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**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**

Application of the Village of North Fond du Lac
for a Permit to Construct a Diversion Channel
Connected to Mosher Creek, Village of North
Fond du Lac, Fond du Lac County, Wisconsin

Case No. 3-SD-96-2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND PERMIT

Pursuant to due notice including publication hearing was held at Fond du Lac, Wisconsin on April 15, 1997, Jeffrey D. Boldt, administrative law judge (ALJ), presiding.

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

Village of North Fond du Lac, by

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Wisconsin Department of Natural Resources, by

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FINDINGS OF FACT

1. The Village of North Fond du Lac, 16 Garfield Street, Fond du Lac, Wisconsin 54937, applied to the Department of Natural Resources for a permit to construct a flood control channel connected to Anderson Creek. The intended purpose of the proposed project is to divert a tributary stream to Anderson Creek and restore drainage to the essential pattern which existed prior to construction of State Highway 175. The current proposal would result in construction of a 2,200 foot long channel to convey water to Anderson Creek.

2. The proposed project is located on or near the Ambrose Braun and Steve and Terry Willis farms in the SW 1/4 of the SW 1/4 of Section 29, Township 16 North, Range 17 East, Town of Friendship, Fond du Lac County, Wisconsin.

3. There has been flooding within the corporate limits of the Village of North Fond du Lac in recent years, particularly in 1986 and 1989. The goal of the proposed project is to lower regional flood elevations within the Village. In pursuit of that end, the United States Government sponsored a Public 83-Law 566 (PL 566) grant for the proposed project, which offers municipalities funding for flood control and other projects. The U. S. Agriculture Department (USDA), Natural Resources Soil Conservation Service (NRSCS), undertook substantial work mapping the hydraulics and hydrology in the area. The USDA records relating to the project include some 12,851 pages. The proposed project will reduce flooding along Mosher Creek. It will increase flooding to some degree on Anderson Creek. The project would not be possible were it not for flowage easements on 17 properties along Anderson Creek. (Exhibit 9)

4. A clear preponderance of the credible evidence indicates that the project will not injure public rights or interest including fish and game habitat. All of the expert testimony indicated that the project will have minimal impact on fish and game habitat. (Nelson, et. al.) There is intensive agricultural and urban development in the watersheds. Little upland cover is available to wildlife other than woody cover adjacent to the streams.

5. The proposed project will not cause environmental pollution as defined in sec. 144.01, Stats.

6. All of the testimony in the record indicated that the proposed enlargement conforms to the requirement of laws for the platting of land and for sanitation.

7. NRSCS engineers undertook extensive modeling to analyze the impact of the proposed diversion project on flood width and elevations relating to a 100 year flood event at numerous points along Anderson Creek. (See: Exhibits 8 and 24) NRSCS Engineer Humple did an extensive review of the results of work undertaken by her predecessor. There were impacts to both flood elevations and flood width and numerous

sites along Anderson Creek. Any increased flooding along Anderson Creek affects property grounds rather than homes. It is not anticipated that any homes in the areas subject to diversion waters will receive flood damage up to and including a 500 year flood event. (Exhibit 6) Further, easements have been obtained for the areas likely to suffer significant increased flood elevations.

8. The closest disputed issue is whether there is material injury to the rights of any riparian owners on any body of water affected by the proposed project. There is a question as to whether the proposed diversion will raise water levels near the Pasch and Zarling properties. The objectors reside near the outlet of Anderson Creek near Lake Winnebago. To some degree the objectors' concerns related to whether or not flowage easement rights were necessary in their area. This issue is largely outside the scope of this proceeding. PL 566 grants require that all necessary flowage easements be obtained under state law as a condition of grant approval. (Lesczynski) Both the Federal NRSCS and the state DNR were satisfied that all necessary easement rights had been obtained by the Village. (Humple, Nelson and See: Exhibits 15, 9) Indeed, all of the expert testimony in the hearing indicated that there was no need for flowage easement rights on either the Zarling or Pasch properties. This is because those areas fall within the Lake Winnebago flood elevation area, which did not experience significant projected flood elevation increases after the proposed diversion. (Humple, Exhibit 24)

As noted, Anderson Creek flows into Lake Winnebago. (Exhibit 7) Lake Winnebago has a 100 year flood elevation of 749.5 as determined in the flood insurance study of Fond du Lac County. Lake Winnebago 100 year flood event elevations are greater than the projected elevations along Anderson Creek even after the proposed diversion. (Josheff) Accordingly, Lake Winnebago elevations govern downstream Anderson Creek properties east of Highway 45. The Pasch and Zarling properties are both within the Lake Winnebago 100 year flood elevations areas. Josheff testified that because of these facts, it was not necessary to purchase flowage easement rights for these properties.

While 100 year flood elevations are not impacted by the proposed diversion, the project is projected to raise flood widths in the vicinity of the Pasch and Zarling properties. The DNR determined that 100 year event flood elevations, rather than flood widths, govern the need for flowage easement rights.

In large part the Department's position relating to the need for flowage easements for the Zarling or Pasch property rests upon the definition of an increase in regional flood height as codified in sec. NR 116.03(28), Wis. Admin. Code. That section provides as follows:

"Increase in regional flood height" means a calculated upward rise in the regional flood elevation, equal to or greater than 0.01 foot, resulting from a comparison of existing conditions and proposed conditions which

is directly attributable to development in the floodplain but not attributable to manipulation of mathematical variables such as roughness factors, expansion and contraction coefficients and discharge. (Exhibit 34)

The Department interprets that section to mean that 100 year flood elevations, rather than flood widths, govern increases in regional flood elevations.

The Department's interpretation of the code is reasonable. The Department is charged by the legislature with authority to review stream diversion projects which have an impact on navigable waters of the state. The Department's interpretation of the statute is entitled to deference. Sterlingworth Condominium Ass'n. v. DNR, 205 Wis. 2d 702, 724 (Wis. Ct. App. 1996).

Further, Josheff noted that 100 year flood elevation govern other regulatory decision making, including zoning ordinances. Josheff's undisputed expert testimony was persuasive on this point.

9. DNR Area Water Management Specialist Andy Nelson testified at length regarding a draft permit setting forth conditions on the proposed diversion necessary to protect the public interest. (Nelson, Exhibit 13) Nelson originally objected to the proposal because it contemplated depositing dredge spoils in wetland areas. The Department determined that the project is not wetland dependent and that there is a practicable alternative to filling wetlands for dredge spoil disposal. Permit condition #9 specifically requires that all spoil material generated by this project be disposed of in upland locations. Riprap placement is required at the confluence of the diversion channel and Anderson Creek.

All of the following permit conditions are reasonable and necessary to protect the public interest in navigable waters.

10. The Department has complied with the procedural requirements related to conducting an environmental assessment of the proposed project. The Department has determined that granting or denying of this permit does not constitute a major state action significantly affecting the quality of the human environment. The USDA conducted an *extensive environmental assessment in connection with the proposal which made specific findings as to the potential environmental affect of the project.* (Exhibit 6)

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders in permits related to tributary stream diversion and enlargement. Sec. 227.43, Stats., and sec. 30.19(1)(a), Stats.

2. Unless a permit has been granted by the Department of Natural Resources, it is unlawful to construct, dredge or enlarge any artificial waterway, canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing navigable stream, lake or other navigable waters, or where any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing navigable stream, lake or other navigable waters. Sec. 30.19(1), Stats.

3. If the Department of Natural Resources finds that the project will not injure public rights or interests, including fish and game habitat, that the project will not cause environmental pollution as defined in sec. 144.01(3), Stats., 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, the Department shall issue a permit authorizing the enlargement of the affected waterway. Sec. 30.19(4), Stats. The applicant has carried its burden of proof in demonstrating all of the conditions set forth above, given the flowage easements and permit conditions.

4. The objectors' property is not likely to experience an "increase in regional flood elevation" as defined in sec. NR 116.03(28), Wis. Admin. Code. The Department's reasonable interpretation of NR 116 is entitled to deference. Sterlingworth Condominium Ass'n. v. DNR, 205 Wis. 2d 702, 724 (Wis. Ct. App. 1996).

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Village of North Fond du Lac is hereby granted under sec. 30.19, Wis. Stats., a permit to construct an enlargement of Anderson Creek in the Town of Friendship, Fond du Lac County, in the SW 1/4 of the SW 1/4 of Section 29, Township 16 North, Range 17 East, subject to the following conditions:

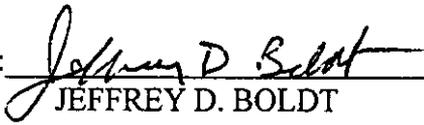
1. You must notify Conservation Warden Todd Schaller, Fond du Lac, Wisconsin, 54935 (phone 414-929-3708) before starting construction and again **not more than 5** days after the project is complete.
2. You must complete the project as described on or before July 1, 1999. You may not begin or continue construction after this date unless the Department grants a new permit or permit extension in writing.
3. This permit does not authorize any work other than what you specifically describe in your application and plans, and as modified by the conditions of this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department.

4. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances or by the U.S. Army Corps of Engineers before starting your project.
5. You must allow free and unlimited access to your project site at any time to any Department employee who is investigating the project's construction, operation, or maintenance.
6. The Department may modify or revoke this permit if the project is not completed according to the terms of the permit, or if the Department determines the activity is detrimental to the public interest.
7. You must keep a copy of this permit and approval plans at the project site at all times until the project is complete.
8. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit.
9. All spoil material generated by this project must be disposed of in an upland location which does not impair the flood flow capacity of any stream. A portion of the area originally intended as a disposal site has been delineated as wetlands by the Department, as shown on the "Plan and Profile" drawing prepared by Robert E. Lee and Associates, Inc., pursuant to the field inspection conducted on March 4, 1997. Due to difficult field conditions at the time of the delineation, a subsequent field inspection shall be conducted by Dale Simon prior to June 1, 1997 to finally delineate the wetland boundary using the 1987 Wetland Delineation Manual published by the Corps of Engineers as modified by the Department of Natural Resources' Basic Guide to Wisconsin Wetlands and Their Boundaries, published in 1995.
10. The grading and disposal of the spoil material shall be conducted in conformance with the best management practices set forth or otherwise permitted under the Wisconsin Construction Site Handbook, published by the WDNR.
11. The confluence of the diversion channel and Anderson Creek must be armored with riprap so as to protect the banks from erosion.

12. The Department recommends that alternative channel lining materials (i.e. vegetation) be considered for use in place of asphalt if technically feasible. This is a non-binding permit condition.

Dated at Madison, Wisconsin on May 16, 1997.

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 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.

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