

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 13, 2004**

Cornelia G. Clark  
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. 03-2100  
STATE OF WISCONSIN**

**Cir. Ct. No. 01CV000028**

**IN COURT OF APPEALS  
DISTRICT III**

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**STEVEN MANNIGEL,**

**PETITIONER-RESPONDENT,**

**v.**

**WISCONSIN DEPARTMENT OF NATURAL RESOURCES,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Florence County:  
ROBERT A. KENNEDY, JR., Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Wisconsin Department of Natural Resources appeals an order reversing an Administrative Law Judge's order that required the removal or modification of Steven Mannigel's illegal pier. Pursuant to WIS. STAT.

§ 227.46(3)(a)<sup>1</sup> and WIS. ADMIN. CODE § NR 2.155(1), the DNR secretary adopted the ALJ's decision. The trial court concluded that the pier constructed in 1989 did not require a permit under WIS. STAT. § 30.13(1)(a) and that additional construction in 1994 did not materially change the pier. Because we conclude that the pier was illegally constructed and maintained and the circuit court exceeded its authority when it overruled the DNR, we reverse the order and reinstate the department's order.

¶2 In a contested case brought by the DNR, the ALJ found that Mannigel's pier exceeded regulatory length requirements in WIS. ADMIN. CODE § NR 326.04(1) and the DNR width guidelines, creating a public nuisance. *See* WIS. STAT. § 30.294. Without a DNR permit, Mannigel constructed a pier forty-eight feet long, and, at its widest, thirty-six feet wide. It extends to a water depth of four feet, six inches. The pier violated WIS. ADMIN. CODE § NR 326.04(1) when it was constructed because it extends beyond the three-foot depth line. The pier's length is not made necessary by the draft of Mannigel's boats or the boat lift. He testified that he could dock his boats and utilize his boat lift in three feet of water.

¶3 The pier also violated the DNR practices and guidelines that limit a pier's width to six feet. The DNR regulations apply to all structures constructed or maintained for the purpose of providing greater access to navigation. *See* WIS. ADMIN. CODE § NR 326.02(1). The ALJ found that Mannigel's structure was a pier plus a deck and a storage facility. It intrudes into public space and interferes

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

with public navigation.<sup>2</sup> Because the pier was unlawfully constructed and maintained without a DNR permit, the ALJ ordered Mannigel to remove the pier or modify it to comply with statutory requirements and DNR regulations.

¶4 The scope of this court’s review is identical to that of the trial court. *See Guthrie v. WERC*, 107 Wis. 2d 306, 315, 320 N.W.2d 213 (Ct. App. 1982). Judicial authority is limited by WIS. STAT. § 227.57. A reviewing court may not substitute its judgment for that of the agency as to any findings of fact or as to questions of law where the legislature has given the agency discretion. *See* WIS. STAT. § 227.57(6) and (8). An agency’s decision will be set aside only if its findings of fact are not supported by substantial evidence in the record. “Substantial evidence” does not mean the preponderance of the evidence. Rather the test is whether, taking into account all of the evidence in the record, reasonable minds could arrive at the same conclusion as the agency. *See Sanitary Transfer & Landfill, Inc. v. DNR*, 85 Wis. 2d 1, 14, 270 N.W.2d 144 (1978). When reviewing the DNR’s legal conclusions regarding the regulation of piers, a reviewing court should apply great deference to the DNR’s decision because it has been charged with the regulation of piers under WIS. STAT. §§ 30.12 and 30.13 and it has expertise in regulating piers and waterways. *See Sea View Estates Beach Club v. DNR*, 223 Wis. 2d 138, 149, 588 N.W.2d 667 (Ct. App. 1998). Judicial review is confined to the record before the agency except when allegations of procedural irregularities are present or a party seeks leave to present

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<sup>2</sup> The ALJ also held that the pier grossly exceeds the reasonable use of public waters under WIS. STAT. § 30.03(4)(a). The ALJ found that the pier had a detrimental effect on the near-shore area causing both immediate and cumulative concern for the lake’s ecological system, aquatic habitat and fishery resources. The circuit court also reversed those findings. We need not review these issues because the ALJ’s order is justified without resorting to that analysis.

additional evidence by showing that it is material and there were good reasons for failing to present it to the agency. *See* WIS. STAT. §§ 227.56(1) and 227.57(1). No such requests or allegations were made in this case.

¶5 Confining our review as required by WIS. STAT. § 227.57 and applying uncontradicted facts, we conclude that the department appropriately determined that Mannigel’s pier violated the administrative code because of its size and Mannigel needed a permit to construct or maintain that structure. The pier extends beyond the three-foot depth line (the line of navigation) violating WIS. ADMIN. CODE §§ NR 326.03(4) and NR 326.04(1). It has also been maintained at an impermissible width. Regardless of when it was constructed, the oversize pier cannot be “maintained” without a permit. *See* WIS. ADMIN. CODE § NR 326.02(1). Existing piers must comply with current WIS. STAT. ch. 30 requirements and DNR guidelines regardless of when they were first constructed.

¶6 The trial court exceeded its authority in its review of the ALJ’s and the department’s decision. The court failed to apply the deferential standard of review to the findings of fact and conclusions of law. It substituted its own judgment for that of the agency. It substantially expanded the record to include evidence and issues that were not presented to the ALJ even though there were no allegations of procedural irregularities or any request by the parties to present additional evidence.

*By the Court.*—Order reversed.

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

