



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

In the Matter of Sheboygan County Highway
Department for a Permit to Grade More Than
10,000 Square Feet on the Bank of Lake Michigan
Located in the Town of Mosel, Sheboygan County,
Wisconsin

Case No. 3-SE-02-60-200SH

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Mr. Roger Laning, Commissioner of the Sheboygan County Highway Department, 1211 North 23rd Street, Sheboygan, Wisconsin, 53081, has applied to the Department of Natural Resources for a permit to grade more than 10,000 square feet on the bank of Lake Michigan and place a rock revetment at the toe of the slope. The proposed project would involve cutting and filling along 500 feet of shoreline, installation of a drainage system to direct water down the slope, and placement of a large rock revetment at the base to stabilize the slope so that Highway LS will not be in danger of collapse. The proposed project has been designed by the US Army Corps of Engineers and would be partially funded by that agency. The County has not made a final determination on whether to proceed with the proposed project and no work will be done at this site until approval is obtained from affected landowners. The proposed project is located in SE ¼, SW ¼, S10, T16N, R23E, Town of Mosel, Sheboygan County, along Highway LS.

The Department of Natural Resources issued Notice of Proposed Grading and Revetment which stated that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. Timely objections were received. On October 29, 2003, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on November 25, 2003, at Sheboygan, Wisconsin, Jeffrey D. Boldt, administrative law judge presiding.

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

Sheboygan County Highway Department, by

Roger Laning, Highway Commissioner
1211 North 23rd Street
Sheboygan, WI 53081

Jerald Holub, County Board Supervisor
W711 Orchard Beach Drive
Sheboygan, WI 53083

Department of Natural Resources, by

Kathi Kramase, Water Management Specialist
P. O. Box 408
Plymouth, WI 53073

Lynn Lindorfer
N8982 County Road LS
Sheboygan, WI 53083

Jeff Rochon and Mickey Judkins
S8677 State Road 37
Eau Claire, WI 54703

FINDINGS OF FACT

1. Mr. Roger Laning, Commissioner of the Sheboygan County Highway Department, 1211 North 23rd Street, Sheboygan, Wisconsin, 53081, completed filing an application with the Department for a permit under Wis. Stat. §§ 30.12 and 30.19, to grade more than 10,000 square feet on the bank of Lake Michigan and place a rock revetment on the bed of Lake Michigan, Town of Mosel, Sheboygan County. The Department and the applicant have fulfilled all procedural requirements of Wis. Stat. §§ 30.12 and 30.02.
2. The co-applicants own real property located in the SE ¼ of the SW ¼ in Section 10, Township 16 North, Range 23 East, Sheboygan County. The above-described property abuts Lake Michigan which is navigable in fact at the project site.
3. The County does not own riparian frontage, but holds an easement for the public roadway. The neighboring riparians, Robert and Lynn Lindorfer and Walter and Verna Schelk, have signed off on the project as co-applicants. (Ex. 1)
4. The applicant proposes to construct a rock revetment and to grade along the bank of Lake Michigan to stabilize the bank and prevent the collapse of County Highway LS. The project would cover an area of approximately 500 feet of frontage. The bank will be re-graded to a slope of approximately 2 to 1. Large field armor stone will be placed along this 500-foot area, roughly one third of the way up the bank. Further, drainage tiles will be placed to redirect and control both run off and groundwater, which at present undercut bank stability. The HDPE pipe will be installed using horizontal directional drilling. Large rock revetment will be over geotextile fabric at the toe of the slope. To prevent flanking, the end 11 feet of the north and south edges of the protection shall be tied into the existing bank.

5. The purpose is to ensure the future safety and stability of County Highway LS. The U.S. Army Corps of Engineers (USACOE) has designed the project and provided significant funding. County Highway "LS" is an important and scenic link between Sheboygan and Manitowoc Counties, particularly the area along the Lake Michigan Shoreline from the City of Sheboygan to the Village of Cleveland and on to the City of Manitowoc. The roadway area that is most threatened is located approximately 5 miles north of the City of Sheboygan, immediately north of the PGA golf course known as "Whistling Straits." There was a slough-off of approximately 300 feet, which has slumped the bank within 6 to 9 feet of the existing roadway. The project has qualified as a safety "Emergency Shoreline Protection" project eligible for USACOE funding. (Ex. 2)

6. The County has explored the option of relocating the roadway, but has chosen to stabilize the bank due to concerns relating to cost, the breaking up of farmland, and the impact on existing residences located on the west side of the roadway facing Lake Michigan. (Laning) These residents would be required to change their access to their back yards, impacting wells, septic systems and property values. (Ex. 2) As a result of these considerations, "local officials prefer to rule out the roadway relocation options." The County has closed the road to truck traffic, has reduced the speed limit to 45 mph, and has imposed weight restrictions that allows for only one bus on the road at a time. (Ex. 2)

Other reputable consultants have previously argued in favor of road relocation. (Ex. 47) The objectors argue in part that a large area of the roadway is ultimately threatened by erosion. However, the instant permit proceeding is not about which option is the best course, but solely whether the proposed project meets the requirements for the grading and riprap permits.

7. The only objections to the proposed project have been made by the neighboring riparians, Jeff Rochon and Mickey Judkins (the objectors). The objectors are concerned that the proposed project will have an impact upon the stability of the bank in front of their property. The project area approximates property boundaries and the project does not extend as far south as the Rochon-Judkins' property. Littoral transport patterns move sand from north to south, so the greatest impact would be expected south of the project area. However, all of the expert testimony indicates that there will be minimal impacts, if any, to the Rochon-Judkins riparian area.

The USACOE authorized a 22-page report prepared by W. F. Baird and Ass. Coastal Engineers, Ltd., directly addressing this issue. (Ex. 9) Reductions in sand volume in theory could lead to bluff recession. The report concluded as follows:

If the revetment is constructed, the resulting deficit in sand and gravel may result in an equivalent volume reduction for the fillet beaches adjacent to the Whistling Straits Golf Course and further to the south. However, even if these reductions in beach volume are only limited to the four pocket beaches north of the Camp Haven revetment and the 50 years of cumulative losses are assumed to occur immediately following the construction of the revetment, only very minor impacts on local recession rates are predicted with the COSMOS model. For example, for a 38-year simulation, bluff recession only increased 1.8%

Locally there is the potential for flanking erosion adjacent to the two terminus points of the revetment. An example of this process was presented for the conditions immediately north of the Camp Haven revetment between 1961 and 1992. This potential impact can be addressed with the termination details on the construction drawings. (Id.)

Mr. Ross of the USACOE concluded that Rochon-Judkins would not notice such a slight reduction.

Further, the potential for flanking erosion has been addressed in the final design plans by means of designing the structure to be turned and tied into the bank. (Ross)

8. The objectors argued that there would be likely detrimental cumulative impacts to their riparian frontage as a result of this project because of existing impacts associated with construction of Whistling Straits Golf Course. However, Mr. Ross of the USACOE provided unrebutted expert testimony that the study considered the impacts from Whistling Straits in reaching its conclusion that there would be no detrimental impact upon the Rochon-Judkins property. (Ex. 14) The County should consider allowing the Rochon-Judkins to put in a drain tile in conjunction with this project. However, any such effort is voluntary on behalf of the County, as the record does not support requiring such a condition in the permit in the absence of expert testimony on behalf of the objectors.

9. The proposed project will impact .16 acres of wetlands. The parties stipulated that there would be no detrimental impact to wetlands from the proposed project and that the project met the requirements of NR 103 and 299.

10. The proposed structure will not materially obstruct existing navigation on Lake Michigan and will not be detrimental to the public interest upon compliance with the conditions of this permit.

11. The applicant is financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

12. The proposed structure will not reduce the effective flood flow capacity of Lake Michigan upon compliance with the conditions in the permit.

13. The proposed structure will not adversely affect water quality nor will it increase water pollution in Lake Michigan. The structure will not cause environmental pollution as defined in Wis. Stat. § 299.01(4) if the structure is built and maintained in accordance with this permit.

14. The proposed project will not injure public rights in fish or wildlife habitat values. (Kramasz) There is minimal fish habitat in the near shore area. The project will not have a detrimental impact upon wildlife, principally migratory birds, making use of the area. (Id.)

15. The proposed project will not have a detrimental impact on public access to the Lake Michigan shoreline. The project is designed to allow as much access as is consistent with the project purpose of stabilizing the bank in the project area. Any minimal impacts on public access from placement of the armor stone are insignificant when balanced against the dangers that collapse of the bank and roadway poses both to users of the highway and users of Lake Michigan.

16. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11, and Wis. Admin. Code ch. NR 150, regarding assessment of environmental impact.

DISCUSSION

Given their proximity to the proposed project area and their concern relating to previous shoreline protection projects, the objector's concerns are reasonable. However, a clear preponderance of the credible evidence, including all of the expert testimony, establishes that the applicants have carried their burden of proof as to both permits.

The applicants have carried their burden of proof in demonstrating that the proposed project will meet the standards of Wis. Stat. §§ 30.12(3) and 30.19(4). There is no question that the proposed riprap and revetment are needed "for the purpose of protecting the bank and adjacent land from erosion" within the meaning of Wis. Stat. § 30.12(3). The bank has sloughed-off, within 6 to 9 feet of the county roadway. This represents an urgent threat to public safety.

Further, the County and USACOE provided un rebutted expert testimony that the proposed grading "will not cause environmental pollution . . . and will result in no material injury to the rights of any neighboring riparian owners," so long as the project is undertaken according to the permit conditions below. The project is designed to prevent exactly the type of "flanking" which the objectors are most concerned about. (Ross)

As a courtesy to the Rochon-Judkins's, the County should consider allowing them an opportunity to tie into the drain tile piping if they so request within 21 days of the issuance of the permit. Because the record does not reflect that this is necessary to prevent damage to the neighboring property, this suggestion is made voluntary for the County, both in terms of design and as to cost.

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.

2. The co-applicants are riparian owners within the meaning of Wis. Stat. § 30.12.

3. The proposed facility described in the Findings of Fact constitutes riprap placed on the bed and bank of navigable waters for “the purpose of protecting the bank and adjacent land from erosion” within the meaning of Wis. Stat. § 30.12(3).

4. The proposed grading will not injure public rights or interest in Lake Michigan and will not cause environmental pollution as defined in Wis. Stat. § 299.01(4), and will result in no material injury to the rights of any neighboring riparian owners, so long as the project is undertaken in accordance with the permit conditions set forth below. The project as proposed conforms to the requirements of laws for the platting of land and for sanitation and meets the standards for issuance of a grading permit set forth in Wis. Stat. § 30.19(4).

5. The parties stipulated that the project would meet all applicable standards relating to wetlands as set forth in Wis. Admin. Code § NR 103 and NR 299.

6. 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.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the permittee, a permit under Wis. Stat. §§ 30.12 and 30.19, for the construction of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.

2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.

3. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

4. The permittee shall submit a re-vegetation plan acceptable to the DNR prior to undertaking project construction. Final site stabilization requires the re-establishment of native vegetation and must not contain any exotic species.

5. The permittee must notify Kathi Kramasz at phone 920-892-8756 before starting construction and again not more than 5 days after the project is complete.

6. The permittee must complete the project as described on or before December 1, 2004. If the permittee will not complete the project by this date, the permittee must submit a written request for an extension prior to the expiration date of the permit. The permittee's request must identify the requested extension date and the reason for the extension. A permit

extension may be granted, for good cause, by the Department. The permittee may not begin or continue construction after the original permit expiration date unless the Department grants a new permit or permit extension in writing.

7. This permit does not authorize any work other than what the permittee specifically described in their application and plans, and as modified by the conditions of this permit. If the permittee wishes to alter the project or permit conditions, the permittee must first obtain written approval of the Department.

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 permittee must post a copy of this permit at a conspicuous location on the project site, visible from the waterway, for at least five days prior to construction, and remaining at least five days after construction. The permittee must also have a copy of the permit and approved plan available at the project site at all times until the project is complete.

10. The permittee's acceptance of this permit and efforts to begin work on this project signify that they have read, understood and agreed to follow all conditions of this permit.

11. The permittee must submit a series of photographs to the Department, within two weeks of completion of work on the site. The photographs must be taken from different vantage points and depict all work authorized by this permit.

12. The permittee, or any agent, and any involved contractors or consultants may be considered a party to the violation pursuant to Wis. Stat. § 30.292 for any violations of Wis. Stat. ch. 30 or this permit.

13. Construction shall be accomplished in such a manner as to minimize erosion and siltation into surface waters. Erosion control measures such as silt fence and straw bales must meet or exceed the standards in the Wisconsin Construction Site Best Management Practices Handbook.

14. The permittee must submit a detailed plan for the project at least 2 weeks prior to beginning construction. This plan must include the site specific construction sequence, details on the location of the access drive and how it will be constructed, information on where any fill material will be hauled from, a detailed revegetation plan that includes natural/native plantings that are conducive the slope stability, a detailed maintenance plan with information as to responsible parties, and a detailed erosion control plan specific to this site.

15. The contractor, the county, and any other necessary parties must meet with the DNR for a preconstruction meeting at least one week prior to work beginning.

16. After the site is 80% stabilized, or prior to at the direction of the Department, all temporary erosion control measures must be removed and disposed of properly. Any remaining

temporary erosion control devices after this point constitute littering and may be enforced as determined necessary by the department.

17. Any area where topsoil is exposed during construction must be immediately seeded and mulched or ripped to prevent soil from being eroded and washed into the waterway.

18. Appropriate erosion control measures must be in-place and effective during every phase of this project. Erosion control measures such as silt fence and straw bales must meet or exceed the standards in the Wisconsin Construction Site Best Management Practices Handbook.

19. Erosion control measures must be in place at the end of each working day. Erosion control measures must be inspected, and any necessary repairs or maintenance performed, after every rainfall exceeding ½ inch and at least once per week.

20. No portion of the bank or upland which is altered or disturbed and, as a result, unstable may remain unprotected for more than 7 days.

21. Site stabilization between October 1 and April 15 requires sodding or seeding and mulching (with a non-toxic tackifier).

22. The bank slopes must be no steeper than 2 feet horizontal to one-foot vertical after construction.

23. The permittee must not deposit or store any of the graded materials in any wetland or below the ordinary high water mark of any waterway. All graded materials must be placed out of the floodway of any stream.

24. The permittee must not operate any construction equipment below the ordinary high water mark of any waterway. If the contractor plans to operate on the beach the permittee must submit written notification of the type of equipment, the length of beach that will be traversed, and the length of distance that will be traversed. The permittee must include an emergency fuel clean up plan with this submittal and the Department must issue a permit amendment prior to any vehicle operation below the OHWM.

25. The permittee must supply a copy of this permit to every contractor associated with this project.

26. A filter cloth, or a gravel filter layer, must be placed under the riprap to extend the life of the structure and to reduce maintenance costs.

27. The project must be constructed in such a manner as to prevent upland soil losses and sediment deposition into surface waters.

28. The revetment wall must be constructed to conform as nearly as possible to the existing shoreline contours. Ends of the wall must be protected with a layer of rock tied into the bank to prevent flanking of the wall.
29. The revetment must be tied back into the neighboring properties to prevent flanking.
30. No other portion of any wetland may be disturbed beyond the 500' area designated in the plans.
31. The lakeward encroachment below the OHWM is limited to that needed to obtain a stable slope from the edge of the highway and must not exceed that shown on the plans.
32. If the revetment obstructs legal use of the lakeshore by the public due to water depth, slopes, etc. the property owners must allow passage over the revetment.
33. Any fill used for this project must be soil material as indicated in the project specifications and cannot be concrete, demolition debris, etc.
34. No further dumping of material over the bluff is to be done.
35. Once an access road is established, the revetment must be constructed from the bottom up. The toe stones must be keyed in as described in the plans.
36. The permittee is responsible for ensuring the safety of motorists on the road, neighbors, and construction vehicles that are involved with this project.

Dated at Madison, Wisconsin on December 18, 2003.

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.