat in shallow areas for protection. Building permanent structures on these substrates will permanently destroy part of existing historical spawning and nursery areas ultimately leading to a reduction in potential spawning success for smallmouth bass. Smallmouth bass are a very popular sport fish in Door

County waters of Green Bay and their populations have demonstrated they are capable of maintaining themselves with the natural habitat available along the Door County shoreline.

- i. In addition to the direct loss of habitat, there will also be indirect losses as documented in the WDNR Environmental Assessment. The littoral drift characteristics of this area can be affected through interaction with the solid pier structure leading to disruption of the natural shoreline and lakebed. The resulting shift in sediment composition and deposition can cause changes in species distribution, diversity, and numbers of benthic organisms. By changing the nature of the near shore bottom material, the zones affected by the structure could see a loss of valuable spawning habitat for a variety of fish species. Also, newly hatched fish of some species are dependent on water currents for movement and interference by pier structures could impact natural dispersal. Spawning fish may no longer utilize the area because the enclosed area will be cut off from the adjacent shoreline. Disruption of this area through these activities will lead to loss of habitat that these fish depend upon. The potential exists for negative impacts to the overall fish community and a reduction in carrying capacity in the proposed area.

5. The applicant's alternative to the groin would be to dredge and construct a pier, and place a boat lift on the pier so that the boat would be protected from wave action during storm events. Another alternative is to winch the boat up to the shoreline via a track system and hoist which cradles the vessel out of the water.

6. The proposed project will not impact wetlands.

7. The project will not conform to the standards in Chapters 102 and 326, Wisconsin Administrative Codes. The mini environment created by solid structures prevents normal water exchange, increases water temperatures, and increases oxygen demand. The overall impact is reduced water quality. The groin will not prevent the deposition of littoral drift and would be an obstruction to navigation.

8. The proposed project will adversely affect water quality and will increase water pollution in Green Bay and will cause environmental pollution as defined in Subsection 283.01, Wisconsin Statutes.

9. The Department has evaluated the proposed project in light of the Wisconsin Environmental Policy Act (Section 1.11, Wisconsin Statutes) and has determined that the grant or denial of the permit would not be a major state action significantly affecting the quality of the human environment.

ADDITIONAL FINDINGS

10. There is an existing pier on the property which is exempt from any permitting requirement because its size and design allows water to flow through the structure. (Webb)

11. The applicant owns approximately 1020 feet of riparian frontage at the project site. The area contiguous to the proposed project site is largely undeveloped and has particularly strong natural scenic beauty features because it is at the base of a rocky escarpment. (Webb)

12. DNR Water Management Specialist Carrie Webb, retired DNR water resources expert Tim Rasman, and Fisheries Biologist Scott Hansen all provided unrebutted expert testimony that supported all of the Adopted Findings above. Further, the Department provided an extensive and well documented scientific record supporting its decision to deny the groin breakwater structure. (Exs. 5-33)

13. The petitioner applicant has not carried his burden of proof in this matter.

DISCUSSION

The DNR denied the application for the solid breakwater groin structure, and the applicant accordingly has the burden of proof in this proceeding. Wis. Stat. § 30.209(2)(e) Mr. Glojek did not present an expert witness to rebut the three knowledgeable and persuasive DNR expert witnesses who testified that placement of the solid breakwater would be detrimental to the public interest in Green Bay. He did not even offer the testimony of his own project engineer. The applicant is an attorney and surely understands that he has fallen well short of carrying his burden of proof in this matter. The DNR's denial was consistent with its longstanding practice of denying solid structures in undeveloped areas of Green Bay. The Department's decision to deny this permit is affirmed.

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

3. The breakwater structure will be "detrimental to the public interest" within the meaning Wis. Stat. § 30.12(3m)(c)2 for the reasons set forth in Finding # 4 above.

4. "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 large groin breakwater structure would stand out from the shoreline background in a visually intrusive manner in this undeveloped area of the bay.

5. The applicant is the petitioner in this matter because the Department denied the request for a Wis. Stat. § 30.12 permit to place the breakwater groin structure on the bed of navigable waters. In an administrative hearing for an individual structure permit granted under Wis. Stat. §30.209(2)(e) “the petitioner shall proceed first with the presentation of evidence and shall have the burden of proof.” The applicant petitioner has not carried his burden of proof of establishing compliance with the standards set forth in Wis. Stat. § 30.12(2)The applicant has not carried his burden of demonstrating that the project would not be “detrimental to the public interest.”

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 January 31, 2014.

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 served and 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.