



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

In the Matter of the Denial of an Application by
Bradley Munger for a Permit to Deposit Material
on the Bed of the East Branch Eau Claire River,
Located in the Town of Upham, Langlade County

Case No. IP-NO-2010-34-00953

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Summit Lake, Wisconsin on March 8-10, 2011, Jeffrey D. Boldt, administrative law judge presiding. The parties requested the opportunity to offer written closing arguments and the last submittal was received on March 28, 2011.

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

Bradley Munger and the Summit Lake Association, by

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FINDINGS OF FACT

1. Bradley Munger, W7580 Sommers Street, Shiocton, Wisconsin, 54170, filed an application with the Department of Natural Resources (Department) on March 8, 2010, under Wis. Stat. § 30.12(3m), to deposit material on the bed of the East Branch Eau Claire River (Summit Lake outlet stream), located in the NW ¼ of the SE ¼ of Section 2, Township 33 North, Range 10 East, Town of Upham, Langlade County.

2. The applicant proposes to fill the Eau Claire River outlet stream as it leaves Summit Lake. The fill area is a 2-foot wide by 1-foot deep starting at the bank of Summit Lake to a point 41-feet downstream. Proposed materials for filling are one-and-a-half inch washed stone over a compacted sand/stone mixture. The stated purpose is to repair damages from dredging done by others in the fall of 2007.

3. In the permit application the applicant references repairing damages to the channel done by others in 2007. (Ex. 10) There is no question that an unlawful trespass occurred in late 2007, when an unauthorized group sought to clear the channel of debris that had likely been intentionally placed in the channel outlet. However, the historic conditions at the project site must be considered from a starting date well before 2007.

Aerial photos over a period of more than 70 years demonstrate that the stream has long been a navigable low-flow stream that provided an outlet to Summit Lake and which in turn fed downstream lakes. (Bartz; Houston; Exs. 207-213) The water resources ecology expert for The Greater Bass Lake District, Dr. John Larson, testified that there has long been a discernable watercourse estimated to be between 10 to 15 feet wide. The actual low-flow stream channel has likely flowed within the larger watercourse out of Summit Lake for most or all of the past seventy years.

Further, most of the damage from the 2007 dredging and/or clearing has already naturally restored itself. A stable and re-vegetated low-flow channel has reestablished itself as a waterway connection between these lakes. (Exs. 112 and 240)

4. The outlet stream is navigable in fact at the project site location. DNR water resources expert Dan Houston testified at length about the standards and process by which he made the navigability determination. Houston has visited the site six times over several years and opined that the stream was navigable in fact. He provided documentary evidence in the form of pictures, water depths (Ex. 112 and 115) and the draft needed to float a duck skiff, kayak and canoe. (Ex.116) The stream could easily be navigated, and numerous photos clearly show water depths that would allow actual navigation in all of the above-mentioned watercraft. The former DNR area water management specialist, Gary Bartz, noted that the channel was navigable when the Summit Lake water level was high during his August, 2007 site visit. (Ex 110, p.2) The undisputed expert testimony of Mr. Houston and Mr. Bartz clearly establish that the outlet stream is navigable in fact at the project site location. Their testimony was corroborated by the testimony of Dan Koch, who took a row boat into the outlet in the late 1960's.

5. The structure would materially obstruct navigation on the Eau Claire River outlet stream. Filling the stream channel with six to twelve inches of compacted fill would materially obstruct navigation by blocking the water flow during much of the year. (Houston, Bartz, Larson) This navigable stream would no longer be available for navigation during time periods when it would otherwise be available for navigation. Even the applicant's own expert, Mr. Goodwin, reluctantly supported this conclusion. Goodwin testified that navigation would still be possible during some high-water periods when the water may be two feet deep over the wetland surface area. However, he also testified that the fill could re-direct water flow into the wetlands and that the result of this would be likely to materially obstruct navigation in the existing stream channel area during some periods when it would otherwise be navigable. This would happen because the water would no longer be concentrated in the channel area, but would be dispersed over a wider area of the wetlands and would therefore be shallower. (Goodwin)

The undisputed expert testimony of numerous witnesses, including one retained by the petitioners, established that the fill structure would materially obstruct navigation on the Eau Claire River outlet stream.

6. A wetland complex is located on both sides of the outlet stream. It is approximately .75 acres in size, according to DNR water resources expert Dan Houston's GIS measurement. (Ex. 101) There is no dispute that this is a high-quality wetland complex, consisting of a diverse mix of native sedges, leatherleaf, alder, birch and emergent plants in open water areas. Houston described his review of wetland issues in detail. (Ex. 122) Houston rated the wetland functional high for flood and storm-water attenuation, aesthetics and shoreline protection. Houston noted that leather leaf plants in particular were effective in protecting stream banks from erosion and thereby important for both protecting water-quality and the shoreline. He rated medium values for floral diversity, wildlife and fishery habitat, and water quality protection. The applicant's expert wetland scientist, Mr. Starzinski, largely agreed with these values and that the wetland had medium to high functional values.

7. The parties offered competing testimony on the issue of whether or not filling in the existing low-flow channel would have a detrimental impact upon this wetland complex. Mr. Houston and Mr. Bartz both opined that filling in the stream channel would have a detrimental impact on important wetland functional values including storm-water attenuation. Dr. Larson opined that blocking the channel flow with fill could deprive the adjacent wetlands of water during low flow conditions, and that this would have a detrimental impact upon the wetland complex.

The applicant's wetland scientist, Mr. Starzinski, and Mr. Goodwin opined that the stream channel was part of the wetland complex, and that the fill in the channel area would actually enhance the adjacent wetlands by dispersing the water flow over a larger area of the wetlands rather than through the discreet stream channel. Starzinski opined that the 2007 trespassing incident had channelized the flow of water through the wetlands and the applicant argued that this conflicted with the recommendations in the Greater

Bass Lake Report. (Ex. 104, p.27) However, that report also advises against changing the existing hydrological patterns, and the stream channel has been in place since well before the 2007 trespassing incident. (Id.)

As established in Finding #3, there has long been a low-flow watercourse in the area under consideration in this permit. The DNR correctly treated this application as a fill or structure in a navigable waterway. However, if the channel at issue in this hearing were to be considered for regulatory purposes as a wetland rather than a stream course, as Mr. Starzinski suggested, then placement of the fill would implicate the rules for water quality certification under NR 103. This includes the issue of whether there is a “practical alternative” to filling the wetland. Dr. Larson and Mr. Houston were persuasive that letting the channel naturally repair itself without placement of the fill would be a practical alternative to filling in the wetlands with stone and rip rap. The channel has re-vegetated and become stabilized from both the 2007 dredging/clearing and the 2009 rip-rap placement. Houston noted that there is more evidence of the stream channel filling in with light colored sand than there is of down-cutting or of the channel getting deeper. This was confirmed by photos taken by Houston in both 2009 and 2010. (See: Exs.111-112)

Mr. Houston and Dr. Larson were persuasive that the best option for both the water course and for the adjacent wetlands would be if the stream was allowed to continue to re-stabilize and find its own course without the many interventions of both those who want to keep water in Summit Lake and those who want water to flow out of it. Over the past three years the stream channel depth has reached a higher level that has naturally mitigated the effects of the 2007 clearing or dredging. (Houston)

Further, this is not a new stream channel through wetlands, as Mr. Starzinski and the applicants suggest. Rather, this is a longstanding low-flow channel in a navigable stream that serves important public interests in navigable waters. (Houston, Larson)

8. The proposed fill structure would be detrimental to the public interest in navigable waters. The Eau Claire River provides important fishing passage between Summit Lake and Greater Bass Lake. (Seibel; Exs. 118-120) A stable and re-vegetated low-flow channel has reestablished itself as a waterway connection between these lakes. (Houston; Larson; Exs. 112; 114 and 240) Filling in the outlet channel would block fish passage, and have a detrimental impact upon the fishery of both lakes. (Seibel, Houston)

9. There has been a long-running dispute between people who live on Summit Lake and those who live on Bass Lake and other downstream lakes. There have been drought conditions in the area over several years. This has resulted in lower water levels and extra-legal actions taken by both groups.

In 1989 Munger obtained an after-the –fact permit to place rip-rap along his shoreline adjacent to the Summit Lake outlet. In 1990, the DNR received a complaint that the rip-rap was placed in such a way as to restrict water flow out of Summit Lake. (Ex. 108) In June 2000, the DNR by Gary Bartz ordered that the rip-rap across the channel be

removed. (Ex. 107) It appears likely, according to two experts, that some remnants of the rip-rap, placed below the surface, were not removed and that this has contributed significantly to the build-up of a sand bar that has restricted water flow out of Summit Lake. (Larson, Houston) Dan Houston testified that this rip-rap would no longer be permitted today, in part because it appears to be placed directly in wetlands. (Larson)

During the period of May to August 2007, the DNR investigated what appeared to be blockages placed in the outlet channel. Gary Bartz concluded at that time that the channel was not purposefully blocked. At hearing, both Dan Houston and John Larson opined that they believed some of the materials placed in the low flow channel were purposefully placed there, including grass clippings and pine needles and other debris. (See: Exs. 104 and 228)

In October 2007, four people trespassed on the Munger property in an effort to clear or dredge out obstructions to water flow in the low flow channel outlet. This in turn led to Munger placing rip-rap across the channel in an apparent effort to block the flow of water out of the Summit Lake outlet channel. Both the trespass group and Munger received citations for these extra-legal efforts to have an impact on the water flow out of the channel.

10. The instant permit application is yet another effort to block the flow of water out of Summit Lake. Filling the Eau Claire River outlet channel from Summit Lake would have a detrimental impact upon water levels of downstream lakes including Bass Lake. (Houston, Bartz, Larson) Downstream lakes including Bass Lake have been hit by both the drought conditions which have impacted Summit Lake and also the efforts to block the longstanding water course outlet from Summit Lake. Numerous downstream lake residents testified that water levels have dropped by as much as six feet, leaving property owners unable to swim or boat in these lakes. (Exs. 244-48, Koch, Schlundt, Thomson)

11. The applicants carried their burden of demonstrating that the deposit would not materially reduce the flood flow capacity of the Eau Claire River outlet stream. (Goodwin) Chris Goodwin, an engineer with Ayres and Associates, testified that he had run the Hydrologic Engineering Center River Analysis System (HEC-RAS) computer model to calculate the water surface flow profile, especially during flood conditions. This involved field work to obtain and then enter elevation data to calculate the projected impact of the proposed fill to the distribution and budget of water flow. Goodwin's analysis demonstrated that the impact would be less than 1/100th of a foot in the 100 year flood elevation, and that the project would not therefore have a material impact upon the flood flow capacity of the stream.

12. The proposed project would not adversely affect water quality and will not increase water pollution in the Eau Claire River outlet of Summit Lake and would not cause environmental pollution as defined in Wis. Stat. § 283.01. Insufficient information was presented to establish that, in and of itself, the proposed project would adversely affect water quality.

13. The DNR followed its usual procedures in undertaking its review of the proposed project. (Houston; Exs. 100; 103-105)

14. The DNR has evaluated the proposed project under the Wisconsin Environmental Policy Act (WEPA), and has determined that the grant or denial of the permit would not be a major state action under WEPA.

DISCUSSION

The record was clear that the outlet channel at the project site is a navigable-in-fact stream course that has existed for at least seventy years. Recent activity at the project site must be put into this important natural and jurisdictional context. Both sides came to this hearing with the baggage of some earlier extra-legal activity in and around the proposed project site.

There is no question that unlawful trespass and clearing of the channel was conducted in late 2007 by four individuals who wanted more water flow going to downstream lakes. Further, the record established that in 2009 there was also unlawful placement of rip-rap that extended beyond permit boundaries and blocked water flow out of the channel. (Ex. 109) It also appears very likely that grass clippings and other debris were intentionally placed in the channel in a misguided effort to block the flow of water out of Summit Lake. Most of these past actions were held to be outside the scope of the present hearing, which relates solely to whether or not the applicant has met the statutory standards for issuing the permit for a structure or fill placed upon navigable waters.

The standards for issuing this permit are set forth in 30.12(3m)(c)

(c) The department shall issue an individual permit to a riparian owner for a structure or a deposit pursuant to an application under par. (a) if the department finds that **all** of the following apply:

30.12(3m)(c)1.

1. The structure or deposit will not materially obstruct navigation.

30.12(3m)(c)2.

2. The structure or deposit will not be detrimental to the public interest.

30.12(3m)(c)3.

3. The structure or deposit will not materially reduce the flood flow capacity of a stream.

The applicants have carried their burden of proof on only one of the three elements necessary to obtain a permit. Their expert engineer, Chris Goodwin, was persuasive that the project would not therefore have a material impact upon the flood

flow capacity of the stream. However, there was no significant factual dispute on the first element; filling in the stream channel would likely materially obstruct navigation, as even Mr. Goodwin admitted could happen.

Further, the greater weight of the credible evidence clearly demonstrated that placement of the fill in the stream channel would be detrimental to the public interest in maintaining the fishery because it would block fish passage. The filling in of this long-standing outlet channel would also be detrimental to the public interest in maintaining water levels on downstream lakes.

The project proponent did not come close to carrying their burden of proof on the statutory standards for issuing this permit. Under these factual circumstances, the DNR's denial of the permit was appropriate and must be upheld.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) and Chapter 30.12 (3m) to hear contested cases and issue necessary Orders relating to individual permit requests.

2. The applicant for a Chapter 30 permit has the burden of proof in a contested case proceeding. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 587, 412 N.W.2d 505, 508 (Ct. App. 1987)

3. To establish its Chapter 30 jurisdiction, the DNR must establish that the waterway in question is "navigable." See: *Klingeisen v. DNR*, 163 Wis. 2d 921, 927, 472 N.W.2d 603, 605 (Wis. Ct. App., 1991).

4. A stream is "navigable in fact" if it is "capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes." *Muench v. Public Service Comm'n*, 261 Wis. 492, 506, 53 N.W.2d 514, 519 (1952) The test is whether the stream has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshets, or has continued to be navigable long enough to make it useful as a highway for recreation or commerce. The test is not whether the stream is navigable in a normal or natural condition, but whether it is in some sense permanently navigable, i.e., regularly recurring or of a duration sufficient to make it conducive to recreational uses...Not one of the cases discussing navigability indicates that a finding of navigability requires a threshold showing of actual commercial or recreational use...The test of navigability requires only that such use is possible. *City of Oak Creek v. DNR*, 185 Wis.2d 424, 518 NW 2d 276 (Wis. Ct. App., 1994)

The channel outlet of the Eau Claire River at the proposed project site is navigable-in-fact under Wisconsin law.

5. The structure or deposit will "materially obstruct navigation" within the meaning Wis. Stat. § 30.12(3m)(c)1.

6. The structure or deposit will be “detrimental to the public interest” within the meaning Wis. Stat. § 30.12(3m)(c)2 because it would block fish passage and be harmful to fishery values and because it would decrease water levels in downstream lakes.

7. The structure or deposit will not materially reduce the flood flow capacity of a stream within the meaning Wis. Stat. § 30.12(3m)(c)3.

8. Placement of the fill would not conform to the standards for water quality certification for filling a wetland under Wis. Admin. Code NR 103 because a practical alternative to such a fill would be to allow ongoing natural re-vegetation to continue.

9. The proposed project has been evaluated under the Wisconsin Environmental Policy Act (WEPA), and it has determined that the grant or denial of the permit would not be a major state action under WEPA.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the Department’s decision to deny the permit be upheld and the petition for review be dismissed.

Dated at Madison, Wisconsin on April 25, 2011.

STATE OF WISCONSIN
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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 Division of Hearings and Appeals 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.