



Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of Manual Code 3565.1 for the Approval Authorizing the Department of Natural Resources to Grade More Than 10,000 Square Feet on the Bank of North Lake, Install a Boat Ramp Structure and Two Outfall Structures on the Bed of North Lake, Install Four Culvert Crossings Over Wetlands, and Fill Up to 0.16 Acres of Wetland for Construction of a Public Boat Launch on North Lake and Adjacent Property Located in the Town of Merton, Waukesha County

Case Nos. IP-SE-2009-68-05745  
IP-SE-2009-68-05746  
IP-SE-2009-68-05747  
IP-SE-2009-68-05748  
IP-SE-2009-68-05749  
IP-SE-2009-68-05750

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Waukesha, Wisconsin on September 19-21, and October 31-November 1, 2011, in Madison, Jeffrey D. Boldt, administrative law judge presiding. The parties requested the opportunity to submit written briefs and the last brief received on March 30, 2012.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

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#### FINDINGS OF FACT

1. The Department of Natural Resources (the Department), prepared a project application for approval under Department Manual Code 3565.1. The proposed project is located on North Lake in Waukesha County in Section 17, Township 8 North, Range 18 East, in the Town of Merton. The proposed project would include grading in excess of 10,000 square feet on the bank of North Lake, construction and placement of a boat ramp on the bed of North Lake, installation of two outfalls below the ordinary high water mark of North Lake, and the discharge of fill in 0.16 acres of wetland to construct an access road and parking facility. The purpose of the proposed project would be to provide adequate public access to North Lake.

2. On September 9, 2010, the Department issued a Notice of Public Informational Hearing for the Proposed North Lake Public Access and held a public informational hearing. The Department approved the activities noted above for the North Lake Boat Launch project by a Manual Code 3565.1 Approval issued on November 4, 2010.

3. On November 22, 2010, the Department received a petition for a contested case hearing and request for a stay from Attorneys William C. Gleisner, III and William H. Harbeck on behalf of the Reddelien Road Neighborhood Association, Inc. and 40 citizens and property owners who reside on Reddelien Road.

4. On December 3, 2010, the Department received a petition for a contested case hearing and request for a stay from Attorney Donald P. Gallo on behalf of the North Lake Management District.

5. By letter dated December 13, 2010, the Department partially granted and partially denied the petition for hearing from Reddelien Road Neighborhood Association, Inc. and 40 citizens and property owners who reside on Reddelien Road. By letter dated December 23, 2010, the Department partially granted and partially denied the petition for hearing from North Lake Management District.

6. The Department has routinely used the Manual Code procedure for its own projects impacting public waterways since August 27, 1970. (Ex. 203, p.12) The Manual Code procedure has been periodically updated over those years, most recently in October, 1993. (Ex.203) Under the Manual Code procedure the DNR binds itself to the standards (but not the procedures) applicable to “the appropriate statutes and administrative rules that would apply to similar privately sponsored projects.” (Ex. 202 and 3)

7. The instant case represents the first known legal challenge to the DNR’s use and application of the Manual code approval process, according to longtime DNR employee, Mr. Robert Wakeman, who was the southeast Wisconsin aquatic habitat coordinator for a decade. Wakeman testified as follows:

Q Okay. In your 20 years of experience has the Manual Code process been the approval process for DNR projects impacting waterways or wetlands?

A Yes...

Q To the extent of your personal knowledge, has there ever been a challenge to a DNR Manual Code 3565.1 approval?

A Not to my knowledge. We have received public comments on projects and worked to accommodate those public comments.

Q So there’s been no legal challenge in your 20 years of experience?

A Not to my knowledge.

The issues of whether the DNR improperly exempted itself from the Chapter 30 process by using the Manual Code, as the petitioners claim, or is exempt from even this contested case review as the Wisconsin Wildlife Federation has argued, was not referred to the Division of Hearings and Appeals for hearing.

8. Both hearing requests were granted only on limited issues relating to whether an area of the property constitutes navigable waters or is a navigable waterway under Wisconsin law. Further, the Department denied both requests for a stay of the permit pursuant to Wis. Stat. §§ 30.209, because the Department was not subject to the provisions of that statute.

Specifically, the hearing requests were granted only as follows:

The Reddelien Road Neighborhood Association, Inc.'s petition was denied except that the "petition for hearing under **s. 227.42, Stats., DNR GRANTS** a s. 227.42 hearing on Issue # 2 and **DENIES** a s. 227.42 on Issues # 1 and 3 through 8."

Issue #2 related to whether the DNR properly assessed the impact to navigable waters including: whether it failed to identify a navigable water with sufficient specificity. (Petition, p. 32);

The North Lake Management District was denied except that the . . . "petition for hearing under **s. 227.42, Stats., DNR GRANTS** a s. 227.42 hearing on the only dispute that is a mix of a disputed material fact and an issue of law—whether DNR erroneously failed to identify navigable waters at the DNR site (Pet. Pp. 8-9 par. 12.c, p. 24 par. 16.b, and pp. 28-29 par. 18.e and 18.1), and **DENIES** a s. 227.42, Stats., hearing on all remaining issues."

9. On March 8, 2011, the Division of Hearings and Appeals received the Request for Hearing from the Department of Natural Resources.

10. Consistent with its longstanding usual practice, the DNR did not separately evaluate whether the fill to be placed in the navigable wetland adjacent to the access road met the standards under Wis. Stat. § 30.12(3m)(c) for placing fill on the bed of a navigable water, nor did it make specific findings in the MC Approval in regard to Wis. Stat. § 30.12(3m)(c) for that fill. (Wakeman, TR 4, pp. 17-18; 40)

11. The DNR had already evaluated placement of that fill for compliance with the wetland standards in Wis. Admin. Code ch. NR 103, which are stricter than and also encompass the standards in Wis. Stat. § 30.12(3m)(c). (Hudak, Tr. 1, p. 239 lns. 18-25, p. 240 lns. 1-5) For an activity that involves placement of fill in a wetland, navigable or not, DNR has consistently applied the wetland substantive standards and issues of a wetland water quality certification under its CWA § 401 wetland program. (Wakeman, Tr. 4, p. 10 lns. 6-19, p. 12 lns. 16-18) This is as true of individual permits as it is in this manual code case. The specific terms and conditions of the NR 103 wetland fill water quality certification were not an issue referred to the Division of Hearings and Appeals for Hearing. (See: Finding 6 above)

12. There was no significant environmental review that was missing from the NR 103 analysis. (Hudak; Wakeman) Rather, a preponderance of the credible evidence makes it clear that the DNR had already evaluated all environmental impacts to the site and adjacent wetlands and navigable waters. (Hudak, Tr. 4, p 150 lns. 7-10, p. 152 lns. 9-

25, p. 153 lns. 1-11) Further, as part of the practicable alternatives analysis the Department considered “past, present and future” attempts to obtain other suitable public access sites for North Lake.

13. Dr. O’Reilly testified that the DNR failed to identify a stream in the grove of trees area represented by the blue line on the north side of Ex. 2-002. (Tr. 2, p. 49) O’Reilly later clarified his opinion that *portions* of the area of the grove of trees were a stream. (O’Reilly, Tr. 2, p. 140 lns. 10-20, Ex. 2-007 (green marking) O’Reilly failed to testify to facts that would establish that the grove of trees contained a waterway with a distinct bed with aquatic substrate, an upland bank, and an OHWM between the two that had been created by the persistent presence of water in the area. Rather, he testified that in his opinion an OHWM was not needed for a stream whereas it was necessary for a lake. (O’Reilly, Tr. 2, p. 126 lns. 12-19, p. 163 lns. 12-25, p. 164 ln. 24 – p. 165 lns. 1-4) O’Reilly identified that in his opinion the stream was located within a depressional area depicted by DNR stormwater expert Wood that contained only about 10% of the Grove of Trees area. (O’Reilly, Tr. 2, p. 70 lns. 4-6, p. 143 ln. 1- p. 144 and 10 Ex. 215 (pink/red area); see also Ex. 2-007 (green line) O’Reilly testified toward the end of the hearing that the “navigable water” that allegedly existed in the “Grove of Trees” was both a wetland and stream, and that the “stream” he had identified had an OHWM but he just had “not determined exactly where it is.” (O’Reilly, Tr. 5, p. 84 lns. 9-22, p. 98 ln. 25, p. 100 lns. 10-20)

14. No witnesses for the Petitioners testified to any physical or biological indicators such as a lack of vegetation, changes in vegetation or substrate, adventitious roots, or permanent water stains on trees that would indicate that the “Grove of Trees” or any other area was frequently and regularly inundated by water. The only support O’Reilly identified for his alleged “bed and bank” was a slight change in elevation, a depression in the contour line of up to one foot, most of it less, on the landscape in that area. (O’Reilly, Tr. 2, p. 142) However, a slight change in elevation does not create a bed, banks, or an identifiable OHWM.

The next best effort by the petitioners to identify the area as a stream was present in the testimony of Mr. Reinbold. (Tr. 3, pp. 30-32) As Reinbold credibly testified, there is no question that that there has been regular flooding in the area and that water has flowed both away from and toward the lake along a line roughly consistent with that drawn by O’Reilly. But that does not make this area a stream. Significantly, no aerial photographs were presented that identified a navigable water that presented itself objectively over time nor was any evidence presented to establish a definite stream channel. Rather, historic aerial photos from 1941 to 2010 do not support the existence of a specific flowing stream channel in this area. (Exs. 206, p. 10)

Further, the day the kayak was paddled and filmed in the grove of trees, July 15, 2010 (ex. 17-F), followed a particularly wet month of June and the second highest rain events in July of that year. (O’Reilly, Tr. 2, p. 112 ln. 5 – p. 113 ln. 25 and Ex. 218) Ms.

Hanson testified that she had not previously navigated anywhere on the DNR property. (Hanson, Tr. 1, p. 152 lns. 19-25) Moreover, Ms. Hansen paddled the area on the specific day that she was directed to by O'Reilly. (O'Reilly, Tr. 2, p. 117 lns. 1-10) Overall, the minimal facts presented do not support a conclusion that a navigable water exists in the grove of trees. Rather, the area meets the legal definition of diffuse surface waters in a floodplain.

15. It is not at all uncommon for a wetland complex to be navigable at certain times of the year during periods of inundation such that you could float a skiff or small kayak. (Hudak, Tr. 1, p. 173 lns 8-15) Further, the testimony of all parties established that water would flow west during high water, high enough to flow over the ice berm at the edge of the lake, and east toward North Lake as it drained from the northern wetlands and that water would pool until it could go over the berm and return to the lake. A stream, in contrast to a wetland complex adjacent to a navigable lake, does not ebb and flow in both directions but rather has a distinct direction of flow. (Hudak, Tr.1, p.53) Diffused surface waters are those waters which are not confined to stream or lake beds and instead flow across or collect on land in a diffused manner. (Hudak, Tr. 4, pp. 190-191) This definition fits precisely with the area in the "grove of trees," which Ms. Hanson and Mr. Wood navigated on several occasions.

16. Mr. Wakeman established an ordinary high water mark (OHWM) for North Lake in 2009. (Tr. 4, pp.18-35) This was found at elevation 897.76. (Ex. 104) Dr. O'Reilly testified that all of the bed elevations of the swale or depression which he opined had a bed and bank were below the OHWM elevation for North Lake and were thus part of the lakebed of North Lake. (Tr.2. pp.86-87) It's hard to square this proposition with his testimony that the area is a stream flowing into North Lake. According to Dr. O' Reilly the putative stream is also a part of the lake proper. However, there is no legal authority cited for such a highly unusual and seemingly inconsistent opinion. Further, the elevations of the navigable portions of the wetlands adjacent to the access road where the project plans identify impacts to wetlands is located at elevation 898.34, higher than the OHWM of North Lake. (Exs. 104, 209, 221, 222)

Mr. Peter Wood, DNR water resources engineer, confirmed these elevations (with some rounding of elevation numbers) and testified at length about the pattern of the flow of water and the locations of the elevations, all above the OHWM of North Lake, of the wetland areas subject to the fill or causing impacts to wetlands in the area. (Tr. 5, pp. 256-319) Water settles ('just sits there') diffusely in low areas in both directions in this area, both toward and away from North Lake, until it reaches elevation 898.68, when a consistent flow occurs toward North Lake at the surface water discharge elevation. (Id., pp. 260-265)

The DNR witnesses all opined that parts of this area are navigable wetlands and parts are diffused surface waters that occur during times of high water flooding. Wakeman opined that it was not uncommon for water to exceed the OHWM, given the

area of the watershed draining into North Lake, the constriction of the outlet, and because “the lake doesn’t have a fast way of draining” it overflows its banks and floods wetland lobes such as those around the project site. (Tr.4, pp. 34-35)

17. The petitioners have not carried their burden of proof in demonstrating that there is an additional stream which should have been evaluated by the Department pursuant to the standards of Chapter 30 in conjunction with the Manual Code approval. Based upon the testimony above, there is also no basis for the conclusion that the swale depression area is part of the lakebed of North Lake. Rather, a clear preponderance of the credible evidence indicates that it is simply a lower swale area subject to occasional flooding which lacks the consistent pattern of flow characteristic of a stream or the hydrological connection to be considered as part of the lakebed of North Lake.

18. Kurt Farrenkopf is the Project Manager at Kapur & Associates, Inc. responsible for the design of the driveway and parking lot. Farrenkopf is a Wisconsin professional engineer who has been building roads for 24 years. (Farrenkopf, Tr. 5, p. 106 lns. 10-20; Ex. 223) He has considerable experience dealing with soils of poor load carrying quality because poor soils and roads built on such soils are common in Wisconsin, especially in the southeastern part of the state. (Giese, Tr. 2, p. 276 lns. 13-25, p. 277 lns. 1-11; Farrenkopf, Tr. 5, p. 115 lns. 1-25, p. 116 ln. 1; Reinbold, Tr. 3, p. 106 lns. 18-25, p. 107 lns. 1-10, p. 132 lns. 1-7) Conducting a partial depth excavation as opposed to a full depth excavation represents an accepted engineering practice recommended in past situations by petitioner’s geotechnical expert Mr. Giese and used in the past by Reinbold and Farrenkopf. (Giese, Tr. 2, p. 272 lns. 7-11; Reinbold, Tr. 3, p. 129 lns. 14-25, p. 130 ln. 1; Farrenkopf, Tr. 5, p. 146 lns. 4-17)

Farrenkopf provided credible and convincing engineering testimony regarding the steps that would be taken to provide a solid base for the access road. Further, an even more detailed description of project methods will be used in the final design phase. Bath included specific recommendations in the GESTRA report to address the presence of Houghton and Roland muck soils. (Ex. 7-007 at Section 3.3.1) In addition, Bath and Farrenkopf discuss methods to address the soils further following the issuance of the GESTRA report. (Farrenkopf, Tr. 5, p. 132 lns. 8-11, p. 145 lns. 10-25, p. 146 lns 1-3) As a result, final plans will incorporate the current recommendations. Specifically, the DNR consultants will follow the following steps recommended by the geotechnical experts: excavate down about three to four feet (beyond the peat material),

1. place a filter fabric/geotextile fabric to separate the marsh soil from the roadway bed and avoid contamination of the roadway bed by the marsh soils,
2. place a uniaxial grid on top which “acts as a snowshoe” to spread load and control vertical settlement, in addition to reducing the need to excavate close to the groundwater table,

3. place usable excavated material such as good granular fill or good excavated material,
4. place the gravel base for roadway, and
5. finally, after observing settlement, place the asphalt.

(Farrenkopf, Tr. 5, p. 138 lns. 4-25, p. 139 lns. 1-7, p. 376 lns. 14-25, p. 377 lns. 1-25, p. 378 ln. 1 and Ex. 7-006)

19. Further, these treatment steps go beyond the recommendations found in 3.3.1 of the GESTRA report. The GESTRA report provides in section 3.3.1 that “[u]ni-axial geogrid could be used to reduce the required granular fill layer from 3-feet to 1-foot (does not include subbase gravel). (Ex. 7-006)

20. The greater weight of the credible evidence establishes that the proposed roadway and parking lot will be constructed in a manner that will meet or exceed long established engineering design standards for such projects. (Farrenkopf)

## DISCUSSION

This case involves a simple public boat ramp which will provide public access to North Lake. To place the boat ramp, the DNR has to fill a small amount of wetland, just over a tenth of an acre, to construct an access road and parking facility. The Department received plans from an experienced engineering firm to undertake the project, and approved the plans after an extensive environmental review using its longstanding policy under its written manual code.

Two groups of petitioners, the nearby Neighborhood Association and the Lake District, have made a grand effort to raise issues in order to prevent the DNR from building this boat ramp for public access. Both hearing requests were granted only on limited issues relating to whether a small area of the property constitutes navigable waters or is a navigable waterway under Wisconsin law. The Department of Natural Resources granted the hearing requests pursuant to Wis. Stat. §§ 227.42. Accordingly, the petitioners have the burden of proof pursuant to Wis. Admin. Code § NR 2.13(3)(b). The petitioners have not come close to proving their case and carrying their burden of proof on any of the limited issues for which the hearing request was granted.

There is no question that the facts of this case are somewhat complicated and implicate numerous aspects of sometimes overlapping water law regulations. But the law and the Department’s approach to this type of fact situation are both well settled. As it has for many years in cases involving wetland fills placed in either navigable or non-

navigable wetlands, the DNR evaluated the project using the wetland standards under NR 103. For an activity that involves placement of fill in a wetland, navigable or not, DNR has consistently applied the wetland substantive standards and issues a wetland water quality certification under its CWA § 401 wetland program. (Wakeman, Tr. 4, p. 10 lns. 6-19, p. 12 lns. 16-18) This is as true of individual permits as it is in this manual code case. Further, there was no significant environmental review that was missing from the NR 103 analysis.

Mr. Robert Wakeman was the southeast Wisconsin aquatic habitat coordinator for nearly a decade before recently taking another job. Wakeman testified as follows on the two most decisive issues. First, with respect to how the DNR has handled overlapping jurisdictional issues in matters involving the placement of fill in a wetland.

1. Q So would it be fair to say that a lot of wetlands in this State are wet enough to have an ordinary high water mark?

A Yes.

Q So why doesn't the Department place ordinary high water marks on all those wetlands?

A Well, we may place ordinary high water marks on the wetlands for zoning issues, things of that nature, but when it comes to the placement of fill, our authority for fill placement in a wetland is a water quality cert.

Q So we already have jurisdiction?

A Yes

Q . . . Is the rationale of not placing an ordinary high water mark because we already have jurisdiction under water quality certification?

A Yes, we don't always have to do the water quality cert for – if you've got a navigable wetland. If you're placing fill it would be a water quality cert authority.

Q So DNR's consistent practice for those wetlands containing navigable waters would be to require a wetland water quality certification to place fill in those wetlands when no other Chapter 30 regulated activity is associated with the fill, is that correct?

A That's correct.

TR 4, pp. 17-18...

Q Going back to the jurisdictional issue, did you reach an opinion within a reasonable degree of professional certainty regarding what jurisdiction DNR should assert for the fill placed for the access road and impacts resulting from widening that road?

A For fill placed in wetlands it would be a water quality cert.

TR 4, p. 40

It is important to note, as well, that the Department has also routinely used the same procedures and jurisdictional determinations that were the source of so much overheated rhetoric by the petitioners, especially the RRNA.<sup>1</sup> Further, the Department's position appears completely consistent with the holding in *Houslet v. DNR*, 110 Wis. 2d 280, 329 N.W. 2d 219 (1982) In *Houslet*, the DNR rejected a Chapter 30.20 dredging contract solely on the basis of the project's impact upon wetlands. In affirming the Department's denial, the Wisconsin Supreme Court explicitly rejected the idea that the Department must put form over substance in determining what constitutes lake bed or wetlands and that the two are not necessarily mutually exclusive categories. Rather the Wisconsin Court concluded "that the department properly applied its wetland regulations (NR 1.95, the precursor to NR 103) in denying the dredging contract." Obviously, there are some factual differences, this case involves a manual code approval rather than a denial, but the point is the same. It is the substance of the review that matters, not the form. Department of Natural Resources staff personnel consider a great number of projects in any given year, and it makes practical as well as legal sense to use the more restrictive wetlands regulations when there are overlapping jurisdictional possibilities.

The petitioners' primary water regulation expert, Dr. Neal O'Reilly, expressed opinions that would dramatically expand the jurisdiction of the Department of Natural Resources in a way that would reach an absurd result that is inconsistent with longstanding principles of Wisconsin law. Dr. O'Reilly opined that under Wisconsin law a defined bed and banks/OHWM were not required for a stream, but were required for a lake. (O'Reilly, Tr. 2, p. 126 lns. 12-19, p. 163 lns. 12-25, p. 164 lns. 1-25, p. 165 lns. 1-4) He even went so far as to opine that the paved Reddelien Road or the backyards of nearby neighbors could be considered navigable waters under Wis. Stat. 30.10(2) (Tr. 2, p.127) However, paved roads, parking lots, backyards and public roadways are not public navigable waters simply because of occasional flooding. Nothing could ever be constructed anywhere near a waterway in this state if O'Reilly's extreme view were the law of Wisconsin. Fortunately, our appellate courts have long since rejected his expansive views, and they are not the law of the state.

Rather than being a navigable stream, several large areas of the property contain diffused surface waters that are subject to flooding. Much of the property, and nearby properties, is in a floodplain. However, the fact that they regularly flood sufficiently to float a small watercraft does not make them navigable waters of the state. It makes them

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<sup>1</sup> The RRNA claimed in its brief that the DNR had shown "contempt" for nearby residents. There is absolutely no basis in the record for such a poisonous conclusion and every reason to conclude that the DNR employees have behaved in a professional and courteous manner. Unfortunately, both sides engaged in overblown language. The DNR asserted that the petitioner's primary expert committed perjury in the course of his testimony. There is likewise no basis for this conclusion.

diffuse surface waters in a floodplain. (See: *Wisconsin Environmental Law Handbook*, 3<sup>rd</sup> Ed., Kent, p.41, Sec 3.1.6 *Diffused Surface Waters* and the cases cited *infra*.) “Diffused surface waters are those waters which are not confined to stream or lake beds and instead flow across or collect on land in a diffused manner.” *Id.* This definition fits precisely with the area in the “grove of trees,” which Ms. Hanson and Mr. Wood navigated on several occasions. (Hudak, Tr. 4, pp. 190-191) There is no defined bed and bank or other sufficient indicators of a stream for purposes of DNR jurisdiction as a navigable water of the state.

In *Hoyt v. Hudson*, the Wisconsin Supreme Court reasoned: “*It would be highly unreasonable and mischievous to attach the legal qualities of water-courses to ravines and hollows thus serving as conduits of mere occasional accumulations of surface water.*” 27 Wis. At 660-661 and 662 (emphasis added.) Accordingly, such navigation is not surprising or dispositive, especially given that some of the same area is a navigable wetland.

Wisconsin law has long defined a stream as a watercourse, and it requires a watercourse to have flow or current in a definite channel and a bed and sides or banks. *Hoyt v. Hudson*, 27 Wis. 656, 660-661 (1871). In order to constitute a watercourse, “the channel and banks must present to the eye, on a *casual glance*, the *unmistakable evidences* of the frequent action of running water.” *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390, 392 (1897), *citing* Gould, *Waters* § 41.264 (emphasis added). No such evidence was provided at hearing. Rather, as Mr. Hudak testified, a stream, in contrast to a wetland complex adjacent to a navigable lake, does not ebb and flow in both directions but rather has a distinct direction of flow. (Hudak, Tr.1, p.53)

Further, Wisconsin case law holds that the bed and bank of a navigable water are delineated by the OHWM, defined as the point on the band or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Diane Shooting Club v. Husting*, 156 Wis. 262, 145 N.W. 816 (1914); *State v. McFarren*, 62 Wis. 2d 492, 498 215 N.W.2d 459 (1974).

After years in the field, water regulation experts have a good feel for knowing when a low area has a sufficient bed and bank and continuous water action to meet the Wisconsin definition of stream. The area described by O’Reilly at hearing and at the site inspection just does not have enough of these objective characteristics. Rather, it seems like a fictional construct of a group of nearby private riparian owners who are unhappy to be sharing this area of public waters with a public boat ramp. But the public waters of Wisconsin belong to the residents of the state and are held in trust for all of them, not just lake property owners. This public trust would have little meaning without affording reasonable public access.

Nor did the petitioners establish, despite being given considerable latitude to do so, that any single factor of a Chapter 30 analysis would not be met.

Similarly, the petitioners did not carry their burden of proof that the area outlined by Dr. O'Reilly meets the definition of a slough within the meaning of §30.10 (2). In Wisconsin, sloughs are often associated with large river systems, such as the Upper Mississippi River. (See: <http://dnr.wi.gov/org/gmu/mississippi/visit.htm>) Many of these sloughs have such a common flow pattern that they are named, such as Wyalusing Slough near the state park of the same name (See: [http://dnr.wi.gov/org/gmu/mississippi/pdf%20files/Maps%20from%20fishing%20and%20boating%20the%20Miss/f\\_page33.pdf](http://dnr.wi.gov/org/gmu/mississippi/pdf%20files/Maps%20from%20fishing%20and%20boating%20the%20Miss/f_page33.pdf)), or Broken Arrow Slough, near La Crosse. ([http://dnr.wi.gov/org/gmu/mississippi/pdf%20files/Maps%20from%20fishing%20and%20boating%20the%20Miss/f\\_page26.pdf](http://dnr.wi.gov/org/gmu/mississippi/pdf%20files/Maps%20from%20fishing%20and%20boating%20the%20Miss/f_page26.pdf)) The depression, navigable wetland and diffused surface waters near North Lake have very little in common with these and many similar well-defined and frequently named water bodies long identified and mapped as Wisconsin sloughs. No evidence was provided that the area meets any established definition of a slough.

Finally, by way of some perspective, it must be noted that if this case were reviewed under the Chapter 30 balancing test, there is strong likelihood that creating a public access would be given strong weight within any such balancing of rights and that the project would likely have been approved. (Hudak, Tr. 4, pp. 168-169)

A preponderance of the credible evidence makes it clear that the DNR had already evaluated all environmental impacts to the site and adjacent wetlands and navigable waters and that the area the petitioners assert is a navigable waterway is rather a slight depression lacking the objective characteristics of a stream that sometimes holds diffused (rather than clearly channelized and defined) surface water during flooding.

The Department's Manual Code approval must therefore be affirmed.

#### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) to hear contested cases and issue necessary orders in cases referred to it by the Department of Natural Resources.
2. The Department of Natural Resources granted the hearing request pursuant to Wis. Stat. §§ 227.42. Accordingly, the petitioners have the burden of proof pursuant to Wis. Admin. Code § NR 2.13(3)(b).
3. The Division of Hearings and Appeals has jurisdiction over only those issues referred to it for hearing by the Department of Natural Resources pursuant to Wis.

Stat. §§ 227.43(1)(b). Many of the issues raised by the petitioners in their brief were not referred to the Division for hearing and accordingly the Division lacks jurisdiction to consider them as a matter of law. Both hearing requests were granted only on limited issues set forth above relating to whether an area of the property constitutes navigable waters or is a navigable waterway under Wisconsin law.

4. The DNR did not fail to account for a stream within the meaning of Wisconsin law. Wisconsin law has long defined a stream as a watercourse, and it requires a watercourse to have flow or current in a definite channel and a bed and sides or banks. *Hoyt v. Hudson*, 27 Wis. 656, 660-661 (1871). In order to constitute a watercourse, “the channel and banks must present to the eye, on a *casual glance*, the *unmistakable evidences* of the frequent action of running water.” *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390, 392 (1897), *citing* Gould, *Waters* § 41.264 (emphasis added). In *Hoyt v. Hudson*, the Wisconsin Supreme Court reasoned: “It would be highly unreasonable and mischievous to attach the legal qualities of water-courses to ravines and hollows thus serving as conduits of mere occasional accumulations of surface water.” 27 Wis. At 660-661 and 662 (emphasis added.) This logic and this holding govern the legal conclusion that the Department did not fail to identify a navigable stream near the project site. The area which the petitioners assert is a stream is rather a slight depression lacking the objective characteristics of a stream. Rather, the area sometimes holds diffused surface water during flooding rather than a clearly “defined channel” and banks with a specific pattern of “flow or current.”

5. The petitioners did not carry their burden of proof that the area outlined by Dr. O’Reilly meets the definition of a slough within the meaning of §30.10 (2). There was simply insufficient evidence that this area had ever been or could reasonably be considered a slough.

6. The proposed project will not detrimentally impact wetlands if the fill is undertaken pursuant to the project plans described in detail above. The project proponent has demonstrated that there are no practicable alternatives to the proposal and that all practicable measures to minimize adverse impacts to the functional values of the affected wetlands have been taken within the meaning of Wis. Admin. Code § NR 103.08(4)(a).

7. Pursuant to Wis. Admin. Code § NR 1.90, it is the goal of the state of Wisconsin to provide, maintain and improve access to the state's navigable lakes, rivers and streams for the public. Public access facilities shall allow for public rights of navigation, related incidental uses and other uses which are appropriate for the waterway. Waterway uses shall be equally available to all waterway users and include enjoyment of natural scenic beauty and serenity. These public rights and uses may be provided by any combination of publicly and privately owned access facilities which are available to the general public free or for a reasonable fee. The department, alone or in cooperation with local government, shall exercise its management and regulatory responsibilities to achieve this goal and to assure that levels and types of use of navigable waters are

consistent with protection of public health, safety and welfare, including protection of natural resources.

8. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. §§ 1.11 and Wis. Admin. Code Chapter § NR 150. Approval of a Department project involving public access to public waters is a Type III action pursuant to NR 150.03(05)(3). Type III actions normally do not require an EA or EIS and are exempt from the procedural requirements of § NR 150.22 to 150.24.

### ORDER

WHEREFORE IT IS HEREBY ORDERED, that the Department's decision to issue the Manual Code approval be upheld and the petition for review be dismissed.

Dated at Madison, Wisconsin on May 4, 2012.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705-5400  
Telephone: (608) 266-7709  
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By: \_\_\_\_\_  
Jeffrey D. Boldt  
Administrative Law Judge

### NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.