



Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application of Sawyer County
to Construct/Place a Culvert in the Little
Round Lake Man-Made Outlet, Located in the
Town of Hayward, Sawyer County
(Permit No. IP-NO-2013-58-02643)

Case No. DNR-14-064

In the Matter of the Application of Sawyer County
to Abandon Little Round Lake Dam and
Rescission of 1941 Public Service Commission
Water Level Order, Located in the Town of
Hayward, Sawyer County
(Permit No. IP-NO-2013-58-01501)

Case No. DNR-16-026

DECISION

Pursuant to due notice, a contested case hearing was held at the Sherman & Ruth Weiss Community Library, 10788 Wisconsin Highway 77, Hayward, Wisconsin, on April 3, 4, 5, 6, and 7, 2017. Administrative Law Judge Eric D. Défort (ALJ) presided over the hearing. The parties decided to submit written post-hearing briefs and the last of those briefs was received on August 21, 2017.

In accordance with Wis. Stat. §§ 227.47(1), Wis. Admin. Code § NR 2.155(3), Wis. Admin. Code § NR 2.12(1)(f), and Wis. Admin. Code § NR 2.08(5) and (6), the PARTIES to this proceeding are:

James Hausman, Petitioner, by
Attorney Jordan Hemaïdan and
Attorney Cameron Field
Michael Best & Friedrich
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Madison, Wisconsin 53703

Sawyer County, Respondent, by
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Wisconsin Department of Natural
Resources, Respondent, by
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Madison WI 53707-7921

FINDINGS OF FACT

Procedural Facts and Issues for Hearing

1. The County of Sawyer (the County), Wisconsin, filed an application with the Department of Natural Resources (DNR) for a permit to construct a culvert in the Little Round Lake man-made outlet channel, located in the Town of Hayward, County of Sawyer.
2. On July 11, 2014, the DNR notified the County of the DNR's approval of the application to construct the culvert, the issuance of the requested permit, and the assignment of Permit No. IP-NO-2013-58-02643.
3. On August 6, 2014, the DNR received a request for a contested case hearing challenging the permit to construct the culvert, pursuant to Wis. Stat. § 227.42, on behalf of Mr. James Hausman.
4. On September 8, 2014, the DNR granted the petition for a contested case hearing and identified the issue for hearing as follows:

Whether the culvert will be detrimental to the public interest in navigable waters.

5. Additionally, the County filed an application with the DNR for the removal/abandonment of the Little Round Lake Dam and for the rescission of a 1941 Public Service Commission (PSC) order pertaining to the regulated water level.
6. On April 25, 2016, the DNR notified the County of the DNR's approval of the application to abandon the dam and rescind the PSC order, the issuance of a permit, and the assignment of Permit No. IP-NO-2013-58-01501.
7. On May 24, 2016, the DNR received a request for a contested case hearing challenging the permit to abandon the dam and rescind the PSC order, pursuant to Wis. Stat. § 227.42, on behalf of Mr. James Hausman.
8. On June 13, 2016, the DNR granted the petition for a contested case hearing and identified the issue for hearing as follows:

Whether the DNR's review of the dam abandonment application sufficiently considered the economic impacts of abandoning the dam and rescinding the water level order.

9. On July 22, 2016, the DNR forwarded both requests for contested case hearing to the Division of Hearings and Appeals.

Substantive Facts

10. The Little Round Lake Dam (also known as Carlson Road Dam) is located in Sawyer County, between Little Round Lake and Osprey Lake (previously known as Squaw Lake). Exh. 3 at 2.
11. The Dam is a timber bridge structure with 5-foot-wide openings and is equipped to accommodate the placement of stop-logs. Exh. 3 at 2.
12. Stop-logs have not been used for any appreciable amount of time, which results in the structure functioning as a culvert. Dallam testimony; Kafura testimony.
13. Moreover, stop-logs have not been used for at least 15 years. Olson testimony; Woznak testimony.
14. The Dam has a center pier / column. Exh. 151, Exh. 156, Woznak testimony.
15. The water levels on Little Round Lake and Osprey Lake have been observed, measured, and found to be the same. Wolf testimony.
16. The water levels on both sides of the Dam are virtually the same. Tyrolt testimony.
17. Round Lake and Little Round Lake outflow through the Carlson Road Dam into Osprey Lake. Exh. 3 at 2; Exh. 208; Olson testimony.
18. Outflows from Osprey Lake flow into Osprey Creek and into Lac Courte Oreilles. Exh. 3 at 15; Exh. 208; Olson testimony; Dallam testimony.
19. Round Lake is spring-fed and is a seepage lake. Kafura testimony.
20. Bluegill and large-mouth bass fish species inhabit the Round Lake System. Kafura testimony.
21. All lakes in the area have been affected by above average precipitation. Kafura testimony.
22. Water levels in the Round Lake System have been high after historic rainfalls. Olson testimony.
23. The water levels in the Round Lake System appear to correspond directly to rainfall patterns. Woznak testimony; Exh. 222; Tyrolt testimony.
24. The Round Lake System is relatively flat, which results in slow removal of water from the system. Dallam testimony; Exh. 11 at 9.
25. Extended periods of wet or dry weather have the greatest impact on lake elevations. Exh. 11 at 9.

26. The Dam does not control the water levels. Kafura testimony; Dallam testimony; Woznak testimony.
27. The current Dam structure requires replacement because it is at the end of its service life and poses a potential public safety risk due to the increasing potential for structural failure. Exh. 13 at 6, § 3.2.
28. The current Dam structure is subject to problems with the accumulation of debris. Olson testimony; Woznak testimony.
29. The center pier / column of the current Dam structure contributes to the accumulation of floating debris within the Dam. An open fixed elevation culvert would remove the existing center pier and allow for debris to pass through the culvert, rather than trapping the debris. Woznak testimony; Exh. 156.
30. The County proposed, and the DNR approved, the replacement of the current structure with a 12-foot span by 7-foot rise reinforced concrete box culvert with an elevation set at 1343.8 feet to allow for a match in elevation to the existing dam sill and stream-bed, while allowing for increased capacity over the existing structure so more water can be conveyed from Little Round Lake during times of high water levels. Exh. 13 at 6, § 3.2; Exh. 15.
31. Beavers in the area are known to build beaver dams downstream of Osprey Lake down to Lac Courte Oreille. Wolf testimony.
32. Beaver dams slow the flow of water in the Round Lake system. Woznak testimony; Kafura testimony; Exh. 11 at 6 – 8.
33. Shoreline erosion on Round Lake may be the result of increased impervious surfaces and the elimination of natural buffers, due to residential construction and landscaping. Tyrolt testimony.
34. Additionally, high water levels appear to contribute to shoreline erosion on Round Lake. Hausman testimony.
35. Low water levels convert the Round Lake system into a series of disconnected ponds, which prevent navigation between the lakes. Hausman testimony.
36. In 1941, the Public Service Commission of Wisconsin (PSC) found that someone obstructed a natural channel between Little Round Lake and Squaw Lake (now known as Osprey Lake) by filling it with road fill. Exh. 1 at 5.
37. The PSC ordered that a channel be constructed between Little Round Lake and Squaw Lake (now known as Osprey Lake). Exh. 1 at 10.

38. The PSC also ordered that Sawyer County maintain the water levels of Round Lake and Little Round Lake at 77 feet and to prevent water levels from rising above 77.25 feet. Exh. 1 at 10.
39. The petitioner's expert witness conceded that the PSC water level order was never realistic. Dent testimony.

DISCUSSION

The burden of proof was on the petitioner to demonstrate that the proposed culvert would be detrimental to the public interest in navigable waters and that the DNR's review of the dam abandonment application insufficiently considered the economic impacts of abandoning the dam and rescinding the water level order. Wis. Stat. § 30.209(2)(e), Wis. Admin. Code. § 2.13(3)(b).

It is undisputed that the properties on Round Lake are suffering from high water levels on the lake. The petitioner sought to prove that the Dam was linked to the high-water levels. However, the preponderance of the evidence demonstrates that both high-water levels and low-water levels in the Round Lake System are caused by corresponding precipitation patterns. The high-water levels and low-water levels are not caused by the operation, or lack of operation, of the Dam. The Round Lake System is a relatively flat system, which results in slow removal of water from the system. Additionally, it appears that beavers construct blockages (beaver dams) that further slow the flow of water downstream. Rainfall, flat gradient, and beaver activities are naturally occurring conditions.

For the reasons stated below, the petitioner has failed to meet its burden.

The Culvert

The standard for the issuance of a permit to construct a culvert requires that the proposed culvert (1) not materially obstruct navigation, (2) not materially reduce the effective flood flow capacity of a stream, and (3) not be detrimental to the public interest. Wis. Stat. § 30.123(8)(c). The petitioner failed to establish that the culvert would violate any of the statutory criteria.

The evidence demonstrates that the proposed culvert will remove a center pier / column, which would improve the navigability of this channel. Moreover, the removal of the center pier would reduce the possibility of debris becoming stuck or trapped in the structure and, as a result, would not materially reduce the flood flow capacity. On a related note, the proposed culvert would widen the channel and, as a result, would not materially reduce the flood flow capacity or act as an impediment to the movement of fish within the Round Lake System. Finally, the current structure has not operated as a dam and, instead, has operated only as a culvert for at least 15 years. Thus, the petitioner has not established that the use of the current structure as a culvert was the reason for the high-water levels and the resulting shoreline erosion. Similarly, the petitioner has not demonstrated that the use or non-use of the Dam was the reason for low water levels in earlier years. As previously noted, the changes in water levels correspond to

precipitation patterns. Additionally, the replacement culvert would increase the flow of water out of Round Lake during times of high water, which may assist residents around that lake in times of high water. Ultimately, the evidence demonstrates that the replacement culvert would not be detrimental to the public interest.

Abandonment of the Dam

The standard for the issuance of a permit for the abandonment of a dam may require the applicant to comply with such conditions that the DNR deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health, property, property values, and economic values. Wis. Stat. § 31.185(5). The petitioner failed to establish that the abandonment would violate any of the statutory criteria.

As discussed earlier in this decision, the applicant (the County) seeks to replace the current structure with a new culvert. The current structure has the capability of being used as a dam, but has not functioned as such for at least 15 years. Thus, it has only been operating throughout all of those years as a culvert. The evidence demonstrates that the abandonment of a dam that has not been in use for at least 15 years is consistent with the preservation of public rights in navigable waters. Specifically, the abandonment will continue the existing flow of water. Moreover, the larger and unobstructed culvert will not be as susceptible to blockages by floating debris and will not be an impediment to the movement of fish within the Round Lake System. The abandonment of the old structure followed by the placement of a new structure will promote safety because the current structure is so old that it is at risk of structural failure. There was no reliable or credible evidence that the abandonment, and subsequent replacement, will adversely affect water quality in any way.

The petitioner challenged that the approval will perpetuate unacceptably high-water conditions, economic harm, and property damage. Specifically, the high-water levels appear to contribute to shoreline erosion. The petitioner's assertions are premised on the assumption that the non-use of the Dam is the cause of the high-water levels. The petitioner's witnesses were not credible or persuasive in their suggestion that the use, or non-use, of the Dam was the cause of the high-water levels. However, the preponderance of the evidence demonstrates that the high-water levels are caused by rainfall in combination with the flat gradient. Based on the evidence, the abandonment of the Dam would have no effect on rainfall or the flat gradient. Therefore, the abandonment of the Dam would have no effect on property, property values, and economic values because precipitation and flat gradient are at fault for the high-water levels.

Additionally, the petitioner challenged that the DNR did not perform an economic analysis of the impacts. However, the fundamental problem with the petitioner's argument is that it assumes that the Dam is the cause of the changes in water levels. As previously noted, the evidence demonstrates that the Dam is not the cause of such changes. Therefore, the petitioner has failed to establish that the abandonment of the Dam and its replacement with a culvert would have any economic impact.

As an aside, there was no dispute that one of the naturally occurring hydraulic controls in this system of lakes and streams is the presence of beaver dams. In fact, the petitioner (Mr. Hausman) testified that he took it upon himself to use explosives to remove such obstructions and that he noticed a drop in the water levels after doing so. As a result, the petitioner argues that the County should be required to clear any and all downstream obstructions, such as beaver dams. However, it is undisputed that the beaver dam obstructions may occur for several miles down the connected lakes and streams that are part of the watershed for this system. It is undeniable that beavers, like rainfall, are a natural part of the environment and their activities cannot be predicted with precision. Ultimately, it would be unreasonable to require the County to clean up and monitor the entire length of the connected lakes and streams below the current dam / culvert structure to eliminate beaver dams in perpetuity. Furthermore, the environmental consequences of the complete eradication of beaver dams are unknown. Finally, and importantly, the petitioner has not presented any legal authority that the State may require an owner of a dam to clear all obstructions that are not occurring in the immediate vicinity of the structure, but that may occur far from the structure and, potentially, several miles downstream.

Rescission of the 1941 PSC water level order

The rescission of the 1941 PSC water level order is reviewable under Wis. Stat. § 31.02(1), which requires that the DNR must act in the interest of public rights in navigable waters, to promote safety, and to protect life, health, property, property values, and economic values. The petitioner has not demonstrated that the proposed rescission is inconsistent with any of these interests. Of note, the petitioner's own expert conceded that the 1941 water level order was never realistic. Indeed, in the petitioner's initial post-hearing brief, the petitioner concedes that the 1941 PSC water level order is unachievable and argues that it should be modified to a different range. Ultimately, the evidentiary record demonstrates that the water levels have fluctuated throughout the years in response to rainfall in combination with the flat gradient of the Round Lake System and that the water levels are not reasonably, or practically, manageable. Therefore, the Division will simply order the rescission of the water level order.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals shall preside over contested case hearings in place of the DNR. Wis. Stat. § 227.43(1)(b).
2. The Division of Hearings and Appeals is subject to the DNR's agency rules when presiding at hearings. Wis. Stat. 227.46(1).
3. The DNR's agency rules provide that, unless the DNR petitions for judicial review as provided in Wis. Stat. § 227.46 (8), the decision of the administrative law judge shall be the final decision of the DNR. Wis. Admin. Code § NR 2.155(1). Thus, as to the causes of action arising under Wis. Stat. §§ 31.185 and 31.02(1), the decision of the administrative law judge is the final decision of the DNR.

4. Furthermore, contested case hearings arising from the issuance of a permit to construct a culvert under Wis. Stat. § 30.123 are referred to the Division of Hearings and Appeals. Wis. Stat. § 30.209(1m)(g). Additionally, after the contested case hearing, any party aggrieved by a decision of the of the administrative law judge may commence an action in circuit court to review that decision. Wis. Stat. § 30.209(3)(b). Thus, the decision of the administrative law judge is the final decision of the DNR in such actions.
5. At the administrative contested case hearing, the petitioner has the burden of proof. Wis. Stat. § 30.209(2)(e), Wis. Admin. Code. § 2.13(3)(b).
6. The burden of proof for the hearing decision is to be by the preponderance of the evidence. Wis. Admin. Code § HA 1.17(2).
7. Wisconsin Statute § 31.185(4) requires the following:

“Prior to the hearing the department shall have its staff make its own investigation of the dam and, on the basis of such investigation, shall make recommendations as to the type of requirements, if any, which it would impose on the applicant under sub. (5) as a condition to granting the permit. Such recommendations shall be presented at the hearing. If no one registers opposition to the application at the hearing, the department shall grant the permit, subject to such conditions as it deems necessary under sub. (5). If someone registers opposition to the abandonment at the hearing and such opposition is not withdrawn, the department shall defer action on the application for a period of 120 days after the hearing. Within a reasonable time after the expiration of such period, the department shall deny the permit, or grant the permit, subject to such conditions as it imposes under sub. (5), unless, within such 120-day period, one or more municipalities or other persons or associations have agreed to acquire ownership of the dam and have furnished satisfactory proof of intent to comply with s. 31.14 (2) or (3).”

The 120-day waiting period expired on August 7, 2017. There is no evidence that any other municipality or person has agreed to acquire ownership of the dam.

8. The DNR has complied with the requirements of Wisconsin Administrative Code Chapter NR 150 and Wisconsin Statute Section 1.11 because the proposed actions qualify as minor actions.
9. The proposed culvert will not materially obstruct navigation, nor will it materially reduce the effective flood flow capacity of a stream, nor will it be detrimental to the public interest.
10. The abandonment of the Dam will preserve public rights in navigable waters, promote safety, and protect life, health, property, property values, and economic values.
11. The rescission of the 1941 PSC water level order is consistent with the interest of public rights in navigable waters, the promotion of safety, and the protection of life, health, property, property values, and economic values.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the decision to grant the permit to construct a culvert is AFFIRMED.

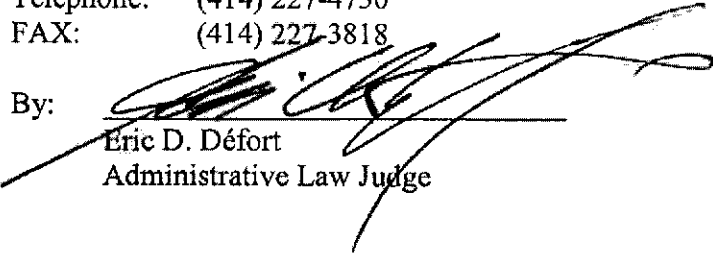
IT IS FURTHER ORDERED that the decision to grant the permit to abandon the Little Round Lake Dam (also known as the Carlson Road Dam) is AFFIRMED.

FINALLY, IT IS ORDERED that the decision to rescind the 1941 PSC water level order is AFFIRMED.

Dated at Milwaukee, Wisconsin, on September ^{13th}, 2017.

STATE OF WISCONSIN
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By:


Eric D. Défort
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 served and 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.