



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

In the Matter of the Application of Wood County
to Discontinue a Part of County Trunk Highway
(CTH) U That Provides Public Access to the Biron
Flowage, a Segment of the Wisconsin River,
Village of Biron, Wood County, Wisconsin

Case No. IH-06-03

DECISION AND ORDER ON REMAND FROM WOOD COUNTY CIRCUIT COURT

On July 17-21, 2006, a hearing was held at Wisconsin Rapids, Wisconsin, Jeffrey D. Boldt, administrative law judge, presiding. The parties agreed to submit written briefs, and the last was received on October 27, 2006. On November 17, 2006, the Federal Energy Regulatory Commission (FERC) issued an Order Amending License to Authorize Land Exchange relating to the same project. The parties submitted written comments on the FERC Order, the last of which was received on November 24, 2006.

On November 29, 2006, the Division of Hearings and Appeals (the Division) issued FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER APPROVING CONDITIONAL ABANDONMENT. On November 28, 2007, the Wood County Circuit Court orally ruled and remanded three conditions back to the Division for decision within 90 days. On January 4th, 2008, the Wood County Court entered a brief written Order reflecting its November 28, 2007 oral ruling.

The parties have stipulated that the 90 day deadline for compliance with the Remand Order will be 90 days from the date of the written Order of January 4, 2008, or April 3, 2008. On January 29, 2008, a telephone conference call was held to set a schedule for consideration of the remand Order of the Wood County Circuit Court. The parties agreed to submit written briefs in lieu of any further hearing, and the last was received on March 17, 2008.

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

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SUMMARY OF ISSUES AND RULING

The Wood County Circuit Court held that Conditions 13, 14 and 15 were too contingent and might at some point deny due process rights to the project objectors if and when certain contingent possibilities came to pass. The non-objecting parties submitted revised proposed language, eliminating Condition 13 and revising Conditions 14 and 15. Further, the Department intends to accept a conservation easement over the Kubisiak Lands (Condition 15).

The Division finds that the suggested revisions to Conditions 13, 14, and 15, the conservation easement, and the resource management plan that the owner of the lands must submit for DNR approval and then implement (Condition 25) will ensure that the Kubisiak Lands will be open and managed for public use in perpetuity. The modified conditions, together with the other conditions in the original decision, ensure that the standards for access abandonment will be met.

DISCUSSION

The disputed Conditions were designed to provide the DNR with some flexibility and discretion in the event of a decision of the FERC that conflicted with respect to the so-called Kubisiak Islands property or other replacement public access requirements. The intent was to allow the Department discretion to determine if any such FERC required modifications rose to the level of significance that would implicate the right to a second right to a contested case proceeding. No final decision from the FERC has been issued as of the date of this remand.

The Wood County Circuit Court held that provision of the Kubisiak Islands public access were central to the “replacement” access provided in conjunction with the abandonment proposal approved by the Division in 2006. The Division Order approving the Abandonment contemplated the possibility of a negotiated Wisconsin River replacement access other than the specific Kubisiak Islands, but allowed the DNR discretion as to whether or not such a switch amounted to a “bait and switch” which implicated the right to another contested case before the project could go forward. Both Condition 13 and Condition 14 included similar language which gave the DNR authority to determine if any minor changes in the public access plan (Condition 13) made by FERC or made as a result of denials of CWA or WQC permits “require[d] new public notice under s. NR 1.92, Wis. Admin. Code.” The conditions sought to allow some flexibility for State regulators so that the entire project would not be stopped as a result of minor changes required by Federal regulators.

However, the Wood County Circuit Court held these conditions would “abdicate DNR authority under § 1.92, Wis. Admin. Code” and possibly deny the due process rights of the Objectors if they were denied a new contested case proceeding relating to possible changes in replacement public access. According to the Wood County Court, this is because, if such changes in the replacement access were made, and if the DNR subsequently declined to require a new public notice and also declined, if requested, a new public hearing under Wis. Admin. Code § NR 1.92, the objectors would no longer have any input into this process. (Oral Ruling Transcript, pp. 24-25) All of these possibilities were remote at the time of the hearing and are even more so today. But the Wood County Circuit Court is no doubt correct that much of the language of Conditions 13 and 14 is confusing and contingent. If the effort to provide flexibility instead creates confusion or, (however unlikely and remote the possibility) a potential future denial of due process rights to the objectors, then these Conditions are more trouble than they are worth.

Accordingly, Condition 13 is no longer necessary. The objectors argue that the Division should instead revise Condition 13 to include a provision stating that the DNR approval of the County’s abandonment request is “null and void” if the FERC denies any replacement access.

Such a condition would go well beyond both the jurisdiction of the Division and the bounds of common sense. Some minor changes may not be sufficient to render the entire abandonment null and void. Indeed, it was such a prospect—forced upon the Division and the parties by a complex and overlapping set of local, state and federal regulatory schemes—that Condition 13 was designed to avoid. The concerns of the Wood County Court are best addressed by eliminating Condition 13.

Similarly, Condition 14 contains much confusing and contingent verbiage. The revised language proposed by the parties reduces the same to its core purpose: requiring that all necessary other approvals be obtained in conjunction with the provision of replacement access.

The deletion of Condition 13 and the revision of Condition 14 eliminates any contingent ambiguity with respect to the proposed CTH U abandonment. The abandonment will not go forward unless all necessary federal, state and local permits and approvals are obtained. As Consolidated noted in the reply brief,

“The Mead/Feith discussion of supposed conflicts between the DNR decision and the not-yet-final FERC order are irrelevant under the Classic-proposed changes to Conditions 13 and 14. If FERC’s final order does not authorize the components of the proposed abandonment of CTH U that are required by the DNR Decision, then the abandonment cannot proceed as proposed without further process.”
(p. 2)

Further, the revised language of Condition 15 makes it clear that the Kubisiak Islands (Lands) will be recorded as a conservation easement that specifically requires that these lands be “kept open for public use in perpetuity and managed in accordance with the resource management and conservancy plans described in Condition 25.” Mead and Feith object to the proposed revisions of Condition 15 because it leaves the ultimate ownership of the Kubisiak Islands unresolved. However, the issue for purposes of the decision and for the removal was not the ownership but whether or not these lands provided replacement public access. This is accomplished by the revised language of Condition 15.

Further, CWPCO suggests a related amendment of Condition 25 to remove either (a) any reference to FERC or (b) to clarify that FERC agreement to the resource management plan is only required if CWPCO owns the Kubisiak Lands. This makes sense. As CWPCO argues, if CWPCO owns the islands, FERC approval would be required by CWPCO’s federal hydropower license. Accordingly, Condition 25 is amended below.

Finally, Condition 20 also needs to be tweaked to reflect the elimination of Condition 13. Accordingly, the second sentence of Condition 20 is also eliminated.

All of the changes below are reasonable and necessary to meet the concerns of the Wood County Circuit Court. As revised, the project meets the standards for abandonment and ensures that the public interest is protected by an “equivalent or superior replacement public access” within the meaning of Wis. Admin. Code NR 1.92.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that Condition 13 be deleted. Further, the second sentence of Condition 20 is also deleted to reflect the elimination of Condition 13.

IT IS FURTHER ORDERED that Conditions 14, 15, 20 and 25 be revised as follows:

14. All local, state and federal permits and approvals that are needed for any portion of the replacement must be obtained.
15. The owner of the Kubisiak Lands shall grant and record a conservation easement to a government body, quasi-government body, environmental group or land trust that is acceptable to DNR. The conservation easement shall ensure that the Kubisiak lands are kept open for public use in perpetuity and managed in accordance with the resource management and conservancy plans described in Condition 25.
20. All CWPCO owned lands and public access components shall be regulated by FERC pursuant to the Federal Power Act and CWPCO's hydro license.
25. The owner of the Kubisiak Islands parcel shall prepare a resource management plan that includes a fishing plan, a wildlife plan, a land management plan, a threatened and endangered species plan and a recreation plan acceptable to WDNR to ensure that this resource continues to provide public benefit as a replacement public access flowage and nature conservancy. In the event that CWPCo takes ownership of the Kubisiak Islands, such plans shall also be acceptable to FERC.

Dated at Madison, Wisconsin on April 3, 2008.

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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 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 therefore 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 and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. 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.