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

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Application of Outagamie County Drainage  
Drainage Board for a Permit to Remove Material  
from 3 Miles of Drainage Streams that are  
Tributaries to Duck Creek, Town of Center,  
Outagamie County, Wisconsin

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Case Nos.: 3-LM-96-420 and 3-NE-98-205

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

The Outagamie County Drainage Board (Drainage Board) filed an application with the Department of Natural Resources on December 22, 1997, for approval to remove or dredge bottom materials from the bed of a tributary of Duck Creek. On April 27, 1998, the Department of Natural Resources issued an order denying the application. On May 20, 1998, The Drainage Board requested a hearing pursuant to sec. 227.42, Stats., to review the denial. By letter dated May 29, 1998, the Department granted the request for a contested case hearing. On December 23, 1998, the Department forwarded the file to the Division of Hearings and Appeals for hearing. Pursuant to due notice a hearing was held on March 16 and 17, 1998, in Appleton, Wisconsin, before Mark J. Kaiser, Administrative Law Judge.

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

Outagamie County Drainage Board, by

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Wisconsin Department of Natural Resources, by

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## FINDINGS OF FACT

1. The Outagamie County Drainage Board (Drainage Board) is a lawfully established drainage board under chapter 88, Stats. The Drainage Board operates the Outagamie Drainage District No. 6, also known as the Duck Creek Drainage District (DCDD). The DCDD was established by a court order dated November 21, 1925 (Ex. 27). Additional land was annexed to the DCDD by court order dated January 10, 1947. The DCDD currently covers 12,427 acres with 535 landowners in the Towns of Center, Freedom, Osborn, and Black Creek in Outagamie County. The DCDD includes the headwaters of Duck Creek, which discharges into Green Bay.

2. Prior to 1980, the Department of Natural Resources (Department) considered Duck Creek and its tributaries to be non-navigable so no dredging permits were needed for the proposed project. However, in 1980 the Department reversed its navigability determination and found Duck Creek to be navigable.

3. In 1980 the Drainage Board began a long-term project to perform maintenance dredging in the eight legal drainage districts in Outagamie County. The Drainage Board intended to dredge the drains in phases and applied for permits for individual projects. In 1996, in order to avoid the cost of multiple permits for each component of the overall project, the Drainage Board applied for a general permit for the entire project. On October 8, 1996, the Department issued a ten year dredging permit for the project (Permit No. 3-LM-96-420). However, a condition of the permit is that the Drainage Board obtain authorization for specific projects from the Department.

4. By application dated December 22, 1997, in accordance with the conditions of Permit No. 3-LM-96-420, the Drainage Board applied for permit to dredge an approximately three mile stretch of a waterway in sections 3 and 10 of the Town of Center. The waterway runs between Krueger Road and Highway 47. The proposed dredging would involve the removal of between 12,000 and 15,000 cubic yards of material.

5. On April 27, 1998, the Department issued an order denying the application.

6. The waterway which is the subject of this hearing has a defined bed and bank and is capable of floating a small watercraft on a regular reoccurring basis. The waterway is a navigable stream.

7. Prior to its status as a legal agricultural drain, historical records show a stream at the location of the waterway. This stream presumably was enlarged in order to improve drainage on adjacent farms. The historical records presented at the hearing do not show the depth or width of the stream so it is impossible to conclusively determine whether this stream was navigable. However, Michael Hanaway, the Department water management specialist for the area, testified that based on his review of available information, in his opinion, the stream would have been navigable prior to dredging. Mr. Hanaway's opinion is primarily based on his review of topographic maps to determine the amount drainage that would flow to the stream and soil

maps to estimate the amount of runoff that would flow to the stream after rain events. Mr. Hanaway's testimony is the only evidence in the record on this issue. Based on Mr. Hanaway's testimony it is found that the stream was navigable prior to dredging for use as an agricultural drain.

8. The subject waterway flows through an extensive wetland complex consisting of emergent marsh and forested swamp. These wetlands act in their natural state to store water during major storm and runoff events, trapping suspended sediments, nutrients, and agricultural chemicals. The project as proposed will drain, and therefore, minimize the natural functions of these wetlands and add to the pollution load carried by the stream.

9. The project as proposed will also result in more rapid water velocity. The increased water velocity will cause additional stream bank erosion and add suspended materials in the waterway.

10. The proposed project will adversely affect water quality and will increase water pollution in the subject waterway and in Duck Creek and will cause environmental pollution as defined in Subsection. 283.01(6m), Wis. Stats.

11. The storing and slow release of water in these headwater areas also diminishes the extent of flooding that will occur downstream, protecting the riparian owners downstream from loss of life and property during major storm events. The proposed project will adversely impact the ability of the waterway and adjacent wetlands to fulfil this function.

12. The subject waterway in its present condition drains relatively slowly retaining pools of water. These pools of water are important for supporting fish populations and other aquatic organisms. The proposed dredging will increase the rate at which stormwater drains through this area eliminating these pools of water. Elimination of these pools of water will adversely impact the fish habitat values of this waterway.

13. The subject waterway in its current condition provides a corridor supporting a wide variety of game and non-game birds, mammals, reptiles and macro-invertebrates. The proposed project, by increasing the rate of drainage along the waterway, will eliminate or significantly diminish the size of this corridor along much of the waterway. The proposed project will adversely impact the wildlife habitat values of this area.

14. The Department completed an environmental assessment of the project and determined that the proposed project is not a major action that would significantly affect the quality of the human environment and that no environmental impact statement was required (Exh. 49). The Department has complied with the procedural requirements of sec 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

## DISCUSSION

The Department denied the Drainage Board's application for a dredging permit for the waterway that is the subject of this hearing. The application was denied because the Department determined that the proposed dredging would result in adverse impacts to fish and wildlife habitat, would adversely impact wetlands, would adversely affect water quality and would increase water pollution. Pursuant to sec. 227.42, Stats., the Drainage Board requested a hearing to review the Department's determination. The Drainage Board has the burden of proof to show that the Department's determination should be reversed.

The Drainage Board did not seriously contest the findings made by the Department regarding the adverse impacts of the proposed dredging and those findings, for the most part, have been adopted in this decision. Rather the Drainage Board disputes the navigability determinations made by the Department. The Drainage Board relies on a letter dated September 6, 1974, sent by Frank Deringer of the Department. In the letter, Mr. Deringer advised the Drainage Board that Duck Creek was not a navigable stream and; therefore, no dredging permit was needed. This determination was issued prior to the Wisconsin Supreme Court's decision in DeGayner and Co. v. DNR, 70 Wis. 2d 936, 236 N.W.2d 217 (1975). Under the navigability test set forth in DeGayner, Duck Creek and the waterway that is the subject of this hearing are navigable.

The Drainage Board does not contest that under the DeGayner test Duck Creek and the subject waterway are navigable; however, during the hearing, the Drainage Board repeatedly argued that the Department's use of the DeGayner test to find this ditch navigable is a change in the law. In other words, the Drainage Board is arguing that the Department has administratively changed the definition of navigability to increase its jurisdiction over waterways. This is not the case, rather the Department had a definition of navigability that it used for making navigability determinations. The Court in DeGayner held that this definition was wrong and set forth the correct test. The Department then began using the test required by the court in DeGayner. The use of this test resulted in many waterways, which had previously been determined to be non-navigable, to now be found to be navigable. Because of this change in the navigability test, the Drainage Board feels it is being treated unfairly. One can understand why the Drainage Board feels this is unfair; however, this is not a change unilaterally imposed by the Department but rather by the Wisconsin Supreme Court. The Department is required to follow the holding in the DeGayner decision.

At the hearing, the Drainage Board also objected to statements by the Department that it would be required to have ditch profiles prepared for this waterway. This is a requirement of the Department of Agriculture, Trade and Consumer Protection, not the Department of Natural Resources. The Drainage Board is again upset because it feels that the rules for it are changing in a manner that will make it a lot more expensive for it to accomplish its goals. Again, one can understand why the Drainage Board feels this way; however, these are not changes imposed by the Department of Natural Resources but by the Department of Agriculture, Trade and Consumer Protection. These changes are the result of better understanding regarding hydrology and the role of drainage ditches, along with the impact of such projects on the environment.

The Drainage Board's primary argument is that the property owners along this drainage ditch are being treated unfairly because they have paid for dredging projects to improve drainage in other areas of the drainage district and now that it is their turn to have the ditch running through their property dredged the project is denied. This allegation is accurate; however, one can not blame the Department for this result. This denial is primarily the result of a change in our knowledge of the cost and benefits of drainage ditches. The cost of ditches in terms of harm to the environment is greater than previously understood and the benefit of such projects is less than previously believed. Accordingly, the laws regulating operation of drainage districts have been modified making it more difficult to obtain approval for dredging projects. Most of the benefit the Drainage Board is attempting to provide can be accomplished with minor projects, which will not have massive adverse affects on the environment. However, the Drainage Board, at this time, is not willing to work with the Department to look at these alternatives.

The other reason why the Drainage Board is not able to conduct business as usual is because of its resistance to operate within the new framework of regulation of drainage ditches. Rather than seek expert analysis which might have refuted some of the Department's findings or had the ditch profiles prepared which are necessary to proceed under chapter 88, Stats., the Drainage Board chose to argue about the change in the definition of navigability and recordkeeping requirements for drainage districts. The Drainage Board is arguing that it should be allowed to conduct its business as it did in the past rather than accept the new, and admittedly more costly, regulation of drainage districts now in place. The Department and the ALJ are bound to follow the provisions of sec. 30.20, Stats.

#### CONCLUSIONS OF LAW

1. Pursuant to the test for navigability set forth in DeGayner and Co. v. DNR, 70 Wis. 2d 936, 236 N.W.2d 217 (1975), the waterway which is the subject of this hearing is a navigable stream subject to the jurisdiction of the Department of Natural Resources.
2. Pursuant to sec. 30.20(1)(b), Stats., no person may remove any material from the bed of any stream without first obtaining a permit from the Department of Natural Resources.
3. Sec. 30.20(1)(c)1, Stats., exempts farm drainage ditches which were not navigable streams prior to ditching from the requirements of sec. 30.20(1), Stats. Based on the evidence in the record, the waterway which is the subject of this hearing was a navigable stream prior to ditching; therefore, this waterway is not exempt from the requirements of sec. 30.20(1), Stats.
4. Pursuant to sec. 30.20(2)(c), Stats., the Department may issue such a permit if the Department finds that the issuance of the permit is consistent with the public interest in the waters involved.
5. Pursuant to sec. NR 2.13(3)(b), Wis. Adm. Code, the Drainage Board has the burden of proof to show the issuance of the permit is consistent with the public interest. The Drainage Board has not satisfied its burden of proof.

6. Pursuant to sec. NR 150.03(8)(f)1, Wis. Adm. Code, the project is a type II action. The environmental assessment completed by the Department satisfies the requirements of sec 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of the environmental impact of the proposed project.

7. Pursuant to sec. 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority by its Administrative Law Judge to issue the following order.

ORDER

IT IS THEREFORE ORDERED that the decision of the Department of Natural Resources to deny the application of the Outagamie County Drainage Board dated December 22, 1997, to dredge material from the bed of a tributary of Duck Creek is AFFIRMED.

Dated at Madison, Wisconsin on April 16, 1999.

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By Mark Kaiser  
MARK J. KAISER  
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 sec. 227.48, Stats., 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 secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
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 therefor in accordance with the provisions of sec 227.52 and 227.53, Stats. 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. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.