

File
9-30



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Alf and Keith Johnson for a Permit
to Connect an Existing Pond "Wing Harbor" to
Spooner Lake, Town of Spooner, Washburn
County, Wisconsin

Case No.: 3-NO-97-66003

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Alf R. Johnson and Keith J. Johnson, W5404 Sandmarkand, Spooner, WI 54801, applied to the Department of Natural Resources for a permit to connect an existing pond "Wing Harbor", to Spooner Lake in the SE ¼ of the NE ¼ of Section 26, Township 39 North, Range 12 West, Town of Spooner, Washburn County, Wisconsin.

The Department of Natural Resources issued a Notice of Proposed Enlargement which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. The Department received several timely objections to the permit application.

On September 21, 1998, the Department filed a Request for Hearing with the Division of Hearings and Appeals. The matter was set for hearing on November 9, 1998. Subsequently, the applicant requested that hearing be delayed until the summer of 1999, to allow for certain water quality evidence to be obtained. The request was granted. A prehearing conference was held on May 27, 1999, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. Subsequently, hearing was held on June 14 and 15, 1999, at Spooner, Wisconsin and on July 16, 1999, at Shell Lake, Wisconsin.

The parties requested an opportunity to submit written briefs and the last brief was received on August 26, 1999.

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

Petitioners Alf and Keith Johnson, by

Attorney Glenn Reynolds
Reynolds and Associates
131 West Wilson Street, #1101
Madison, WI 53703

Spoooner Lake Protection and Rehabilitation District, by

Charles Swanson, President
W6038 Spoooner Lake Road
Spoooner, WI 54801

Wisconsin Department of Natural Resources, by

Attorney Michael Cain
P. O. Box 7921
Madison, WI 53707-7921

Attorney Timothy T. Patula
Patula & Associates
116 South Michigan Avenue, 14th Floor
Chicago, IL 60603

Howard E. Snow
N5774 County H
Spoooner, WI 54801

Margaret Nelson
11509 Alden Road
Harvard, IL 60033

Frank J. Grady
W5354 Yellowssand
Spoooner, WI 54801

Ed Fischer
W5851 Honey Hill Road
Spoooner, WI 54801

Donna Trudelle
N5798 County Highway H
Spoooner, WI 54801

Marilyn J. Hill
N5910 Sleepy Lagoon Road
Spooner, WI 54801

Mr. and Mrs. M. Maruska
W5892 Spooner Lake Road
Spooner, WI 54801

Daniel J. Kraft
W5823 County Road A
Spooner, WI 54801

Martha (Cooke) Stiller
517-7 St. S.W.
Rochester, MN 55902

Tom Cuskey
N5616 Slatehill Road
Spooner, WI 54801

Polly Banick
W5581 Miramar Road
Spooner, WI 54801

Derrick L. Mobley
W5315 Mann Road
Spooner, WI 54801

Gary Cuskey
511 Dale
Spooner, WI 54801

Steve Sundeen
W5815 Honey Hill Road
Spooner, WI 54801

FINDINGS OF FACT

1. Alf R. and Keith J. Johnson, W5404 Sandmarkand, Spooner, WI 54801, completed filing an application with the Department for a permit under sec. 30.19, Stats., to enlarge a waterway by connecting an existing pond to Spooner Lake in the Town of Spooner, Washburn County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.19 and 30.02, Stats.

2. The applicants own real property located in the SE ¼ of the NE ¼ of Section 26, Township 39 North, Range 12 West, Town of Spooner, Washburn County, Wisconsin. The above-described property is proximate to Spooner Lake which is navigable in fact at the project site.

3. The applicants propose to connect an existing artificial pond known as Wing Harbor to Spooner Lake.

4. The purpose is to allow for riparian access to Spooner Lake for homeowners located along the existing pond channel known as Wing Harbor. The applicants amended their proposal at hearing by agreeing that no more than six such homes would be built and by restricting boats to non-motorized watercraft. Significantly, any such homeowner could gain access to the water for non-motorized watercraft simply by portaging over the existing 30 foot area between the pond and the lake.

5. The Wing Harbor is an artificial pond that was created in 1971, when a boggy area was excavated a length of 1300 feet, 70 feet wide at an average depth of six feet. As a condition of the DNR permit authorizing creation of the pond, the west end of the pond was to be kept 30 feet from Spooner Lake.

6. There is no question that the DNR has long had questions about the impact of connecting the artificial pond with Lake Spooner. (Exs. 50-51) There is also no question that the applicants have long dreamed of connecting Wing Harbor and the lake. On September 8, 1978, an earlier application of John Johnson, father of Alf and grandfather of Keith Johnson, was denied, largely on the basis of the same concerns about water quality that were the subject of the instant proceeding. (Ex. 2)

7. Prior to creation of the Wing Harbor Pond, the project site was part of a boggy wetland complex. Aerial photos from 1938, 1952 and 1966 demonstrated no open-water linkage between the boggy area and the lake. (Exs. 46, 47, 49) Numerous witnesses provided somewhat conflicting testimony as to whether there were periods when there was a direct open-water connection between the dredged pond harbor area and the lake. The great weight of the evidence indicates that there was not a regular open-water connection between the lake and the bog area at the time the ponded harbor was dredged in 1971. On its face, the application for the 1971 permit states: "(c)onected waterway not contemplated at this time." (Ex. 1)

However, the issue before the Division in this matter is not what the lake and bog were like prior to the 1971 dredging that created the artificial pond. Rather, the question is whether connection under current conditions would meet the statutory requirements for permit issuance.

8. The DNR has had considerable experience with the connection of artificial ponds with natural waterways. Several Department witnesses testified that many lakes have experienced water quality problems as a result of such connections. (Exs. 81-83) These problems have included excessive growth of algae and aquatic macrophytes. (Donatell, Koshere, Haack, Damman) Further, fish kills are common when off-lake channel areas are connected with lakes because of oxygen-depletion, particularly in winter. (Damman, Koshere)

These generalized, state-wide concerns of the DNR were borne out by the site-specific facts developed in the record. The record reflected that attempts to stock fish in the Wing Harbor have been unsuccessful due to winter oxygen depletion. (Hinde) The applicant's expert, John Hinde, testified that this failure reflected an inadequate aeration system and proposed an elaborate aeration plan to address this concern. (Ex. 43) Further, the DNR witnesses expressed concern about fish becoming trapped in the Wing Harbor due to ice blocking the originally proposed 18 inch water depth of the connection between the lake and pond. This is a particular concern given that ice on Spooner Lake regularly exceeds a 24 inch thickness.

In response to this concern, at hearing the applicants sought to amend their proposal to dredge out a 4 ½ foot deep connection between the pond and the lake. Further, to stabilize the bank and maintain the 4 ½ foot channel, the applicants proposed construction of a large solid pier that would not normally be permitted on an in-land lake under Wisconsin law. (Ex. 54) The applicants, apparently recognizing their error, back away from this latest amendment in their brief. (Applicant's brief, p. 8) and seem to now favor the original 18 inch water depth. Under these circumstances, it is likely that there would be some fish kills as a result of ice blockage of the connection between the pond and the lake.

There are other concerns which make the proposed connection a risk to the public waters of Spooner Lake. First, Koshere testified persuasively that he has observed many ponds such as this and has seen the continued degradation of the water quality of such ponds over time. Koshere testified that when he visited the Wing Harbor pond, he observed that the water was "stained" and that this limited, under current conditions, the growth of aquatic macrophytes in the pond. Even under the present conditions, there were organic sediments on the bed of this pond which "gassed" when he disturbed them with a canoe paddle. Koshere opined current conditions of the pond would deteriorate further if it were connected to Spooner Lake.

Second, there would be additional nutrients added to the pond from additional development of the six remaining lots on the pond; third, there would be additional organic materials added to the pond from additional macrophyte growth and from organic materials blown into the pond from the connection with Spooner Lake; fourth, these conditions would exacerbate the already critical oxygen depletion conditions which exist in the pond; fifth, the pond will provide a source of additional phosphorous to Spooner Lake and will exacerbate conditions on this lake, which is already eutrophic; sixth, to allow this to occur is not consistent with the efforts of the Department, Washburn County, and the sanitary district to eliminate sources of pollutants, including phosphorous, coming into the lake; seventh, the cumulative impacts of the type of action contemplated by the applicant is significant, and is detrimental to the public interest. (Koshere, Exs. 41, 64-65, 81-82)

This last point is very significant and in itself is a sufficient basis to deny the proposed connection. There are marshy and boggy areas around the state which would be threatened if the DNR were to ignore its legal obligation to consider the cumulative impact of many small projects on the public waters as whole. Clearly, extension of "riparian frontage" into such areas would create much more highly valued property in bogs and wetland areas. It would also have a significant major detrimental impact upon the water quality of connecting lakes. (Koshere)

9. There was not sufficient credible evidence in the record to demonstrate with any accuracy the precise phosphorous loadings anticipated as a result of the artificial pond and the lake.

10 The proposed enlargement and connection will adversely affect water quality and will increase water pollution in Spooner Lake. The enlargement and connection will cause environmental pollution as defined in sec. 299.01(4), Stats.

11. There is no factual basis in the record to conclude that the 1971 installation of the fill material creating the 30 foot barrier between Wing Harbor and Spooner Lake was in violation of the Clean Water Act.

12. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

This case has a long and acrimonious history. However, based upon the record developed at hearing, there is no question that the greater weight of the credible evidence demonstrated that the proposed connection must be denied because it will have direct and cumulative detrimental impacts to the public interest in navigable waters. The applicants, despite considerable effort and expense, have simply not carried their burden of proof under sec. 30.19(4), Stats.

The applicants repeatedly argued that to connection of Wing Harbor and Spooner Lake would return hydrologic conditions to a more natural state. However, there is nothing natural about the dredged pond known as Wing Harbor. Connection of this artificial waterway with Spooner Lake requires a permit. To obtain a permit, the applicants have the burden of proving that such connection would not injure public rights or interest including fish and game habitat and will not cause environmental pollution. Accordingly, several issues raised by the applicants really do not address the statutory requirements for the permit.

For example, the applicants asserted that placement of the fill material maintaining the 30 foot barrier between the pond and the lake violated the Clean Water Act (CWA). However, Federal Regulation extending the CWA to wetlands did not take effect until some years after the "plug" was installed. Further, the record strongly suggests that there was not a regular open-water connection between the original bog and the lake. However, even if there were, it would not be dispositive of the present permit application. A connection between the lake and a bog and wetland complex, has a value in filtering out and absorbing sediment and other nutrients. This is quite different from a connection between a large and deep still-water artificial pond, which is likely to harm rather than improve water quality.

The applicants' expert, Mr. Hinde, made a noble attempt to calculate phosphorous loadings expected as a result of the proposed connection. Mr. Hinde developed a simple

mathematical method for calculating the amount of additional phosphorus that would be added to Spooner Lake if the waters were connected. Mr. Hinde used calculations based upon the comparative water quality tests which were performed by the Johnsons and correlated this information with average annual rain fall and the size of the immediate Wing Harbor watershed. Based upon these calculations, Mr. Hinde determined that no more than five additional pounds of phosphorous would be added to Spooner Lake as a result of connection. However, these calculations are inherently suspect because the data relied upon by the applicants was fundamentally flawed. (Koshere) Even Mr. Englehart, who collected the water quality samples, could not explain the phosphorous values which came back from the Commercial Testing Laboratory. (See: Ex. 17) Hinde conceded that there were significant problems with the data, but argued that "some data is better than no data." In this instance, however, the data is not sufficiently reliable to give any weight to Hinde's calculation as to phosphorous loadings. These calculations simply do not have sufficient reliability to carry the applicants' burden of proof.

Finally, there was really no dispute that the pond regularly experiences low dissolved oxygen (DO) levels, particularly in winter. Instead, applicants argue that portions of Spooner Lake also experience low DO levels in winter months. However, fish in the lake would be free to migrate to DO levels sufficient to sustain them over the winter months. Fish in the pond would not be likely to make it through the ice barrier that would likely exist between the pond and the lake. (Damman, Donatell, Koshere) This may not involve a large number of fish, but it is yet another reason why connection of the artificial pond and Spooner Lake is not consistent with maintaining public rights in Spooner Lake.

Experience has taught that there are detrimental impacts when such artificial waterways are connected to the navigable waters of the state. (Koshere) In this instance, there are many site-specific reasons to be concerned that connection would harm water quality. Finally, the marginal benefit of eliminating a need to portage canoes or other non-motorized watercraft over the 30 foot barrier is not worth the risk when balanced against the likelihood of detrimental impacts upon public rights. The permit request must be denied.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and to issue necessary orders in cases involving the enlargement of navigable waterways pursuant to secs. 227.43(1)(b) and 30.19, Wis. Stats.
2. The applicant has the burden of proof in an application for a permit under Ch. 30, Stats. Village of Menomonee Falls, v. DNR, 140 Wis. 2d 579, 412 N.W 2d (Wis. Ct. App. 1987)
3. The Department shall issue a permit for a proposed enlargement if the project will not injure public rights or interest, including fish and game habitat, that the project will not cause environmental pollution as defined in sec. 299.01(4), that any enlargement connected to navigable waterways conforms to the requirements of laws for the platting of land and for sanitation and that no material injury to the rights of any riparian owners on any body of water

affected will result. Section 30.19(4), Stats. As set forth in the findings of fact, the applicants have not satisfied this burden.

4. The proposed project will adversely affect water quality and will increase water pollution in Spooner Lake. The proposed project will cause environmental pollution as defined in sec. 299.01(4), Stats. (See: Finding #8)

5. The proposed enlargement "conforms to the requirements of laws for the platting of land and for sanitation" within the meaning of sec. 30.19(4), Stats.

6. The proposed enlargement will not result in any "material injury to the rights of any riparian owners" on Spooner Lake within the meaning of sec. 30.19(4), Stats.

7. The DNR must consider the "cumulative impacts" of many small projects on the public waters of the state. Sterlingworth Condominium Ass'n v. DNR, 205 Wis. 2d 710, 721-22, 556 N.W.2d 791 (Wis. Ct. App. 1996) Citing Hixon v. PSC, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966) There would be detrimental cumulative impacts of connecting artificial ponds with the navigable waters of the state.

8. The proposed enlargement is a type IV action pursuant to sec NR 150.03(5)(f)2.c., Wis. Adm. Code. Pursuant to sec. NR 150.01(b), Wis. Adm. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the Department of Natural Resources' determination to DENY the permit be AFFIRMED, and that the contested case be DISMISSED.

Dated at Madison, Wisconsin on September 30, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 264-9885

By Jeffrey D. Boldt
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 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.