

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1517

Cir. Ct. No. 2015CV36

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PHILIP MYERS AND TERRIE MYERS,

PETITIONERS-APPELLANTS-CROSS-RESPONDENTS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Philip and Terrie Myers (collectively, Myers) appeal a circuit court order entered on judicial review of a decision by the Wisconsin Department of Natural Resources (DNR). The DNR's decision amended a 2001 permit allowing Myers to construct a pier. Myers argues the DNR lacked legal authority to amend the permit. Alternatively, Myers contends that, even if the DNR had legal authority to amend the permit, the amendment was nevertheless improper because: (1) the pier was exempt from permit requirements, pursuant to WIS. STAT. § 30.12(1k)(b) (2015-16);¹ and (2) the pier was exempt from enforcement actions, pursuant to WIS. STAT. § 30.12(1k)(cm), and the DNR's attempt to amend the permit constituted an enforcement action. Myers also asserts the record did not support the DNR's decision to amend the permit. The DNR cross-appeals, arguing the circuit court erred by remanding this matter to the DNR for additional fact-finding regarding the two statutory exemptions cited above.

¶2 We conclude the DNR had legal authority to amend Myers' permit. We therefore affirm the circuit court's order in that respect. However, based on the DNR's factual findings, we conclude as a matter of law that neither of the two statutory exemptions Myers cites is applicable in this case. Accordingly, a remand to the DNR for further fact-finding regarding the exemptions is unnecessary, and we reverse that portion of the circuit court's order remanding this matter to the DNR. We further conclude the record contains sufficient evidence to support the DNR's decision to amend Myers' permit. We therefore remand with directions that the circuit court enter an order affirming the DNR's decision.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

BACKGROUND

¶3 Myers owns waterfront property on Madeline Island in Lake Superior. In December 1999, Myers filed an application under WIS. STAT. § 30.12 to construct a rock-filled pier on the bed of Lake Superior, appurtenant to Myers' property and located on the site of a preexisting dock. The DNR received several objections to Myers' application. The objectors were concerned that Myers' proposed pier would result in beach erosion and other shoreline changes related to "littoral drift"—that is, the process of moving sediment (i.e., sand) along the shore. Specifically, the objectors believed sand and other deposits would accumulate on the up-current side of Myers' proposed pier, and the beach on the down-current side of the pier would be "starved" of sand deposition.

¶4 The DNR held a hearing on Myers' permit application in June 2001. Following the hearing, an administrative law judge (ALJ) granted Myers a permit to construct a pier consisting of "rock-filled cribs 10 feet in width extending 70 feet waterward from an existing 16-foot crib," with a "14-foot L-extension" and a "12-foot flow-through opening." The ALJ acknowledged the objectors' concerns regarding erosion and littoral drift. However, he found by a preponderance of the evidence that it was unlikely the proposed pier would cause "detrimental impacts relating to shoreline alterations." The ALJ observed Myers had made "several changes in his proposal to meet potential concerns about shoreline alteration," including increasing the length of the flow-through opening from ten feet to twelve feet. The ALJ asserted, "In all likelihood, the proposed pier will be less likely to cause impacts relating to littoral drift because of the flow-through design."

¶5 Nonetheless, the ALJ acknowledged it is “not always possible to predict the impact of a particular structure in such a dynamic system.” Accordingly, Myers’ permit included a condition stating, “The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.” The ALJ explained this condition would be “protective of unexpected impacts on neighboring properties relating to sand accumulation or beach starvation” and would “requir[e] modification if sand deposition or beach starvation became a problem.” The ALJ further found that Myers was “financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.” By accepting the permit, Myers was deemed to have accepted each of its conditions.

¶6 Construction of Myers’ pier was completed in October 2001. Over ten years later, in 2012 and 2013, the DNR received complaints from two neighboring property owners regarding shoreline erosion and “loss of riparian property,” which the complainants believed were caused by Myers’ pier. The DNR then conducted an investigation, which included reviewing historical aerial photographs, visiting the site, and consulting with Gene Clark, a coastal engineer from the University of Wisconsin Sea Grant Institute.

¶7 Based on its investigation, the DNR sent Myers a letter on July 19, 2013, informing him that his pier was not in compliance with the 2001 permit. As relevant to this appeal, the DNR asserted the pier’s flow-through opening was not functioning as intended. To address that problem, the DNR requested that Myers remove “the 2 24-foot cribs along the main stem of the pier” and replace the “bridge” between the crib on shore and the “L” at the end of the pier with “a support system that provides free movement of water and littoral material.”

¶8 Myers refused to make the changes requested by the DNR. The DNR therefore issued a “Notice of Pending Amendment” regarding Myers’ 2001 permit, indicating the DNR proposed to amend the permit to require “expansion of the flow-through opening from 12 feet to 60 feet.” Following a public hearing, the DNR issued an amendment to the 2001 permit, which required Myers to either: (1) remove two waterward cribs on the main stem of the pier to expand the length of the flow-through opening from twelve to sixty feet; or (2) provide the DNR with certified engineering plans depicting an alternative opening length that would allow for the free movement of water and sediment.

¶9 Myers petitioned for judicial review of the DNR’s decision to amend his permit, arguing: (1) the DNR lacked legal authority to apply for, and grant itself, an amendment to the permit; (2) Myers’ pier was exempt from permit requirements under WIS. STAT. § 30.12(1k)(b); (3) the pier was exempt from enforcement actions under WIS. STAT. § 30.12(1k)(cm), and the DNR’s attempt to amend the permit constituted an enforcement action; and (4) the evidence did not support the DNR’s decision to amend the permit. The circuit court rejected Myers’ argument that the DNR lacked legal authority to amend his permit. However, the court concluded additional factual development was necessary to determine whether Myers was entitled to an exemption under either § 30.12(1k)(b) or (cm). The court therefore remanded the matter to the DNR for further proceedings on that issue.

¶10 Myers now appeals, raising the same arguments he asserted in the circuit court. The DNR cross-appeals, arguing the circuit court erred by remanding this case to the DNR for further proceedings.

DISCUSSION

I. Legal authority to amend Myers' permit

¶11 In an appeal under WIS. STAT. ch. 227, we review the agency's decision, not the decision of the circuit court. See *Chicago & N. W. Transp. Co. v. Office of Comm'r of R.R.s*, 204 Wis. 2d 1, 7, 553 N.W.2d 845 (Ct. App. 1996). Here, Myers argues the DNR's decision must be reversed because the DNR lacked legal authority to amend his permit. "Ordinarily we give deference to an agency's decisions on questions of law because of the agency's special expertise and experience." *Hazelton v. State Pers. Comm'n*, 178 Wis. 2d 776, 785, 505 N.W.2d 793 (Ct. App. 1993). However, "[w]hen the decision of the agency deals with the scope of the agency's powers, deference is not appropriate." *Id.*; see also *Loomis v. Wisconsin Pers. Comm'n*, 179 Wis. 2d 25, 30, 505 N.W.2d 462 (Ct. App. 1993).

¶12 Myers' argument that the DNR lacked legal authority to amend his permit relies primarily on WIS. STAT. § 30.208. That statute provides, in relevant part, that a "person who seeks to obtain or modify an individual permit under this subchapter ... shall submit an application to the department." Sec. 30.208(1). The statute further provides the department "shall review an application, and within 30 days after the application is submitted, the department shall determine that either the application is complete or that additional information is needed." Sec. 30.208(2)(a). In addition, the statute permits "[t]he department and the applicant" to agree to extend certain statutory time limits. Sec. 30.208(3)(eg)1. Finally, the statute allows the DNR to delegate to the applicant the obligation to fulfill certain notice requirements. Sec. 30.208(5)(c).

¶13 Myers argues the plain language of WIS. STAT. § 30.208 shows that an application to amend a permit issued under WIS. STAT. § 30.12 must be filed by a “person” other than the DNR. Myers asserts that, if the DNR could file an application to amend a permit, there would be no need for the DNR to review the application for completeness, as required by WIS. STAT. § 30.208(2)(a). Myers further contends that, if the legislature intended the DNR to be able to apply to amend permits under § 30.208, the statute “would not contemplate the [DNR] and the applicant making agreements” or the DNR delegating its notice responsibilities to the applicant.

¶14 Myers’ reliance on WIS. STAT. § 30.208 is misplaced. That statute provides a method for persons outside the DNR to apply to amend permits issued under WIS. STAT. § 30.12. Nothing in § 30.208, however, prohibits the DNR from amending a permit when it possesses other legal authority to do so. In this case, the permit itself gave the DNR legal authority to issue amendments by virtue of the condition stating “[t]he authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.” Myers cites no law indicating the DNR cannot reserve to itself such authority when permitting the construction of a pier. Myers agreed to the condition allowing amendment by accepting the permit.

Accordingly, Myers cannot now complain that the DNR lacked legal authority to amend the permit.²

¶15 Myers notes his original permit stated, “The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.” Because more than three years have elapsed since July 23, 2001—the date of the permit’s issuance—Myers contends the permit has expired. If the permit has expired, Myers is presumably no longer subject to its conditions, including the condition allowing the DNR to amend or rescind the permit.

¶16 We reject Myers’ argument that the 2001 permit has expired. The permit states it expires three years from the date of issuance “*if the structure is not completed before then.*” (Emphasis added.) It is undisputed that construction of Myers’ pier was completed in October 2001, less than three years after the permit was issued. Thus, pursuant to the plain language of the permit, the permit has not expired.³ The permit’s conditions, including the condition allowing the DNR to amend the permit, therefore remain in effect.

² Myers also argues that neither WIS. STAT. § 30.12(3m) nor § 30.2095(2) granted the DNR authority to amend the permit. Because neither statute cited prohibits the DNR from amending the permit and we conclude the DNR had authority to amend the permit based on the terms of the permit itself, we need not address Myers’ argument that these additional statutes failed to provide authority for the amendment. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

³ Moreover, if the permit expired on July 23, 2004, as Myers contends, Myers’ pier would have been illegal as of that date, and Myers would have been required to either remove the pier or apply for a new permit.

II. The “grandfather exemption”—WIS. STAT. § 30.12(1k)(b)

¶17 In the alternative, Myers contends his pier is exempt from the permitting requirements found in WIS. STAT. § 30.12, pursuant to the “grandfather exemption” set forth in § 30.12(1k)(b). That exemption provides:

In addition to the exemptions under sub. (1g), a riparian owner of a pier or wharf that was placed on the bed of a navigable water before April 17, 2012, is exempt from the permit requirements under this section unless any of the following applies:

- 1m. The department notified the riparian owner before August 1, 2012, that the pier or wharf is detrimental to the public interest.
2. The pier or wharf interferes with the riparian rights of other riparian owners.

Sec. 30.12(1k)(b). Myers contends the grandfather exemption applies to his pier because the pier was placed on the bed of Lake Superior before April 17, 2012. In response, the State asserts the grandfather exemption is inapplicable in the instant case because it applies only to unpermitted piers that were placed before April 17, 2012, and Myers’ pier was placed pursuant to a permit.

¶18 While the parties would like us to address the legal issue of whether the grandfather exemption in WIS. STAT. § 30.12(1k)(b) applies to permitted piers that were placed before April 17, 2012, we need not do so under the circumstances of this case. Assuming without deciding that the grandfather exemption applies to permitted piers placed before April 17, 2012, Myers’ pier nevertheless fails to qualify for the exemption.

¶19 WISCONSIN STAT. § 30.12(1k)(b)1m. and 2. set forth two exceptions to the grandfather exemption. As relevant here, § 30.12(1k)(b)2. provides the

exemption does not apply if “[t]he pier or wharf interferes with the riparian rights of other riparian owners.”⁴

¶20 In its decision to amend Myers’ permit, the DNR did not expressly find that Myers’ pier interfered with the riparian rights of other riparian owners. However, the DNR did make the following findings: (1) Myers’ original permit included a condition requiring modification if sand deposition or beach starvation became a problem; (2) the DNR received complaints in 2012 and 2013 from two of Myers’ neighbors that the pier had caused “shoreline erosion and loss of riparian property adjacent to [Myers’] property”; (3) the DNR conducted an investigation to determine whether Myers’ pier contributed to the shoreline erosion occurring down-drift from the pier; and (4) based on its investigation, the DNR determined the existing twelve-foot flow-through opening in the pier was

not functioning as intended consistently enough to provide sufficient movement of water and sediment on a regular basis to prevent the interruption of the natural littoral processes. This disruption, in turn, is exacerbating the formation of land on the bed of Lake Superior and starving adjacent “down-drift” properties of sediment.

Read together, these findings demonstrate the DNR implicitly found that Myers’ pier was interfering with neighboring property owners’ riparian rights by causing erosion and beach starvation on their shorelines.

⁴ “Riparian owners are those who have title to the ownership of land on the bank of a body of water.” *ABKA Ltd. P’ship v. DNR*, 2002 WI 106, ¶57, 255 Wis.2d 486, 648 N.W.2d 854. A riparian owner has certain rights based on his or her ownership of shorefront property, including the right to use the shoreline and have access to the waters. *Id.* “A riparian owner is entitled to exclusive possession to the extent necessary to reach navigable water and to have reasonable access for bathing and swimming.” *Id.*

¶21 We review the DNR’s factual findings using the deferential “substantial evidence” standard. *See Sea View Estates Beach Club, Inc. v. DNR*, 223 Wis. 2d 138, 148, 588 N.W.2d 667 (Ct. App. 1998). Under this standard, we will set aside the DNR’s factual findings only if they are not supported by substantial evidence in the record. *See* WIS. STAT. § 227.57(6). “Substantial evidence is such relevant evidence that a reasonable person might find sufficient to support a conclusion.” *Borsellino v. DNR*, 2000 WI App 27, ¶7, 232 Wis. 2d 430, 606 N.W.2d 255. Notably, the substantial evidence standard does not require that the agency’s findings be supported by a preponderance of the evidence. *Kitten v. DWD*, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649. Instead, “[i]f the factual findings of the administrative body are reasonable, they will be upheld.” *Id.*

¶22 The administrative record in this case is replete with emails and letters from individuals asserting Myers’ pier had caused erosion and beach starvation on neighboring properties. One member of the public reported that the pier had “caused not only erosion of the beach, but the neighboring property as well,” and that the “grass area on the adjacent land owner’s property has greatly diminished.” Another individual complained that the pier had caused “severe erosion” of the beach. A third individual, who stated he had been visiting the beach to the south of Myers’ pier for more than twenty years, asserted the beach “has definitely eroded towards the cabins on the shore since the pier was installed.” In addition, the record contains multiple photographs showing erosion on neighboring property owners’ shorelines.

¶23 The administrative record also contains Clark’s expert report, which opined that the old and new structures on Myers’ shoreline “have caused a buildup of littoral material to the northeast of [Myers’] structures and a deficit of littoral

material to the southwest of the structures.”⁵ Clark also noted the flow-through opening in the pier was “almost completely filled.” Clark opined that, overall, the structures on Myers’ shoreline were “[c]learly ... not making the costal processes better for the natural movement of nearshore sediments from the northeast to the southwestern directions.”⁶

¶24 Based on the evidence summarized above, a reasonable person could conclude Myers’ pier caused erosion and beach starvation on his neighbors’ properties, which interfered with their riparian right to use their shorelines. *See ABKA Ltd. P’ship v. DNR*, 2002 WI 106, ¶57, 255 Wis. 2d 486, 648 N.W.2d 854 (stating a riparian owner’s rights include the right to use the shoreline). Consequently, the DNR’s implicit finding in that regard satisfies the substantial evidence test. *See Borsellino*, 232 Wis. 2d 430, ¶7. We acknowledge that Myers submitted evidence supporting a contrary finding—in particular, the expert opinions of engineer Douglas Spaulding. However, the mere existence of evidence supporting a contrary finding is insufficient for us to set aside the DNR’s factual finding. A reviewing 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). Where the record contains substantial evidence supporting two

⁵ Clark indicated that, due to the “complexity of the mix of older and newer structures” on Myers’ property, it was “extremely difficult” to determine to what extent the observed impacts were attributable to the pier that was installed in 2001, as opposed to remnant structures on the site. However, read as a whole, Clark’s report supports a finding that both the old and new structures contributed to the erosion and beach starvation observed on Myers’ neighbors’ properties.

⁶ Clark acknowledged he had visited Myers’ property shortly after a significant storm. He opined the storm had caused some of the erosion he observed on Myers’ neighbors’ shorelines. However, Clark did not indicate the storm was wholly responsible for the erosion he observed.

conflicting findings of fact, it is for the agency to decide which finding to accept. *Hamilton v. DILHR*, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980).

¶25 In summary, the DNR implicitly found that Myers’ pier interfered with other riparian owners’ riparian rights, and substantial evidence supports that finding. We therefore conclude that, even assuming the grandfather exemption in WIS. STAT. § 30.12(1k)(b) applies to permitted piers that were placed before April 17, 2012, Myers’ pier nevertheless fails to qualify for the exemption.⁷

III. The “enforcement exemption”—WIS. STAT. § 30.12(1k)(cm)

¶26 Myers also argues the DNR’s decision to amend his permit must be reversed because his pier is exempt from enforcement actions under WIS. STAT. § 30.12(1k)(cm). As an initial matter, the parties dispute whether the DNR’s decision to amend Myers’ permit qualified as an enforcement action. However, we need not resolve this dispute because, assuming without deciding the permit amendment was an enforcement action, we nevertheless conclude the enforcement exemption does not apply to Myers’ pier.

¶27 WISCONSIN STAT. § 30.12(1k)(cm) sets forth three circumstances—only two of which are potentially applicable here—in which structures placed by riparian owners are exempt from enforcement actions. First, the DNR may not

⁷ Myers contends the DNR did not argue in the circuit court that the grandfather exemption was inapplicable because Myers’ pier interfered with the riparian rights of other riparian owners. We may decline to address arguments raised for the first time on appeal. *See State v. Gladney*, 120 Wis. 2d 486, 492, 355 N.W.2d 547 (Ct. App. 1984). However, under the circumstances of this case, we choose to address the DNR’s argument for two reasons. First, both parties have addressed the argument in their appellate briefs. Second, because we review the DNR’s decision, rather than the decision of the circuit court, we would not defer to the circuit court’s reasoning on this issue in any event. It is therefore less significant in this case than in others that the argument at issue was not raised below.

take any enforcement action against a structure for which the DNR has issued a permit under § 30.12 “if the structure is in compliance with that permit.” Sec. 30.12(1k)(cm)1. Second, the DNR may not take any enforcement action against a riparian owner for the placement of a structure “that is exempt under par. (b)” — that is, the grandfather exemption. Sec. 30.12(1k)(cm)3.

¶28 Here, the DNR implicitly found in its decision amending Myers’ permit that Myers’ pier was not in compliance with the original permit’s terms. The DNR noted the original permit contained a condition stating the permit could be “amended or rescinded” if Myers’ pier became “a material obstruction to navigation or ... detrimental to the public interest.” The DNR further observed that, in the ALJ’s findings of fact regarding the original permit, the ALJ stated the condition referenced above would “requir[e] modification if sand deposition or beach starvation became a problem” and would be “protective of unexpected impacts on neighboring properties relating to sand accumulation or beach starvation.” The DNR noted it had conducted an investigation after receiving complaints from neighboring property owners that Myers’ pier was, in fact, causing shoreline erosion. Based on its investigation, the DNR found that the flow-through opening in Myers’ pier was not functioning as intended, and the pier was therefore contributing to the erosion of neighboring property owners’ shorelines. Taken together, these findings indicate the DNR implicitly found that Myers’ pier was not in compliance with the original permit’s terms, in that the pier had caused erosion and beach starvation.

¶29 Substantial evidence supports the DNR’s implicit finding that Myers’ pier was not in compliance with the original permit. As discussed above, the citizen comments and photographs in the administrative record, along with Clark’s expert report, support a finding that Myers’ pier was causing erosion and

beach starvation on property belonging to Myers' neighbors. Based on that finding, one could reasonably find that Myers' pier was not in compliance with the original permit, which was granted based on the understanding the pier would not cause erosion and beach starvation. Because substantial evidence supports the DNR's implicit finding that Myers' pier was not in compliance with the original permit, the pier does not qualify for the enforcement exemption under WIS. STAT. § 30.12(1k)(cm)1.

¶30 The pier also fails to qualify for the enforcement exemption under WIS. STAT. § 30.12(1k)(cm)3. By its plain language, that subdivision applies only to structures that are exempt from permitting requirements under the grandfather exemption. *See id.* We have already concluded the grandfather exemption does not apply to Myers' pier. Section 30.12(1k)(cm)3. is therefore inapplicable.

IV. Sufficiency of the evidence supporting the DNR's decision

¶31 Finally, Myers argues there was insufficient evidence to support the DNR's decision to amend his permit. We disagree.

¶32 As noted above, the original permit stated it could be amended or rescinded if Myers' pier became "detrimental to the public interest."⁸ We have already concluded substantial evidence supports the DNR's finding that Myers' pier has caused erosion and beach starvation on Myers' neighbors' shorelines. *See* WIS. STAT. § 227.57(6); *see also infra* ¶¶20-24. Based on that finding, the DNR could reasonably find the pier was detrimental to the public interest. While Myers

⁸ The permit also authorized amendment if the pier became "a material obstruction to navigation." However, the DNR has never relied on that wording as a basis for its decision to amend the permit.

cites evidence supporting a contrary finding, we again note that we may not substitute our judgment for that of the DNR as to the weight of evidence on any disputed finding of fact. *See id.*; *see also Hamilton*, 94 Wis. 2d at 617. Because a reasonable person could find, based on the administrative record, that Myers' pier was detrimental to the public interest, sufficient evidence supported the DNR's decision to amend Myers' permit.⁹

¶33 Only the DNR may recover its appellate costs. *See* WIS. STAT. RULE 809.25(1).

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁹ Myers does not argue the specific terms of the amendment are unsupported by the evidence; he contends only, as a general matter, that the evidence was insufficient to justify an amendment.

