

TRI-COUNTY POWERBOAT ALLIANCE,

Petitioner,

v.

Case No. 09-CV-2064

Administrative Agency Review: 30607

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES, TOWN OF WOLF RIVER,
TOM HINZ, RONALD J. NAPARALLA,
GORDON PAGEL, JOSEPH HALL,
SHEILA MCNULTY WORTHERN,
DON STEEGE, STEPHEN H. LANDOLT,
RONALD SPRENGER, and
MICHELLE PROSEK,

Respondents.

RESPONSE BRIEF OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

The respondent State of Wisconsin Department of Natural Resources (the Department) by its counsel, Attorney General J.B. Van Hollen and Assistant Attorney General Cynthia R. Hirsch, submits this response brief in opposition to the petitioner Tri-County Powerboat Alliance's request for judicial review of an administrative law judge (ALJ) order. As will be shown below, the ALJ's order was in accord with Wisconsin law, and should be affirmed.

FACTS OF THE CASE

On April 27, 2009, the Town Board of the Town of Wolf River, Winnebago County, adopted Ordinance No. 10-B, a slow-no-wake ordinance to regulate boating upon the navigable waters of the Town of Wolf River. R. 74-75. The Department received a request for hearing objecting to the ordinance from the Tri-County Powerboat Alliance (TCPBA). R. 72-73. After the ordinance passed, the Department referred the request to the Division of Hearings and Appeals for hearing. On August 6, 2009, the Division of Hearings and Appeals held a public hearing under Wis. Stat. § 30.77(3)(2r) and Wis. Stat. ch. 227 at Oshkosh, Wisconsin. R. 68. The Department, the Town of Wolf River, and TCPBA appeared by counsel. Nine other persons participated as parties.

The Town of Wolf River adopted Ordinance No. 10-B, an approximately 0.55 mile extension of an existing slow-no-wake zone to address safety concerns created by congestion and conflicting uses on the Wolf River. R. DNR Exhibits B, G; Testimony of Town Clerk Gilbert: Transcript at 127-129; Testimony of Town Chairman Rutten: Transcript at 133-134; Testimony of DNR Warden Knorr: Transcript at 231-32. The ordinance was adopted and based on public testimony concerning the dangers created by multiple conflicting uses in a well populated and heavily used area of the Wolf River near Fremont, Wisconsin. *Id.* The Town submitted its ordinance and proposed placement of buoys marking the slow-no-wake zone to the Department. R. DNR Exhibits A, C, D, E; Testimony of Town Clerk Gilbert: Transcript at 129-30; Testimony of DNR Staff Ringquist: 160-62; Testimony of DNR Warden Dombrowski: Transcript at 213-214. The Department does not rule upon the propriety of boating safety ordinances relating to

ivers, but does approve the placement of buoys. *Id.* In this case, the Department did undertake to support the ordinance as consistent with state law and reasonable and necessary to protect the public health and safety and the resource.

Maps depicting the general area of the river in Winnebago County, the area of the river in the Town of Wolf River ("Leg #4" on R. DNR Exhibit K), the slow-no-wake zones on the river, and the extension at issue here, were prepared by the Winnebago County Land and Water Conservation Department. R. DNR Exhibits J, K, L, M. The extension of the no wake zone provided for in Ordinance No. 10-B was approximately 0.55 miles, an area with a number of facilities such as campgrounds, boat launches, other businesses, residences, piers, and docks.

Testimony before the ALJ demonstrated overwhelmingly that congestion and conflicting use afflict the area. The area is more heavily populated than adjacent areas. Town Chair Randal Rutten testified he no longer boats on the river because he doesn't feel safe in his 16 foot boat, now smaller by comparison than many others on the river, because of danger from wake. As a volunteer firefighter and first responder, he has seen the results of accidents, including an incident where one boat rode over another, in a wake caused accident, as well as other accidents in the area. There is no budget for increased police presence. Accidents, difficulty in using a boat ramp accessible to the public, and the effect on the shore all informed the Town's decision to adopt the ordinance. R. Transcript at 131-158.

Daniel Rudebeck, the habitat chair for a local sportsmen's organization, testified concerning limitations on the river that diminish its apparent width in the area – erosion cuts, and the unprotected top of the shore result in soft organic material which then subsides into the river and changes the width of the channel, reducing it by 20 to 30 feet, leaving less space than might otherwise be apparent. He also witnessed hazardous events on the river. On July 3, 2009, the Friday before a weekend holiday, he was on a pontoon boat traveling from Lake Poygan to an area where a handicapped passenger could more easily gain access to the shore. The river was crowded. Many boaters were courteous, however, four large powerboats in line passed by and created high bow wakes. The shoreline was vertical where the pontoon boat was stopped. Four waves pushed his boat toward the shore, four higher waves pushed them back. The pontoon boat was "tossed like leaf," and lost its grip on dock. Mr. Rudebeck nearly lost his footing, and could have gotten caught between boat and shore. He testified that in his opinion, the slow-no-wake ordinance is needed for everyone's safety. The incident demonstrates what happened on most weekends without the slow-no-wake ordinance – the situation is dangerous when the river has a large number of boats. R. 173-181.

Joe Hall testified he owns the Triangle Campground, which has about 100 sites, and also lives on the river. He has a boat launch and piers in the slow-no-wake area that the public can use for a fee. He has noticed a great improvement since the ordinance was adopted. The traffic has slowed down and is calmer. Before the slow-no-wake ordinance, he observed injuries caused by wakes at the boat launch. One person ripped a rotator cuff trying to hang on through a wake. Other people trying to launch when fast

boats go by have experienced cuts and bruises. Some boats come within 20 feet of his dock, something they wouldn't be able to do on a lake. His customers come to relax, fish, and engage in other activities, including boating. Mr. Hall also testified regarding his own serious accident as a result of speed and an unseen wake. R. 182-197.

Don Steege lives on the river. He testified about incidents involving a high wake hitting a smaller boat emerging from around an island in the river at a 90 degree angle. He described another incident involving a pontoon boat with six to eight small children and one adult that was passed by two speed boats at high rate of speed. The boat was hit by wakes from both sides and children were frightened. In yet another incident, a boat coming down river pulling a person in a tube, was hit by wake from a pontoon boat going 45 miles an hour to show off a powerful engine – the tube rider was thrown out, and a cigarette boat who couldn't see her came within 15 feet of her. R. 198-211.

Mr. Steege testified he notices a difference with the new ordinance – he can see people in smaller boats proceeding with less anxiety, not clinging to sides of their boats. The area is also quieter – outdoor conversation is now audible. Mr. Steege, who has training and experience in soil conservation, also testified that the river bank and the island's banks have eroded at a rapid rate on account of the boat traffic and attendant wake over the last four years. He noted that below the water line the power of wake is greater than that exhibited above water and that this is evident in the trees tipping over on the island, the sinking of riprap on his banks, and the wear and tear on his seawall. He joined in a petition for the ordinance and stated that speed, racing, erosion, and noise

were all discussed, but safety was the biggest factor. He is concerned that with all of the traffic, the island and the birds that frequent it will be gone before long. *Id.*

DNR Warden Jeffrey Knorr testified concerning the safety conditions on the river. He has been a warden for 15 years and assigned to the Wolf River for 10 years. He stated that the area of the river in question has significant congestion, problems with speed, and multiple users and uses. R. 225-268. Warden Knorr showed several video clips to support his testimony. R. DNR Exhibit Q. The video illustrates crowding, speed, and the types of watercraft seen on the river. Warden Knorr has fielded many citizen complaints regarding the safety of this area of the river, which he shared with town and county government. See e.g. R. DNR Exhibit N. He noted that the river is subject to severe pressure. It has unusually varying uses – it is adjacent to lake traffic. Its users swim, dive, canoe, kayak, operate many sizes of boats up to 40 feet long, and fish from shore and raft. He discussed the details of two accidents. R. DNR Exhibits O, P. He testified about accidents on the river that he had plotted on a map. His filmed record showed, among other things, very large boats, a boat towing a tube, and a jet ski within short distances of one another; it also showed speeding, and the density of shore use.

Warden Knorr noted that while the river is approximately 116 yards wide, one must reduce that by 30 feet for docks, weeds, and other shoreline features, and that boats travel closer to shore than they are permitted to do on lakes. As a result, watercraft are often very close to one another when passing, and often operate close to shore. R. Transcript at 236-48. Petitioner supports its argument by noting that the portion of the river where the slow-no-wake zone was extended is relatively wide and ignores this fact.

Petitioner's brief at 6, ¶ 4. This fact regarding safety conditions on the river is noted by the ALJ. R. 14 at ¶ 8. In Warden Knorr's opinion the slow-no-wake zone has improved safety. It has resulted in an increase in the number of different uses, less citizen complaints, and generally slower traffic. He testified that his role is to provide the town and other municipal governments with information on the river's dangers, and the limitations of the available enforcement tools. He testified that without some regulation, there was great danger in the mixture of uses. R. Transcript at 248-49.

STANDARD OF REVIEW

The standard of review is prescribed by Wis. Stat. § 227.57. Review is limited to the administrative record before the Court. Wis. Stat. § 227.57(1) and *State Public Intervenor v. DNR*, 171 Wis. 2d 243, 249-50, 490 N.W.2d 770 (Ct. App. 1992). "Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief ... it shall affirm the agency's action." Wis. Stat. § 227.57(2). "If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." Wis. Stat. § 227.57(6). "The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by *substantial* evidence in the record." Wis. Stat. § 227.57(6) (emphasis added).

Courts have discussed the standard of review for cases that challenge an ALJ decision that involves the regulation of piers and waterways. *Sea View Estates Beach*

Club, Inc. v. DNR, 223 Wis. 2d 138, 149, 588 N.W.2d 667 (Ct. App. 1998); *Hilton v. Dept. of Natural Resources*, 2006 WI 84, 293 Wis.2d 1, 717 N.W.2d 166. Under great weight deference, the court upholds the ALJ's conclusion if it is reasonable, even if an equally reasonable or more reasonable interpretation is offered. *Hilton*, 293 Wis. 2d 1, ¶ 17. The ALJ's factual findings are entitled to substantial deference under these substantial evidence tests. *City of Oak Creek v. DNR*, 185 Wis. 2d 424, 443-49, 518 N.W.2d 276 (Ct. App. 1994). Substantial evidence, for the purpose of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Sterlingworth Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 727, 556 N.W.2d 791 (Ct. App. 1996) and *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 594, 412 N.W.2d 505 (Ct. App. 1987). The reviewing court is not permitted to pass on credibility or to reverse an administrative decision even if it is against the great weight and clear preponderance of the evidence where there is substantial evidence to sustain it. *Id.* The court may not substitute its judgment for the ALJ as to weight of the evidence. Wis. Stat. § 227.57(6) and *Hixon v. Public Service Comm.*, 32 Wis. 2d 608, 629, 146 N.W.2d 577 (1966).

ARGUMENT

I. THE ALJ'S DECISION IS CORRECT.

The ALJ in this matter correctly found in his decision dated September 24, 2009, that the Town of Wolf River made the judgment that the extension of the slow-no-wake ordinance was necessary for public health and safety. R. 15. The ALJ found nothing in

the hearing record which established that the Town's decision was unreasonable. R. 15. The ALJ cited the video evidence and testimony which demonstrated potential safety hazards which the town stated was the rationale for the slow-no-wake ordinance. R. 14-15. The ALJ also noted that the facts show that safety hazards had been greatly reduced as a result of the ordinance, further supporting the town's rationale for the ordinance. R. 15.

The ALJ referenced the tradition of balancing both public and private rights and multiple user types under both Wis. Stat. ch. 30 and the Public Trust Document. R. 15. In the spirit of such balancing the ALJ noted that the ordinance is only enforced during weekends and holidays when user conflicts and potential safety hazards are the most intense. R. 15. The ALJ concluded that the town was protecting the interests of all weekend and holiday users on the Wolf River. The ALJ, in the best position to hear first hand the testimony and review the evidence, made a finding of fact supported by substantial evidence to which he gave due weight. He correctly applied the law and under the substantial evidence test came to the correct conclusion. The ALJ concluded that the town had a reasonable basis to enact the ordinance as necessary and consistent with Wis. Stat. ch. 30. R. 16.

II. THE LAW DOES NOT REQUIRE THE ALJ TO CONSIDER ALL POSSIBLE ALTERNATIVES.

The petitioner continues to argue that there were alternatives to the ordinance, namely a reduction in the speed limit. The town produced testimony stating that in order for a reduced speed limit to have an impact on the safety issues, there would need to be

increased law enforcement on the river, for which there is no current available funding. R. Testimony of Town Chairman Rutten: Transcript at 137-38; Testimony of DNR Warden Knorr: Transcript at 264-65. The ALJ is correct in his decision when he states that unlike wetland regulations, the issue for review in this matter is not whether other alternatives would be practical. R. 15. The ALJ was under no legal obligation to thoroughly evaluate all proposed alternatives and choose the best one. The ALJ's only job in this matter was to review the decision at issue and determine whether or not it was reasonable, that is whether the ordinance was necessary and consistent with Wis. Stat. ch. 30. As the ALJ noted, there was ample evidence to support the necessity of the ordinance in order to protect the safety of all those using the river. R. 14. Necessary in this context means that it is necessary to regulate, not that the option chosen was the least intrusive or the most appealing to a particular subgroup of those using the river for recreation. In evaluating what was reasonable and necessary, the town was entitled to take into consideration the cost of additional law enforcement as well as the use of the river by many different groups and at many different times.

III. NO SINGLE PUBLIC INTEREST IS ABSOLUTE.

Petitioner's key argument seems to be that there is some sort of "equal access" doctrine that in competition with the public trust doctrine entitles the powerboat users of the river to equal time and attention. No such doctrine exists, in fact, the law compels, in applying the public trust doctrine a look at the use of the resources as a whole. In *State v. Village of Lake Delton*, 93 Wis. 2d 78, 286 N.W.2d 622 (Ct. App. 1979) the court in

referring to previous caselaw states: "no single public interest in the use of navigable waters, though afforded the protection of the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all." *Id.* at 96. Also see *State v. Public Service Comm.*, 275 Wis. 112, 81 N.W.2d 71 (1957) and *Madison v. State*, 1 Wis. 2d 252, 259-60, 83 N.W.2d 674 (1957). Public bodies must control the use of the area and determine how to devote the area to public purposes. No one of the public uses can prevail and the disappointment of the few must be balanced against the enjoyment of the many. See *Public Service Comm.*, 275 Wis. at 118.

The ALJ is correct in that he understood that the powerboat uses are not losing their right to enjoy the river, their use is being limited in a reasonable way in order to afford the entire public safer recreation. Moreover, this is not a battle between powerboat users and riparian owners. The ordinance protects vacationers, swimmers, and other small boat users on the river. The ordinance reduces the risk of unsafe conditions for everyone.

CONCLUSION

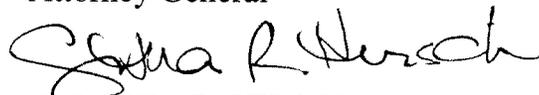
The ALJ correctly concluded that the ordinance is not contrary to or inconsistent with Wis. Stat. ch. 30 and that the objectors did not establish that the ordinance or any portion of the ordinance is not necessary for public health, safety, welfare, or the public's interest in preserving the state's natural resources. The ALJ correctly found that the Town of Wolf River Ordinance No. 10-B is reasonable and necessary for the public's

health and safety given the congestion and likely safety hazards at the extension site. We are asking the Court, pursuant to Wis. Stat. ch. 227 review, to affirm the ALJ's decision.

Dated this 13th day of May 2010.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General



CYNTHIA R. HIRSCH
Assistant Attorney General
State Bar #1012870

Attorneys for Respondent State of Wisconsin
Department of Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3861
(608) 266-2250 (Fax)
hirschcr@doj.state.wi.us