



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Abatement Action on Motion
of the Department of Natural Resources to Remove
Alleged Illegal Material Placed and Maintained by
Jan Bax on the Bed of Long Lake, Located in the
Town of Dayton, Waupaca County

Case No. ENF-NE-2007-69-0876WL

FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER

On October 5, 2009, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice, hearing was held at Waupaca, Wisconsin on November 30, 2009. The parties submitted written closing arguments, the last of which was received on December 21, 2009.

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

Wisconsin Department of Natural Resources, by

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Dr. Jan Bax, by

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PROCEDURAL HISTORY AND ALLEGATIONS

On August 25, 2007, while investigating a complaint regarding a shed near the ordinary high water mark (“OHWM”) of Long Lake, a 104-acre lake navigable in fact, WDNR Warden Ted Dremel saw what appeared to be new fieldstone placed as rock riprap along the shoreline of a riparian property. DNR staff determined that the property, which is located at N2227 Butternut Road, Waupaca, Wisconsin, in the NW ¼, SW ¼, Section 4, Township 21 North, Range 11 East, Town of Dayton, Waupaca County, is owned by Dr. Jan Bax.

By letters dated September 21 and December 10, 2007, and January 16, 2008, WDNR staff advised Dr. Bax, his attorney, and his agent that placing rock riprap at this location required a Wis. Stat. § 30.12 permit. Further, that because Long Lake was an area of special natural resource interest, shore erosion control structures (including riprap and bioengineered structures) were not exempt from permitting under Wis. Stat. §§ 30.01(1am) and 30.12(1g)(i), (j), or (k); that based on the shoreline energy calculation for this location and pursuant to Wis. Admin. Code § NR 328.07(3), placement of new riprap was prohibited at low energy sites; that WDNR could only approve rock riprap for this location if it met the general permit requirements of Wis. Stat. § 30.12(3)(a)3c., that allow placement of riprap under a general permit to replace or repair existing riprap; that Dr. Bax did not establish that riprap existed at the site before the new rock was added, and photos of the site from September 2006 do not show existing riprap; and that the rock that had been placed on the shoreline had to be removed by May 1, 2008, to avoid further enforcement action.

WDNR Warden Nathan Furlong viewed the site on May 25 and June 11, 2008, and saw that the rock had not been removed. By letter dated June 12, 2008, he issued two citations to Dr. Bax for obstructing navigable waters pursuant to Wis. Stat. § 30.15(1)(d) on May 25 and June 11, 2008, by placing the rocks in navigable waters without a permit in violation of Wis. Stat. § 30.12. Dr. Bax pled not guilty on both counts and requested a jury trial. Attempts to resolve the matter were fruitless. On November 11, 2008, the court dismissed the citations on motion of the prosecutor.

WDNR decided to pursue the matter in a Wis. Stat. § 30.03 hearing. On October 5, 2009, the Department filed the instant Request for Hearing with the Division of Hearings and Appeals.

FINDINGS OF FACT

1. Dr. Jan Bax (Bax) purchased a cottage on Long Lake in Waupaca County in 2006. The property is located at N2227 Butternut Road, Waupaca, Wisconsin, in the NW ¼, SW ¼, Section 4, Township 21 North, Range 11 East, Town of Dayton, Waupaca County (the site or the Bax property). Bax owns approximately 100 feet of frontage on Long Lake. (Ex. 11)

2. Long Lake is a 104-acre navigable in fact lake that is part of the Waupaca Chain of Lakes. (Ex. 22) Long Lake is an “area of special natural resource interest” (ASNRI) because it contains endangered or threatened resources or aquatic elements identified in the Wisconsin Natural Heritage Inventory. (Koehnke)

3. On August 25, 2007, while investigating a complaint regarding a shed near the ordinary high water mark (“OHWM”) of Long Lake, WDNR Warden Ted Dremel saw what appeared to be new fieldstone placed as rock riprap along the shoreline of a riparian property. DNR staff determined that the property, which is located at N2227 Butternut Road, Waupaca, Wisconsin, in the NW ¼, SW ¼, Section 4, Township 21 North, Range 11 East, Town of Dayton, Waupaca County, is owned by Bax.

4. Bax testified that when he purchased the property, the cottage, yard and the shoreline were in a state of disrepair. Bax removed the cottage and built a new home. Bax also rehabilitated the front yard and the waterfront over this period. He removed dead and diseased trees. Bax removed noxious and invasive weeds including poison ivy and Purple Loosestrife. Bax removed thorny bushes and Eurasian water milfoil. He planted numerous native plants and shrubs with the assistance of an employee, Ron Wolff. (Wolff)

5. Bax also removed concrete from the bed and bank. The concrete included whole and broken cinder blocks and silo staves which had formed a crude sidewalk and seawall at one time. Portions of the old sidewalk remain at this time. (Ex. 5-A)

6. Bax and Wolff placed and rearranged rocks and stones in the bed of the lake to protect against erosion. These rocks were placed eighteen feet on the north end of his property and forty to fifty feet at the south end of his shoreline. Bax asserts that this rearrangement is not subject to the requirement for a rip-rap permit. Bax and Wolff also placed rocks and stones from the bank onto the bed of the lake at the shoreline. Fifteen feet of the shoreline does not contain rocks because of the two docks and the open area between the docks to allow easy access to the water.

On the final fifteen feet of frontage, Bax admits that he inserted without a permit natural, washed, large stones, six to ten inches in diameter, from a quarry near Manawa, Waupaca County, Wisconsin.

7. Bax and Wolff removed most of the natural vegetation on the bank and placed fieldstone along the shore on the bed and bank of the lake and a flat stone behind the fieldstone. Posts, concrete pads, and what appeared to be a dog “invisible” fence had also been placed below the OHWM at this site. WDNR staff verified they had not issued a Wis. Stat. § 30.12 permit to place any material on the bed and bank of the lake at this site. (Koehnke)

At hearing, DNR Water Management Specialist Scott Koehnke noted the legal significance of the OHWM as the boundary between upland that belongs to the riparian owner and lakebed under the public trust jurisdiction of the state, and the fact that (in the absence of applicable exemptions) permits are required to deposit material on a lakebed. Using photos of the site, and well-established marks and indicators used to identify an OHWM, Koehnke provided unrebutted expert testimony that the rocks along the Bax property shoreline had been deposited below the OHWM. (Koehnke)

8. There is no lawfully established bulkhead line at the Bax property that would allow for the placement of riprap without a permit. (Koehnke) Further, Koehnke did a search of an extensive data base and found that no rip-rap permits had been issued at the site.

9. Waupaca County Zoning Specialist Jeff Henneman testified that he was on site and visited and viewed the shoreline in September 2006 – after Dr. Bax bought the property (January 2006) but before DNR learned of placement of new rock (August 2007). Henneman was at the Bax site in connection with alleged shoreland zoning violations. He testified that he had not seen any rock along the shoreline other than maybe a few rocks that had been placed around the base of a pine tree. He provided photos of the site from his September 2006 visit that did not show rock along the shoreline. (Henneman, Ex. 3A-L)

10. Koehnke testified that, in 2003, Bax had placed rock without a permit at another site he owned on Beasley Lake (also in the Chain of Lakes), and had been contacted by Koehnke regarding that violation. Bax later applied for an after-the-fact permit to allow the rock at this location to remain. (Koehnke, Bax, Ex. 13-15) On cross-examination, Dr. Bax essentially affirmed Mr. Koehnke’s testimony with respect to the 2003 incident on Beasley Lake.

11. Dr. Bax testified that he understood that no permit was required to place rock along the shoreline because he believed rock had been placed there previously. He admitted on cross-examination that he had not contacted anyone at DNR to confirm this. (Exs. 14-15) Further, Area DNR Water Management Specialist Scott Koehnke testified that the fact that some rock had been placed previously was a mitigating factor in granting the 2003 after the fact permit. However, subsequent to the 2003 incident, the DNR adopted a new regulatory framework which eliminated the permit exemptions to replace or repair existing riprap in areas of special natural resource interest. (Koehnke)

12. As noted above, Koehnke testified that Long Lake is an “area of special natural resource interest” (ASNRI) because it contains endangered or threatened resources or aquatic elements identified in the Wisconsin Natural Heritage Inventory. Accordingly, Koehnke opined that the permit exemptions to replace or repair existing riprap do not apply to the Bax property and Bax needed either a general or individual permit to place rip-rap at the site. Further, the materials removed likely did not meet the definition of “existing riprap.” (Koehnke) Koehnke testified that the rock as placed on Dr. Bax’s shoreline is not “riprap” as that term is defined in s. NR 328.03(22), Wis. Admin. Code, or understood as a “term of art” by persons who design and place shore erosion control structures.

Riprap requires a gentle slope that provides a stable angle of repose for layers of rocks of various sizes. Various sizes of rock are required so that smaller rocks can settle between larger ones into a stable matrix with interstices that allow vegetation to take root. Plant roots help anchor the riprap in place and their vegetative greenery provides a more natural look that helps mitigate the visual impact of bare rock riprap on the natural scenic beauty of the shore viewed from the lake. The slope, varied rock size, and softer vegetative covering also are important for riprap to effectively provide erosion control on a shore as these elements help absorb rather than deflect wave energy that hits riprap. (Koehnke) The materials previously placed at this location were not rip-rap, and some of it was use for the unrelated purpose of providing a crude sidewalk.

13. Koehnke provided testimony, corroborated by his contemporaneous notes, that Dr. Bax's landscape contractor, Ron Wolff, had contacted him in February 2007 to discuss the Bax project. In a November 19, 2007 phone call, Wolff told Koehnke that Wolff had informed Dr. Bax that a permit was needed for the rock. (Koehnke, Exs. 23, 24) On cross-examination, Wolff neither admitted nor denied such discussion had occurred. Wolff testified instead he did not remember the discussion. (Wolff) Koehnke's testimony that the conversation occurred, especially as corroborated by his contemporaneous notes, is both more credible and more probative.

14. Koehnke provided unrebutted expert testimony that the Bax site was a low energy site within the meaning of NR 328. While Bax disputed some of the values used by Koehnke, he did not offer the opinion of a qualified expert to dispute Koehnke's methods or conclusions. Further, unlike many other Wisconsin lakes, lakes on the Waupaca chain have a relatively stable water level and a variation of only six inches between high and low water levels. (Koehnke)

15. Dr. Bax has not applied for an after-the-fact individual permit to keep the rock he placed without an exemption or a permit. Koehnke testified that the site would not qualify for a permit to place rock riprap under s. 30.12(3m), Wis. Stats., because as a low energy site it does not meet the requirements for new rock riprap under s. NR 328.06(3)(b), Wis. Admin. Code. Dr. Bax has not demonstrated the requisite bank-edge recession required under par. (b)1. and his EI (erosion intensity) score was less than the 40 required under par. (b)2. Dr. Bax could protect his shore adequately from whatever wave intensity reaches it using bioengineered methods of shore protection. (Koehnke)

16. Koehnke opined that the near-shore area is critically important to most aquatic and semi-aquatic organisms. This is because hardening of shorelines by placing rip-rap creates a net loss of biodiversity for flora and fauna in the immediate area. The impacts of rock and other hard armoring of shorelines reduces the quantity of littoral vegetation, which typically consists of deep rooted plants that dissipate wave action and hold soil in place, reducing erosion and sedimentation. Hard armor/riprap reduces the areas of naturally vegetated shore that contain plants that allow for nutrient uptake and slow the overland flow of surface water runoff to the lake, thus losing the benefits to water quality that such plants provide. (Koehnke, Exs. 36, 37)

17. Further, the cumulative impact of this and similar projects across not just Long Lake but in the 21 lakes in the Chain of Lakes will increase the loss of biodiversity. (Koehnke) Dr. Bax himself illustrated the potential cumulative impact when he offered photographs which showed a number of other rip-rap placements on Round Lake. Round Lake is not an area of special natural resource interest and these projects may well have been exempt from permitting requirements. (Exs. 46-48) Nonetheless, these photos show substantial new construction on the chain of lakes in just the past two years and the potential for the cumulative loss of biodiversity inherent to a more developed and simplified shoreline.

18. Koehnke testified that, because there are no permit exemptions for rip-rap on Long Lake (due to its being an ASNRI and under 300 acres in size), either a general or individual permit is needed to allow placement of rip-rap at the Bax site. Further, the only

general permit available under these circumstances would be for replacing existing rip-rap. Under NR 328, if he applied for a permit, Bax would be eligible to place rip-rap to the OHWM, plus to the elevation of the wave-height calculation. (Koehnke) The rip-rap as currently placed exceeds the wave-height calculation. Accordingly, under these circumstances the Division has no choice but to order removal of the rip-rap in its current configuration.

DISCUSSION

Dr. Bax placed rip-rap on his property and below the OHWM without a permit and at his own risk. He admits that he placed some additional materials from a quarry near Manawa, Wisconsin, in addition to rearranging some existing materials that do not meet the definition of rip-rap. Given his prior experience in having placed rip-rap without a permit in 2003, Dr. Bax had a reasonable basis for his belief that he was allowed to “replace or repair” existing rock as rip-rap at the site. However, this belief did not account for the change in the regulatory structure after 2003.

In early 2004, the Wisconsin Legislature enacted 2003 WISCONSIN ACT 118, which included a new section s. 30.12(1g)(i). (Ex. 19) Further, on May 1, 2005, NR 328, Wisconsin Administrative Code, relating to Shore Erosion Control Structures in Navigable Waterways, became effective. Under these standards, as Area DNR Water Management Specialist Scott Koehnke testified, it is clear that Dr. Bax does not meet any permit exemptions set forth in s. 30.12(1g)(i), Stats., which allows a riparian to repair or replace existing rip-rap.

Sec. 30.12(1g) provides as follows: “A riparian owner is exempt from the permit requirements under this section for the placement of a structure or the deposit of material *if the structure or material is located in an area other than an area of special natural resource interest...*” (Emphasis added) Long Lake is an ASNRI and therefore is not subject to those permit exemptions to related replacement or repair of existing rip-rap.

Given the fact that Bax did not apply for an after-the-fact permit at any time between 2007 and the date of the hearing, the Division has little discretion in finding a middle ground between the positions of the two parties. It would be fundamentally unfair to allow Dr. Bax to exceed the standards promulgated by the Department and made available to riparians who follow the required process and apply for rip-rap permits. This is especially true given that this is the second time that Dr. Bax has been the subject of water regulatory issues involving placing rip-rap without a permit. (Ex.19) The Department’s position seeking a removal order for all rock rip-rap from Manawa and any other unauthorized material or structures below the OHWM, must therefore prevail. This includes materials which were rearranged by Dr. Bax and Mr. Wolff.

However, even at this low energy site, the new rules allow Dr. Bax to install bioengineering shore protection. Further, if he installed such methods and later could show they were inadequate by demonstrating the requisite bank-edge recession, he could apply for an individual permit for rock riprap at the site at that time and his application would be analyzed using the factors in s. NR 328.06(5), Wis. Admin. Code. Bax may also apply for an individual permit for rock if he can meet the requirements under s. NR 328.06(3)(b), Wis. Admin. Code.

But there is no permit application pending before the Division, and the removal order must therefore be granted.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43 and 30.12(1), 30.15(1)(d) and 30.294 and NR 328.

2. Unless an individual or a general permit has been issued under Chapter 30 or authorization has been granted by the legislature, no person may do any of the following: Deposit any material or place any structure upon the bed of any navigable water where no bulkhead line has been established. 30.12(1)(a). The respondent did not have a permit authorizing placement of materials below the OHWM. The respondent placed materials on the bed of Long Lake, a navigable waterway, without a permit.

3. There are some permit exemptions set forth in s. 30.12(1g)(i), Stats., which allow a riparian to replace or repair existing riprap. Sec. 30.12(1g) provides as follows: “A riparian owner is exempt from the permit requirements under this section for the placement of a structure or the deposit of material *if the structure or material is located in an area other than an area of special natural resource interest...*”(Emphasis added)

Long Lake is an ASNRI and therefore is not subject to those permit exemptions related replacement or repair of existing rip-rap. Long Lake is listed as an ASNRI under s. 30.01(1am)(c), because it contains endangered or threatened species or aquatic elements identified in the Wisconsin Natural Heritage Inventory (“NHI”). S. NR 1.05(2), (4)(intro.) and (a), Wis. Admin. Code. Accordingly, the permit exemptions of s. 30.12(1g) do not apply

4. The Bax site is a low-energy area within the meaning of NR 328. Under NR 328.07(3), construction of new riprap is prohibited at low energy sites, except as provided in s. NR 328.06 (3) (b). The respondent has not as of the date of hearing established that the site meets the bank-edge recession or EI scores necessary to place new rip-rap at this low energy site, however this issue has not been litigated in this proceeding because this hearing did not include an after-the-fact permit application.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that Dr. Jan Bax present a plan acceptable to the DNR for the removal of all rock rip-rap and any other unauthorized material or structures below the OHWM, and to stabilize the bank against erosion using natural re-vegetation or bioengineering, and to re-vegetate the bank above the OHWM for a minimum of 10 feet, and to monitor the site for the presence of exotics within 40 days of the receipt of this decision. All work in the approved plan shall be completed no later than June 15, 2010, unless a written extension is authorized by the Department.

Dated at Madison, Wisconsin on January 29, 2010.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

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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.