



Before the  
State of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of the Application of Pinecliff, LLC  
for a Permit to Remove Materials from the Bed of  
Lake Michigan, Town of Baileys Harbor, Door  
County, Wisconsin

Case No. IP-NE-2014-15-00117

DHA Docket No. DNR-16-0005

**DECISION**

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to due notice, a hearing was held at the Door County Justice Center, 1205 S. Duluth Avenue, Sturgeon Bay, Wisconsin, on July 17, 2017, and July 18, 2017, Eric D. Défort, Administrative Law Judge presiding.

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

Pinecliff, LLC, by

Attorney Paul Lay  
1450 Pine Drive  
Baileys Harbor, WI 54202

Wisconsin Department of Natural Resources, by

Attorney Michael Kowalkowski  
Department of Natural Resources  
101 S. Webster Street  
PO Box 7921  
Madison, WI 53707-7921

ISSUE FOR HEARING

Whether the proposed project is detrimental to the public interest in navigable waters.

FINDINGS OF FACT

1. Rodney Lockwood, Jr., filed an application on behalf of Pinecliff, LLC, with the Wisconsin Department of Natural Resources (DNR) to remove, or dredge, 190 cubic yards of material from the bed of Lake Michigan to extend an existing pier located at 1450 Pine Drive, Baileys Harbor, Wisconsin 54202. Exh. 101, Exh. 102, Exh. 103, and Exh. 104.
2. The application was denied by DNR Water Management Specialist Carrie Webb. Exh. 109.

3. Mr. Lockwood filed the application because low water levels made the existing pier virtually unusable. However, Mr. Lockwood conceded that, after the application was filed, the water levels rose to a higher level and, as a result, the pier is usable again. Lockwood testimony.
4. The project location is part of a whitefish spawning area. Hansen testimony; Exh. 109.
5. Successful spawning of whitefish at the project location has been essential to the proliferation of the whitefish population in the Great Lakes and, as a result, has supported a robust sport fishery in addition to several millions of dollars in dockside whitefish sales, annually. Hansen testimony.
6. The proposed dredging project will destroy habitat that is used by whitefish and will promote the proliferation of aquatic invasive and nuisance species. Exh. 109, Webb testimony, and Hansen testimony.
7. An alternative to dredging would be the installation of a flow-through pier extension, which would allow for water to flow underneath the pier. Webb testimony.
8. Pinecliff, LLC, never explored installing a pier extension with the DNR application reviewer as an alternative to the proposed dredging project. Lockwood testimony; Webb testimony.

#### DISCUSSION

Unless an individual permit or a general permit has been issued by the DNR or authorization has been granted by the legislature, no person may remove any material from the bed of any lake or navigable stream. Wis. Stat. § 30.20(1)(b). A person may apply to the DNR for a permit that is required under sub. (1)(b) to remove material from the bed of any lake or stream. Wis. Stat. § 30.20(2)(bn). The DNR shall issue a permit pursuant to an application if the DNR finds that the issuance of the permit will be consistent with the public interest in the lake or stream. Wis. Stat. § 30.20(2)(c).

At issue in this case is the impact of Pinecliff's proposed project on Lake Michigan's aquatic habitat. Specifically, Pinecliff claimed that there would be no harm to Lake Michigan's whitefish habitat because the channel where the dredging would occur is not a spawning site nor is it an area where spawning activities would be successful. Jude testimony; Exh. 1 at 27. However, the primary concern of the DNR is that the process of dredging creates plumes of sediment that will ultimately have adverse effects within the channel and in the areas adjacent to the channel. Webb testimony. It should be noted that the petitioner did not dispute that the areas adjacent to the channel are part of the North Bay in Baileys Harbor. Exh. 1 at 2. Moreover, the petitioner agreed that the North Bay is very important as a nursery area for lake whitefish. Jude testimony, Exh. 109 § 9(b). Thus, the general area of Pinecliff's proposed project is a place where whitefish spawning activities are likely to occur. As a result, it is important to note that increased sedimentation may bury and suffocate whitefish eggs that are deposited in the area. Exh. 113 at 22. First, if whitefish eggs are harmed, then there may be an adverse impact on the continued success of the species and, as a result, the success of the sport fishery and the public's interest in consuming whitefish. Second, increased sedimentation may provide nutrients for algae and result in algae blooms. Exh. 113 at 21. Algae blooms result in decreased water clarity and decreased dissolved oxygen. Exh.

113 at 21. Sudden fluctuations in dissolved oxygen impacts all aquatic life. Exh. 113 at 22. There are already 367 known dredged channels in Door County and those channels have changed the habitat of the area appreciably. Exh. 113 at 21. Therefore, the cumulative impact of yet another dredging project may be significant. It should be noted that an aerial photograph demonstrates that there was a visible algae bloom in the previously dredged channel, which happens to be the location of the proposed dredging project. Webb testimony and Exh. 122. While it is true that the DNR noted that turbidity curtains may be used to limit the plumes of sediment that occur from dredging, it is also true that such curtains are difficult to use during the winter (which is when the project is proposed to occur) and are not entirely reliable. Hansen testimony. Additionally, dredged channels appear to encourage the growth of invasive species such as Eurasian watermilfoil. Exh. 113 at 23. Indeed, DNR Water Management Specialist Carrie Webb observed Eurasian watermilfoil at the proposed project site, which is a channel that was previously dredged. Webb testimony, Exh. 143, and Exh. 144.

At present, Pinecliff, LLC, has no actual need to engage in the dredging project because the water levels have risen to a point where the current pier is usable. Furthermore, they have not explored the installation of a flow-through pier extension as an alternative to dredging, if the water level were to drop at some point in the future.

Based on the evidence, Pinecliff, LLC, has not carried its burden of proving that the proposed dredging project is consistent with the public interest in the lake.

#### CONCLUSIONS OF LAW

1. Contested case hearings arising from a permit denial under Wis. Stat. § 30.20 are referred to the Division of Hearings and Appeals. Wis. Stat. § 30.209(1m)(g).
2. The Division of Hearings and Appeals shall preside over the contested case hearing in place of the DNR. Wis. Stat. § 227.43(1)(b).
3. Following the contested case hearing, any party aggrieved by a decision of the hearing examiner may commence an action in circuit court to review that decision. Wis. Stat. § 30.209(3)(b). Therefore, the hearing examiner's decision is the final decision.
4. The burden of proof for the hearing decision is to be by the preponderance of the evidence. Wis. Admin. Code § HA 1.17(2).
5. At the hearing, the petitioner has the burden of proof. Wis. Stat. § 30.209(2)(e).
6. The petitioner, Pinecliff, LLC, failed to meet its burden, by a preponderance of the evidence, to demonstrate that the DNR improperly denied the permit application to remove, or dredge, materials from the bed of Lake Michigan to extend an existing pier.
7. The DNR properly determined that the application did not meet the criteria for permit approval, pursuant to Wis. Stat. § 30.20(2), because the proposed project is detrimental to the public interest in the lake.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the decision to deny the permit application is AFFIRMED.

Dated at Milwaukee, Wisconsin, on August 8<sup>th</sup>, 2017.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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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.