



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

In the Matter of the Abatement Action on the
Motion of the Wisconsin Department of Natural
Resources to Remove or Reconfigure an Alleged
Illegal Seawall and Wharf/Deck on the Bed of the
Wisconsin River, Town of Carson, Portage
County, Wisconsin

Case No. 3-WC-01-50042 CW

Application of Tom and Lisa Jakusz and
Consolidated Water Power Company for an After-
the Fact-Permit for a Seawall and Wharf/Deck on
the Bed of the Wisconsin River, Town of Carson,
Portage County, Wisconsin

Case No. 3-WC-01-50016 CW (ATF)

**FINDINGS OF FACT, CONCLUSIONS OF LAW, PERMIT
AND
ORDER FOR REMOVAL**

Pursuant to due notice hearing was held on April 24-25, 2002 at Stevens Point, Wisconsin before Jeffrey D. Boldt, administrative law judge (the ALJ). The hearing was a combined proceeding which included both the enforcement action and the after-the-fact permit application.

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

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
P. O. Box 7921
Madison, WI 53707-7921

Tom and Lisa Jakusz
1058 Martin Island Drive
Stevens Point, WI 54481

Consolidated Water Power Company
P. O. Box 8050
Wisconsin Rapids, WI 54495-8050

FINDINGS OF FACT

1. Tom and Lisa Jakusz, 1058 Martin Island Drive, Stevens Point, Wisconsin, 54481, completed filing an application with the Department for an after-the-fact permit under Wis. Stat. § 30.12 to construct a wharf on the bed of the Wisconsin River, Town of Carson, Portage County. The Department and the applicants have fulfilled all procedural requirements of Wis. Stat. §§ 30.12 and 30.02.
2. The co-applicant, Consolidated Water Power Company (Consolidated), owns real property located in the Government Lot 1 in Section 23, Township 23 North, Range 7 East, Town of Carson, Portage County. The above-described property consists of a 16.5 feet wide strip abutting the Wisconsin River, Stevens Point Flowage, which is navigable in fact at the project site.
3. The Jakusz' property is a 142 foot wide non-riparian parcel located at 1058 Martin Island Drive. The applicants seek an after-the-fact permit for a wharf and seawall located below the ordinary highway mark.
4. Consolidated manages the Project Land within the context of the federal hydroelectric license issued to Consolidated by the Federal Energy Regulatory Commission (FERC) for the Stevens Point Project. FERC allows hydroelectric license holders to issue annual permits to adjacent landowners allowing such landowners to access the river from and place docks along Project Land. Permit condition #7 requires the permittee to "adhere to all local, state, and/or federal ordinances and rules that may apply or enacted in the future concerning boat docks" including "the size, construction, maintenance or appearance of the boat dock." (Exs. 9, 10)
5. On or about June 15, 1999, Tom Jakusz (Jakusz) placed concrete in the flowed waters of the Wisconsin River adjacent to the Project Land. (Exs. 3, 14, Patrick) Most of the concrete was placed below the Ordinary High Water Mark (OHWM). (Exs. 3, 24, 25, Patrick) Jakusz created a base concrete slab 33 feet long x 8 feet wide x 1 foot thick, then built an "erosion barrier," "retaining wall" of 12 inch concrete blocks. The wall is 3 feet 8 inches tall and tied to the shoreline below the OHWM. Jakusz placed a treated wood wharf/deck 28 feet 3 inches long x 12 feet 2 inches wide on the concrete, tied the deck to the wall, and extended the deck beyond the concrete 6-8 feet over the water. The wharf is at a water depth of 2.4 feet at the NE edge and 3 feet at the SE edge. (Exs. 3, 14, 24, 25, Patrick)

6. In June 1999 while on the river with citizen John Rowe and WDNR's Mark Burmesch in the course of his duties, WDNR Conservation Warden Barry Meister saw the retaining wall and Mr. Jakusz working on the wharf. Warden Meister and later Keith Patrick advised Mr. Jakusz that the project appeared to require a WDNR permit and advised him to stop work unless and until he obtained a permit. Mr. Jakusz nonetheless completed the wharf. (Meister, Patrick)

7. From June 1999 to March 2001, via site visits, conversations, and letters, WDNR staff sent Mr. Jakusz WDNR publications on piers, wharves, retaining walls, grading, and riprap and asked him to submit a permit application for the retaining wall and wharf/deck with concrete slab. (Exs. 4, 5, 6, 7, 13) The Department received an after-the-fact permit application on April 6, 2001. (Ex. 14) The Department determined that the retaining wall and wharf/deck with concrete slab required a permit but did not meet the statutory standards for issuance. Mr. Jakusz was unwilling to modify the structure in a manner that would satisfy the Department's objections, and the case was accordingly referred for a combined permit/enforcement hearing. (Exs. 18-22, Patrick)

8. The referral for hearing was initiated by WDNR's Keith Patrick and approved by the following WDNR staff: the Central Wisconsin River Basin Leader, the Regional Aquatic Habitat Expert, the Regional Water Leader, and the Chief of the Rivers and Habitat Section, Bureau of Fisheries Management & Habitat Protection. (Exs. 18-23)

9. The existing retaining wall and wharf/deck with concrete slab are detrimental to the natural scenic beauty of the shoreline as viewed from the Wisconsin River. (Exs. 2, 26) The placement of a portion of the retaining wall above the OHWM and the vegetation removal undertaken to construct the retaining wall and wharf/deck did not comply with the Portage County Shoreland Zoning Ordinance. (Exs. 17, 18, 22) However, the detrimental impact on natural scenic beauty would not be sufficient, in itself, to require removal of the structure. Numerous similar structures have been placed near the project area, and have degraded the natural features of the shoreline.

10. A retaining wall is not necessary to prevent shoreline erosion at this site. (Exs. 30, 31, 32, Patrick, Cunningham, Anderson). There was no testimony that proved there was any significant erosion in this area. All of the expert testimony indicated that the area was not a significant risk for shoreline erosion. DNR Systems Ecologist Paul Cunningham, a shoreline erosion control specialist, analyzed prevailing wind patterns and wave action and concluded that the project area was a low-energy site. He further opined that the risk of shoreline erosion was low to moderate. Significantly, the consolidated Water Power Company Resources Coordinator, Mark Anderson, also opined that the project area was not an area subject to substantial erosion. A concrete slab is not needed in order to place or maintain a structure for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft. A smaller pier or wharf could be placed on pilings. (Patrick)

11. The Jakusz' have placed chairs and an umbrella table on the wharf/deck indicating it is used for living space as well as for loading/unloading passengers and cargo. (Ex. 3) A riparian has a limited right to place a pier as an "aid to navigation" but not to increase private living space by occupying public waters. A 12 feet wide wharf/deck is not needed in order to reach the line of navigation or provide a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft. (Patrick) A 6 feet wide pier and stairs as shown in the Department's recommendations and attached permit will provide access to a navigable depth of water without the detrimental impacts of the existing structures. (Exs. 25, 29)

12. The Stevens Point Flowage has a high quality diverse fishery, including walleye, northern pike, muskellunge, channel catfish, smallmouth bass, black crappie, bluegill, and yellow perch. Flowage substrate is mostly firm and consists of sand, sandy gravel, and scattered boulders. Nearshore areas provide space for spawning, nursery, and feeding habitat. Natural vegetation on and overhanging the shore provides insects and woody debris essential to the aquatic habitat. Amphibians and reptiles move between shore and water. (Hauber, Exs. 16, 28, 30)

13. Construction of the retaining wall and wharf/deck with concrete slab eliminated any natural shoreline and aquatic vegetation that may have been present and prevents its regrowth. The retaining wall and concrete slab hinder the movement of amphibians and reptiles between shore and water. Shading the substrate prevents development of aquatic vegetation. (Hauber, Ex. 16, 26) Further, areas subject to concrete retaining walls have a detrimental impact upon public waters because they simplify habitat and reduce species richness. (Cunningham, Ex. 30)

14. Applicants Tom and Lisa Jakusz are financially capable of constructing, maintaining, or removing the proposed pier if it should be found in the public interest to do so.

15. The permitted structure will not materially obstruct existing navigation on the Wisconsin River, Stevens Point Flowage and will not be detrimental to the public interest upon compliance with the condition of this permit.

16. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

17. The permitted structure will not reduce the effective flood flow capacity of the Wisconsin River, Steven Point Flowage, upon compliance with the conditions in the permit.

18. The permitted structure will not adversely affect water quality nor will it increase water pollution in the Wisconsin River, Stevens Point Flowage. The structure will not cause environmental pollution as defined in Wis. Stat. § 281.01(10), if the structures are built and maintained in accordance with this permit.

DISCUSSION

Mr. Jakusz alleges that the DNR's enforcement policy (or lack thereof) relating to oversized pier structures on the Stevens Point Flowage, amounts to "selective enforcement" in his case. Numerous similar deck-like structures exist on Stevens Point Flowage waters, occupying a large area of public waters. The DNR argues that its limited enforcement policy, responding only to complaints or when someone is caught in the act of building an unlawful structure, is rational and reflects its lack of adequate staffing.

The adequacy of the DNR's policy is beyond the scope of this hearing. The Division finds there was no intent to single Mr. Jakusz out for enforcement for any personal reasons. He was unfortunate enough to encounter the DNR warden as he was nearly finished building his retaining wall and deck. There was no evidence to support Mr. Jakusz' suspicion that DNR Warden Meister targeted Jakusz as a result of his opposition to a slow/no wake ordinance. Significantly, the slow/no wake ordinance was not proposed until well after Mr. Meister's first contacts with Mr. Jakusz.

Nevertheless, the DNR's lax enforcement on the Stevens Point Flowage is troubling and not consistent with its efforts elsewhere in the State or its obligation to protect the waters of the State. If the public trust doctrine has any meaning, it is clear that it prohibits large areas of public water being consumed by large private decks that are detrimental to the public interest in those waters. The DNR indicated at hearing that it intends to pursue further actions on the Stevens Point Flowage.

The testimony was clear that the concrete retaining wall was poured below the OHWM without a permit. The area is not at significant risk of erosion, as all of the experts testified, including Mr. Anderson of the co-applicant, Consolidated. Mr. Jakusz was not able to demonstrate any significant loss of shoreline to erosion. The record was clear that there are numerous other options available to prevent erosion, including field stone riprap and the newer vegetative ripraps. The concrete retaining wall creates a dead area where plants can not grow and inhibits the natural movement of amphibians and reptiles getting into and out of the water. (Hauber, Ex. 30) Further, the resulting loss of habitat diversity has led to significant loss of fish and invertebrate species richness in areas covered by concrete retaining walls. (Ex. 30) This was confirmed in a large-scale 1996 Shoreline Protection Study undertaken by the WDNR at the request of the Wisconsin State Legislature. (Id.)

The existing deck must be reconfigured to become a pier structure that provides Mr. Jakusz with reasonable access to the water. This is all that Chapter 30 and the public trust doctrine allows riparians. The existing structure exceeds the reasonable use of the shoreline by Consolidated, the riparian owner. The permit restricting the size of the pier represents a balance of the riparian rights and the public interest.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12 and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified. The Division also has authority to order removal of structures which violate Chapter 30 pursuant to § 30.03(4)(a).
2. The co-applicant Consolidated Water Power Company is a riparian owner within the meaning of Wis. Stat. § 30.12.
3. The existing retaining wall and wharf structure described in the Findings of Fact constitute structures within the meaning of Wis. Stat. § 30.12.
4. The Order for Removal as set forth below is necessary to ensure compliance with Chapter 30.
5. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

The wharf/deck and retaining wall placed by Tom Jakusz below the OHWM on the bed of the Stevens Point Flowage of the Wisconsin River—in its existing size and configuration—requires a permit. No permit was issued for the existing wharf/deck or retaining wall. Pursuant to the motion of the Department, the existing structures constructed and maintained by Tom & Lisa Jakusz are found to be violations of Wis. Stat. § 30.12, and are declared unlawful obstructions pursuant to Wis. Stat. § 30.13(4)(a), and public nuisances pursuant to Wis. Stat. § 30.294. The existing retaining wall and concrete slab shall be removed, and the existing wharf/deck either removed or reconfigured to comply with the following permit within ninety (90) days of this order.

PERMIT

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicants a permit to undertake the activities authorized by this permit, subject to the conditions in this permit. Failure to comply with any of these conditions renders this permit null and void.

PERMIT CONDITIONS

1. A series of photographs clearly showing all areas covered by the permit shall be submitted to the Department within one week of completion of work on the site. The photographs shall be taken from different vantagepoints on the sites. Failure to properly submit the photographs would be a violation of permit conditions.
2. The permittees, their agent, and any involved contractors shall be jointly and severally liable for any violations of Chapter 30 State Statutes or this permit.
3. The permittees shall notify [Keith Patrick](#) at phone [715-241-7502](#) before starting construction and again not more than 5 days after the project is complete.
4. The permittees shall complete the project/restoration as described no later than [90 days after issuance of this permit](#). The permittees may not begin or continue construction after this date unless the Department grants a new permit or permit extension in writing.
5. This permit does not authorize any work other than what the permittees specifically describe in the application and plans as altered by the Department and as modified by the conditions of this permit. If the permittees wishes to alter the project or permit conditions, the permittees shall first obtain written approval of the Department.
6. The permittees are responsible for obtaining any permit or approval that may be required for this project by local zoning ordinances or by the U.S. Army Corps of Engineers before starting the project.
7. The permittees shall allow free and unlimited access to the project site at any time to any Department employee who is investigating the project's construction, operation, or maintenance.
8. 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.
9. The permittees shall keep a copy of this permit and an approved plan at the project site at all times until the project is complete.
10. Acceptance of this permit and efforts to begin work on this project signify that the permittees have read, understood and agreed to follow all conditions of this permit.

11. This permit is not valid unless and until applicants submit a letter to WMS Keith Patrick from the riparian owner Consolidated Water Power Company consenting to be a co-applicant on the permit application and agreeing that the permit shall issue jointly in the names of Consolidated Water Power Company and Tom & Lisa Jakusz.
12. The permittees are hereby authorized to place clean fieldstone or quarry stone 6 to 24 inches in diameter along approximately 34 lineal feet of the shoreline. The stone may extend up to 24 inches waterward as measured from the existing bank. The stone shall follow the natural contour of the shoreline, and shall not be placed higher than the top of the existing bank. The final riprap slope shall not exceed 2 feet horizontal to 1 foot vertical.
13. The use of filter cloth, or a filter layer, under the riprap is required to extend the life of the structure and to improve effectiveness.
14. This permit does not authorize any removal of aquatic or upland vegetation above or below the ordinary high watermark of the waterway. The permittees shall comply with county shoreland vegetation removal regulations. Contact the county zoning office for specific information on shoreland vegetation.
15. The project shall be constructed in a manner that prevents upland soil losses and sedimentation of the waterway. Temporary erosion control measures such as mulch, silt fence, and/or straw bales shall be used as needed and shall be put in place prior to any precipitation or if work ceases for longer than 24 consecutive hours. Any upland areas disturbed during construction shall be properly stabilized immediately following project completion by seeding and mulching.
16. The permittees shall maintain the riprap in good condition.
17. The rock riprap shall be covered with topsoil from a point 2 feet above the normal water level to the top of the rock. This topsoil should be seeded with native grasses and mulched.
18. No waterward extension of the upland property is permitted other than what is reasonably necessary for the placement of riprap to stabilize and protect the existing bank. No fill material may be placed in a wetland or below the ordinary high watermark or any surface water.
19. The existing deck/wharf structure shall be reconfigured to make a "T" or "L" shape pier being no wider than six (6) feet in width, instead of a 12-foot by 28-foot deck. The pier shall be placed horizontally to the shore and shall not exceed the existing 28 feet in horizontal length. The pier shall be placed as shown in attached Exhibit A or such similar configuration as is approved by the DNR Water Management Specialist. Stairs no wider than six (6) feet in width are

allowed to the extent needed to provide access from the shore to the pier. This would allow reasonable access to the water as well as allow the pier to extend to the same water depth and length as the existing structure.

20. A single bench of open construction not to exceed six (6) feet in length and boarding ladders required for safety may be allowed. Other accessory structures such as tables, flower pots, and table canopies shall be removed.

Dated at Madison, Wisconsin on May 23, 2002.

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
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 Department of Natural Resources 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 therefor 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. 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.