

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH ____

DANE COUNTY

STATE OF WISCONSIN
17 West Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857,

Plaintiff,

v.

Case No. 10-CX-_____

WILLIAM HAUS
3300 Lake Mendota Drive
Madison, Wisconsin 53705,

Complex Forfeiture: 30109

BAUER & RAETHER BUILDERS, INC.,
a domestic corporation
4801 Tradewinds Parkway, Suite 200
Madison, Wisconsin 53718-6837,

and

D.L. ANDERSON'S LAKESIDE LEISURE CO., INC.,
a domestic corporation
5440 Blue Bill Park Drive
Madison, Wisconsin 53704,

Defendants.

THE AMOUNT CLAIMED IS
GREATER THAN THE
AMOUNT CLAIMED UNDER
WIS. STAT. § 799.01(1)(d).

COMPLAINT

The plaintiff State of Wisconsin, by its attorneys, J.B. Van Hollen, Attorney General, and Thomas L. Dosch, Assistant Attorney General, brings this complaint against the defendants William Haus, Bauer & Raether Builders, Inc., and D.L. Anderson's Lakeside Leisure Co., Inc., at the request of the Wisconsin Department of Natural

Resources (DNR), and alleges that the defendants have violated Wis. Stat. ch. 30, as follows:

1. The plaintiff State of Wisconsin is a sovereign state of the United States of America, with its principal offices at the State Capitol in Madison, Wisconsin.

2. The defendant William Haus (Haus) resides at 3300 Lake Mendota Drive, Madison, Dane County, Wisconsin. Haus is an owner of the land and a residence at that address, which will hereafter be referred to as "the property." On information and belief, the shore of Lake Mendota forms the north boundary of the property and the natural shoreline in that location is a steep rock bluff approximately thirty-two feet in height, sometimes referred to by the defendants and others (and hereafter in this complaint) as "the cliff."

3. The defendant Bauer & Raether Builders, Inc. (Bauer & Raether) is a Wisconsin corporation with its principal offices located at 4801 Tradewinds Parkway, Suite 200, Madison, Dane County, Wisconsin. On information and belief, Bauer & Raether is a general building contractor specializing in commercial and select residential construction projects.

4. The defendant D.L. Anderson's Lakeside Leisure Co., Inc., also known as D.L. Anderson Marine Contractors (DL Anderson), is a Wisconsin corporation with its principal offices located at 5440 Blue Bill Park Drive, Madison, Dane County, Wisconsin. DL Anderson's advertised business services include pier and dock installations, "DNR approved" shoreline repairs, restorations, constructions, and reinforcements, shoreline erosion control installations, boulder and shoreline restorations,

and rip-rap and rock-wall placements. DL Anderson also advertises that it provides property owners assistance in obtaining necessary permits from the DNR.

5. Lake Mendota is a natural, navigable lake and thus a public water of the State of Wisconsin within the meaning of Wis. Stat. § 30.10. Its bed includes all land beneath the waters of the lake and on its banks up to the elevation of the lake's ordinary high water mark (OHWM).

6. At all times relevant to this proceeding Lake Mendota has been classified and designated by the DNR as an "area of special natural resource interest" within the meaning of Wis. Stat. § 30.01(1am).

7. Pursuant to Wis. Stat. § 30.12, with exceptions not applicable here, no person may deposit any material or place any structure on the bed of any navigable water where no bulkhead line has been established unless the DNR has issued a permit authorizing, or the Legislature has granted authorization for, such material deposit or structure placement.

8. Pursuant to Wis. Stat. § 30.15, any person who violates Wis. Stat. § 30.12 shall forfeit not less than \$10 nor more than \$500 for each offense, and each day during which a deposit or structure continues to exist in violation of that statute is a separate offense for purposes of imposing these mandatory penalties.

9. Pursuant to Wis. Stat. § 30.294, every violation of Wis. Stat. ch. 30 is a statutory public nuisance which may be prohibited by injunction and which may be abated by legal action brought by any person. Furthermore, pursuant to Wis. Stat. § 30.298(5), courts are specifically authorized to order a defendant to perform or refrain

from performing such acts as may be necessary to fully protect and effectuate the public interest in navigable waters, and may order the abatement of any nuisance, restoration of a natural resource or other appropriate action designed to eliminate or minimize any environmental damage caused by the defendant.

10. Pursuant to Wis. Stat. §§ 30.292 and 30.99, whoever is concerned in the commission of a violation of Wis. Stat. ch. 30 may be charged with and convicted of the violation as a party to the violation even though he or she did not directly commit it.

11. Prior to March 17, 2008, Haus submitted architectural plans and drawings for a proposed "Haus Lake Access" project (hereinafter, "the project") to the Village of Shorewood Hills (hereinafter, "the Village") in support of his application to the Village for a conditional use building permit. Those original plans depicted a structure consisting of a series of decks, stairways and landings that would be cantilevered out from the cliff behind his home on two vertical steel beams driven into Haus' property on land approximately ten to fifteen feet inland from the water and approximately three to four feet in elevation above the elevation of the OHWM of Lake Mendota. The tops of the two supporting steel beams were depicted as being stabilized or anchored by "tie-back" cables running to a "deadman" under a landing in Haus' back yard. These original plans did not contemplate or depict the placement of any fill or structures on the bed of Lake Mendota, and access to the water from the lowest level deck of the proposed project would have been obtained by means of a retractable staircase. A copy of excerpts of those plans is attached as Exhibit A. The only part of the project depicted as being in the lake in the original plans was a seasonal dock.

12. On or before March 17, 2009, Village officials asked Haus or his agents to seek comment from the DNR on the project depicted in those original plans before the Village would make a decision on Haus' conditional use permit application. On March 17, 2009, Haus' architect sent a copy of the original plans to the DNR for that purpose. At that time Haus' architect advised the DNR that the "intent is not to impact the shoreline as it exists. . . . All solid construction will be about 12' above lake level" On March 24, 2009, Haus' architect contacted the DNR again to ask whether the project was "under the jurisdiction of the DNR."

13. On April 1, 2009, DNR responded to Haus and his architect by indicating that while it could not endorse the construction of a project this large at that site, the DNR nevertheless did not assert jurisdiction over the project because, as DNR advised the Village the same day, "DNR jurisdiction only applies . . . to structures on the bed of the lake"

14. At a public hearing of the Village of Shorewood Hills Plan Commission on April 15, 2009, held to determine whether Haus' application for a conditional use permit should be granted, Haus advised the Plan Commission that "there is no DNR involvement and they have no jurisdiction" over his proposed project because the structure would be cantilevered and its supporting columns "are not in the lake."

15. After obtaining a conditional use permit from the Village, but without advising the DNR, Haus revised his plans for the project by, among other things, eliminating the proposed use of cantilevered structures and tie-back cables that would have avoided placing any materials or structures on the bed of Lake Mendota. Instead,

under the revised plans, Haus would construct a rectangular concrete pad on top of a rectangular area of crushed rock extending from the base of the cliff and onto the bed of the lake. Furthermore, that concrete pad and the project structure would be further supported by the placement of additional rock fill material on the bed of Lake Mendota in an area extending outward from the concrete pad into deeper waters of the lake in an attempt to create a sufficient "angle of repose" for the crushed rock pad foundation to keep the project structure from toppling over or slipping into the lake.

16. Haus employed the defendant Bauer & Raether to construct the project using the revised plans.

17. Prior to the construction of the project there existed, near the base of the cliff on the north border of the property and in the water of Lake Mendota, a triangular-shaped pile of rocks (hereinafter "the rubble pile") which had formed naturally as rock eroded from and broke in pieces off the cliff, from which point the pieces of rock fell or slid into the waters of Lake Mendota and came to rest upon the bed of the lake. A photograph of the rubble pile as it appeared prior to the defendants' construction activities is attached to this complaint as Exhibit B. The rubble pile included one particularly large piece of rock, approximately eight feet long, six feet wide, and six to eight feet high, which had fallen off the cliff within the last ten to fifteen years. Prior to the construction of the project, the rubble pile pointed and extended into Lake Mendota approximately twenty feet from the cliff, including the outer-most portions of the rubble pile that were submerged below the waters of Lake Mendota when the water level of the lake was at (or even well below) the elevation of the lake's OHWM. Also prior to the

construction of the project, the naturally occurring rubble pile included various gaps or inlets where the waters of Lake Mendota flowed onto and inundated the bed of the lake during normal water conditions, *i.e.*, whenever the water level of the lake was at (or even well below) the elevation of the lake's OHWM. Also prior to the construction of the project, as depicted in Exhibit B, there existed against the base of the cliff a conical pile of debris, consisting primarily of smaller rocks and soil, approximately ten feet high and thirty feet wide.

FIRST CLAIM -
UNLAWFUL DEPOSIT OF MATERIAL AND
PLACEMENT OF A STRUCTURE ON LAKE BED
(Lake Bed Areas Not Previously Covered By Natural Rubble Pile)
Wis. Stat. § 30.12

18. To facilitate the construction of the project as contemplated by the revised plans, Haus and Bauer & Raether contracted with the defendant DL Anderson to break the large rocks in the rubble pile into smaller pieces and to move the other stone material and soil which had slid down or accumulated in the pile against the cliff. Beginning on or about July 8, 2009, and continuing on July 9, 2009, and July 13, 2009, DL Anderson, using a barge equipped with heavy construction equipment, and Bauer & Raether personnel, using a jackhammer, broke the large rocks in the rubble pile into smaller pieces and excavated the accumulated stone and soil material from against the cliff, and thereafter:

- (a) Spread those materials on the bed of Lake Mendota to form a level, roughly rectangular-shaped rock foundation, twenty-two to twenty-nine feet deep

and thirty-five to thirty-eight feet wide, for a concrete pad (measuring approximately thirteen feet, ten inches deep by nineteen feet wide) which they then installed on top of the crushed rock foundation. The crushed rock and soil was redistributed to create a flat foundation, and in that process some was used to fill the previously-described inlets or gaps in the naturally occurring rubble pile, raising the elevation of the land's surface in those areas approximately two feet above the elevation of the OHWM. The appearance of the artificially created crushed rock foundation as of July 13, 2009, is depicted in Exhibit C;

(b) Spread those materials on the bed of Lake Mendota to form a sloping pile of rock and soil, submerged under the waters of Lake Mendota, and which extended the naturally-occurring rubble pile in all directions an additional eight to ten feet into the lake. On information and belief, the defendants engaged in this filling activity in an attempt to create a sufficient "angle of repose" for the crushed rock underlying the concrete pad and the project structure in hopes that this additional filling might minimize or prevent the loss of crushed rock foundation material from beneath the concrete pad, thereby reducing chances that the project structure might tip over or slip away from the cliff further into Lake Mendota. In so doing, the defendants artificially covered more than 350 square feet of lake bed with stone rubble where there had been none before; and

(c) After July 13, 2009, but before August 28, 2009, the defendants placed additional stone fill material on the lake bed in the area between the crushed rock pad they had artificially created and the steel fence posts and silt

fence depicted in Exhibit C, thereby extending the artificially created pad several additional feet into Lake Mendota east, west and north of the cliff.

19. On or before August 28, 2009, Haus and Bauer & Raether began installing large vertical and horizontal steel beams on top of the concrete pad, as depicted in a photograph taken that day, a copy of which is attached as Exhibit D. Some of this project structure rests on areas referred to in paragraph 18(a) of this complaint, *i.e.*, areas of the bed of Lake Mendota on which there had been no artificially placed fill, rubble or structures prior to the defendants' construction project.

20. Prior to crushing the rocks in the rubble pile, excavating the accumulated stone and soil material from against the cliff, spreading the crushed rock, stone and soil materials on the bed of Lake Mendota, installing the concrete pad, and installing the steel beams and other structures, none of the defendants advised the DNR that they intended to take any of these actions, nor did they advise the DNR that they intended to build the project using the revised plans. Among the post-construction justifications for so revising the plans which Haus has offered to the DNR is his opinion that the cantilevered structure depicted in the original plans he had provided to the DNR for its review would be "significantly more expensive" than building the project in the manner he has since employed.

21. The shoreline area of Lake Mendota's lakebed which the defendants filled to construct the project was once habitat used by spawning walleye and staging panfish, but that habitat was destroyed by the defendants' actions. The unlawful filling and placement of structures associated with the project also interfere with the exercise of

public rights of navigation, fishing, and enjoyment of scenic beauty in these public waters and on these public trust lands. Pursuant to Wis. Stat. § 30.294, the defendants' unlawful filling activities constitute a statutory public nuisance.

22. Although Haus has repeatedly been advised by the DNR, beginning on or about September 4, 2009, that the ongoing construction project was an unlawful encroachment on state-owned lakebed not authorized under Wis. Stat. § 30.12 or by legislative grant, construction work on the upper components of the project continued throughout the summer months of 2010. Haus has repeatedly asserted to the DNR that he will neither stop construction on the project nor voluntarily remove the unlawful encroachment it represents.

23. At no time have the defendants, or anyone else, been issued a permit under Wis. Stat. § 30.12, or authorization from the Legislature, to place fill material or structures, like the crushed rock, the stone material, the concrete pad or the steel beam framework, on the bed of Lake Mendota adjacent to the property.

24. No bulkhead line has been established for Lake Mendota in the vicinity of the project.

25. The fill material and structures the defendants unlawfully placed on the bed of Lake Mendota beginning on July 8, 2009, have unlawfully remained in place every day since July 8, 2009, and until the defendants abate the violations, each day those materials and structures remain on the lakebed will constitute separate violations by each defendant of Wis. Stat. §§ 30.12 and 30.15.

26. Pursuant to Wis. Stat. §§ 30.03(2), 30.294, and 30.298(5), the Wisconsin Attorney General is authorized to enforce violations of Wis. Stat. ch. 30 and to seek temporary and permanent injunctions abating violations, restoring a natural resource, and eliminating or minimizing any environmental damage.

SECOND CLAIM –
UNLAWFUL DEPOSIT OF MATERIAL AND
PLACEMENT OF A STRUCTURE ON LAKE BED
(Lake Bed Areas Previously Covered By Natural Rubble Pile)

27. The allegations of paragraphs 1-22 are restated and incorporated herein by reference.

28. The rubble pile on the bed of Lake Mendota before the commencement of construction of this project was formed as a result of the natural process of erosion of the cliff on Haus' property due to the actions of water, ice and wind over many years. As a matter of law, when the rocks constituting the rubble pile broke off the cliff and fell or slid onto the bed of Lake Mendota, the resulting avulsion, *i.e.*, a sudden change in the contour of the shoreline on the cliff and around the rubble pile, did not operate to extend Haus' title into Lake Mendota wherever rock in the rubble pile happened to protrude above the elevation of the lake's OHWM. Instead, consistent with long-standing common law principles, while the process of shoreline erosion may have caused Haus to lose some amount of riparian property, the public lost no interest in or, pursuant to Wis. Stat. § 30.12, regulatory authority over those areas of the bed of Lake Mendota onto which the rocks had fallen. In other words, at all times relevant to this proceeding, the naturally occurring rubble pile rested upon and was part of the bed of Lake Mendota.

29. The defendants' previously described placement of crushed rock, the excavated stone and soil material from against the cliff, a concrete pad and the shore access structure on areas of the bed of Lake Mendota where there was a naturally occurring rubble pile constituted the deposit of material and structures on the bed of a navigable water.

30. The allegations of paragraphs 23-26 are restated and incorporated herein by reference.

31. Pursuant to Wis. Stat. § 30.294, the defendants' unlawful filling activities and placement of structures, as alleged in this claim, constitute a statutory public nuisance. Furthermore, because within the first year of its existence the crushed rock and soil foundation underlying the concrete cap has been so undermined by the action of water that the entire front edge of the concrete pad is unsupported, as depicted in Exhibit E, and because that erosion can be expected to continue until the shore access structure slides or falls further into Lake Mendota, additional statutory public nuisances, including the increased obstruction of navigation, contrary to Wis. Stat. § 30.15, may result if the shore access structure is not removed from the bed of Lake Mendota.

WHEREFORE, the plaintiff asks for judgment as follows:

1. An injunction requiring the defendant Haus to remove all materials and structures the defendants have unlawfully placed on the bed of Lake Mendota and to take all other steps necessary to fully protect and effectuate the public interest in these

navigable waters, to accomplish the restoration of the natural resource and to eliminate or minimize the environmental damage the defendants have caused;

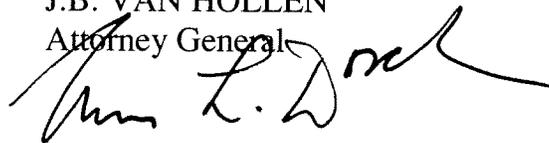
2. For forfeitures from the defendants as provided in Wis. Stat. § 30.15, to be assessed for every day that the fill and structures have unlawfully been on the bed of Lake Mendota and continuing until those materials are removed;

3. The 26% penalty surcharge provided for in Wis. Stat. § 814.77(11), the 20% environmental surcharge provided for in Wis. Stat. § 814.77(5), the \$25.00 court costs pursuant to Wis. Stat. § 814.63(1), the \$13.00 crime laboratories and drug law enforcement surcharge pursuant to Wis. Stat. § 814.77(2), the \$68.00 court support services surcharge pursuant to Wis. Stat. § 814.77(1m), the 1% jail surcharge pursuant to Wis. Stat. § 814.77(7), and the \$21.50 justice information system surcharge pursuant to Wis. Stat. § 814.77(8); and

4. Such other relief as the Court may find just and appropriate.

Dated this 12th day of November, 2010.

J.B. VAN HOLLEN
Attorney General



THOMAS L. DOSCH
Assistant Attorney General
State Bar # 1017026

Attorneys for Plaintiff State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0770
(608) 267-2250 (Fax)
doschtl@doj.state.wi.us