

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1982

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MICHAEL VAN ESS,

Petitioner-Appellant,

v.

**DEPARTMENT OF NATURAL
RESOURCES, an administrative
agency of The State
of Wisconsin,**

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Door County:
JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Michael Van Ess appeals a judgment that affirmed the Department of Natural Resources' decision to deny Van Ess's application for a permit to construct a concrete boat ramp on his property abutting the shores of Green Bay. Van Ess argues that (1) no substantial evidence supports the DNR's findings that the proposed boat ramp would adversely affect fishing and macroinvertebrate habitat; (2) the boat ramp would

not detract from natural beauty; (3) the DNR's introduction of a learned treatise was erroneous; and (4) the DNR failed to give notice of new objections to the permit. For the reasons that follow, we affirm the judgment.

Section 227.57(6), STATS., defines the scope of judicial review.

If the agency's action depends on any fact ... the court shall not substitute its judgment for that of the agency as to the weight of the evidence ... The court shall, however, set aside agency action or remand the case ... if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

We review the agency's decision, not the circuit court's. *Richland Sch. Dist. v. DILHR*, 166 Wis.2d 262, 273, 479 N.W.2d 579, 584 (Ct. App. 1991), *aff'd*, 174 Wis.2d 878, 498 N.W.2d 826 (1993).

Van Ess applied for a permit pursuant to § 30.12, STATS., to build a concrete boat ramp ten feet by sixty feet long, of which approximately thirty-three feet would be below the ordinary high water mark. The ramp would consist of eight inches of poured concrete reinforced with a mesh of steel reinforcing rods. The edges nearest the lake would be up to twelve inches thick. It would be poured in one piece over the heavy cobblestone substrate.

The administrative law judge (ALJ) made the following findings of fact. The concrete color of the proposed ramp would blend with the natural cobblestone and, although it would have some detrimental aesthetic impact, it would not be enough to deny the permit on this basis alone. The proposed ramp would not cause erosion, obstruct navigation, adversely affect water quality or reduce flood flow. However, based upon the testimony of DNR Area Fish Manager Terrence Lychwick, "[p]ouring concrete over such areas directly destroys this habitat for burrowing insects and renders the area inhospitable for walleye spawning. The cumulative effects of this loss of habitat was demonstrated by the number of similar, mostly unpermitted, boat ramps in the

area." It concluded that the proposed project would be detrimental to the public interest in maintaining fishery values.

Van Ess argues that the proposed boat ramp does not detract from the scenic beauty and does not adversely affect invertebrate population or spawning. There is no dispute that the proposed boat ramp would not sufficiently detract from aesthetics so that aesthetics alone would provide a sufficient basis for the denial of the permit. However, the ALJ determined that aesthetic considerations, taken together with the cumulative adverse impact on fish and macroinvertebrate habitat, precluded a finding that the project is "not detrimental to the public interest" within the meaning of § 30.12, STATS. Our review of the record discloses substantial evidence to support the challenged findings.

Terrence Lychwick, who holds a bachelor of science degree from the University of Wisconsin in ecosystems analysis, an environmental science specializing in aquatic ecology, works as senior fisheries biologist in the Green Bay DNR office. He testified as an expert witness on behalf of the agency, stating: "[o]ver the course of the last 20 years, I've probably been along every inch of the shoreline of Green Bay, and I, I know the shoreline fairly well."

Lychwick testified that the Van Ess property is located in the vicinity of perch, walleye and smallmouth bass habitat. He testified that he was familiar with the shoreline along the Van Ess property, having walked it and boated it. Lychwick testified that the type of cobble along that shoreline is used by walleye for spawning. He testified that actual construction of the ramp would not interfere with spawning, but eggs would be destroyed if boats were brought up the ramps during incubation. Later in the season, the walleye return to forage for minnows because in those areas invertebrate populations are available for the forage species to feed on. He testified that he personally has not done an invertebrate assessment in this area, but has done substrate invertebrate sampling in other areas. It was his opinion, based on observations in other areas, that invertebrate populations would be found in this area.¹

¹ Lychwick's use of the term "invertebrate" refers to the chiromids, such as bayflies, lakeflies and mayflies.

Lychwick stated:

I can also indirectly show that ... the statement about the forage species being associated with this area based on firsthand and collective material in survey work along shorelines, including this shoreline where we have done electrofishing surveys which includes staying in waters that are less than 6-foot of depth. We do that type of survey routinely ... and ... where we have this type of habitat, we collect forage species. And associated with the forage species, we're also finding those game fish.

Lychwick testified that concrete ramps interfere with invertebrate habitat because many of the forms must burrow in and utilize the material in the interstitial spaces, for example, where the cobble is over sand, they would burrow down into the sand. "That would not be available to them over a concrete base." He testified that at any one location the impact of concrete ramps may be small, "but incrementally ... given the opportunity to have this occur many times over the course of ... a stretch of beach, yes, it will have an impact, and it can be significant." Lychwick testified that in their immature aquatic form, invertebrates use the shoreline for nurturing and the incremental effect of many ramps removing habitat adversely affects them.

Lychwick added: "[A]ny one issue at any one point in time does not seem to be important to the ... individual that wants to have something done. However, we, as an agency, see this as a continuing problem."

Lychwick's un rebutted testimony provided substantial evidence to support the ALJ's finding that the proposed ramp would adversely affect invertebrate habitat and spawning. Conflicting inferences in testimony are for the fact-finder, not the appellate court to resolve. See *VTAE v. DILHR*, 76 Wis.2d 230, 240, 251 N.W.2d 41, 46-47 (1977). The ALJ properly considered Lychwick's testimony concerning the cumulative incremental effect of permitting individual ramps over a period of time. See *Hixon v. PSC*, 32 Wis.2d 608, 631-32, 146 N.W.2d 577, 589 (1966).

Van Ess argues that it is pure speculation that there is an actual adverse impact on invertebrate population, citing common knowledge that fish populations are diminishing rapidly while bayflies and mayflies are on the increase. A review of the record demonstrates that Lychwick's concern was with habitat, not just invertebrate population. The ALJ was entitled to rely on Lychwick's expert testimony that the incremental effect of the destruction of habitat adversely affects the invertebrates, which provide food for the forage species sought by game fish. The weight and credibility of the evidence is for the fact-finder, not the reviewing court, to evaluate. *Bucyrus-Erie Co. v. DIHLR*, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979).

Next, Van Ess argues that the ALJ erroneously admitted a learned treatise into evidence. Van Ess's complaint fails to establish grounds for reversal. Lychwick was asked to testify with respect to findings of a study done on Lake Erie, published in the *Journal of Great Lakes Research*. Van Ess objected, on the grounds that the document was hearsay and concerned itself with Lake Erie, not Lake Michigan. The ALJ overruled the objection, stating that document fit within the learned treatise exception to the hearsay prohibition and that the objection that it involved Lake Erie went to its weight, not the admissibility. The ALJ indicated that it would entertain a continuance motion to allow Van Ess time to respond to the study, but Van Ess declined because of his desire to resolve the proceedings quickly.

Van Ess argues that because Lychwick is not a microbiologist, he was not able to verify the article as required by § 908.03(18), STATS. Van Ess further argues that he did not receive notice of the agency's plan to use the article as required by § 908.03(18). First, we observe that the rules of evidence do not strictly apply to administrative hearings. *State v. McFarren*, 62 Wis.2d 492, 506, 215 N.W.2d 459, 467 (1974); § 227.45(1), STATS. If they did, however, Van Ess's objections would not prevail because at the hearing he made no objection on the ground that Lychwick was not able to verify the article and thereby waived this specific objection. See § 901.03, STATS. Also, because the ALJ invited a motion for continuance, which Van Ess declined, any lack of notice was without prejudice. See § 805.18, STATS. For the same reason, we reject Van Ess's claim that he was denied fundamental due process rights by the agency's lack of notice to him of new reasons to deny his permit.

By the Court. — Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.