



Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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Application of Dr. Aftab Ansari for an After-the-Fact Permit to Construct a Pond Ultimately Connected to Pike Creek, City of Kenosha, Kenosha County

Case No.: 3-SE-97-062

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FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER  
AND AFTER-THE-FACT PERMIT

Dr. Aftab Ansari, applied to the Department of Natural Resources (Department) for an After-the-Fact permit for pond construction and grading in excess of 10,000 square feet adjacent to Pike Creek in the City of Kenosha. The Department of Natural Resources issued a "Notice of Proposed Pond" which stated that unless written objection was made within thirty days of publication of the notice, the Department might issue a decision on the permit application without a hearing. Several timely objections were received by the Department of Natural Resources.

On November 4, 1997, the Department filed a request for hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was held on January 12, 13 and February 5, 1998 in Kenosha, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written arguments after the close of the hearing. The last brief was received on March 2, 1998.

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

Dr. Aftab Ansari, applicant, by

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Kenosha, WI 53142

Wisconsin Department of Natural Resources, by

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**BUREAU OF  
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George J. and Mary V. Capoun Revocable Trust, objector, by

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and

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City of Kenosha, by

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#### FINDINGS OF FACT

1. Dr. Aftab Ansari owns an approximately 27 acre parcel of property along Green Bay Road in Kenosha, Wisconsin. The legal description of the parcel is the NE ¼ of the SE ¼ of Section 27, Township 2 North, Range 22 East, City of Kenosha, Kenosha County, Wisconsin. The street address of the parcel is 4211-4233 Green Bay Road, Kenosha, Wisconsin. The parcel is bordered by State Trunk Highway 31 (STH 31) on the west, property owned by Wisconsin Electric Power Company (WEPCo) on the south, 56<sup>th</sup> Avenue extended on the east, and a golf driving range (the Capoun property) on the north

2. The area in which the subject property is located historically was used for agriculture. It is located in the Pike Creek watershed. Pike Creek drains a watershed of approximately 165 acres. The WEPCo property and the Ansari property were traversed from the southwest to the northeast by an unnamed intermittent stream. The unnamed stream continued across the Capoun property to a culvert along the east boundary of the Capoun property. The culvert carried the water under 56<sup>th</sup> Street and discharged into Pike Creek. In 1986, the Department of Natural Resources (Department) conducted a navigability inspection in this area and concluded that the unnamed stream was not navigable but that Pike Creek east of the 56<sup>th</sup> Street culvert was navigable.

3. The area south and west of the Ansari property has experienced extensive development since 1980. The property immediately south of the Ansari property was developed by WEPCo. Prior to developing the property, WEPCO extensively landfilled its property. An underground storm drain was constructed to carry the unnamed stream through the WEPCo property.

4. The Ansari property is zoned commercial. It was previously owned by Donald and Scott Pfarr. Donald Pfarr filled the southern portion of the property and constructed a facility for his company, State Construction. Subsequently, Donald Pfarr filled more of the property to further develop it. Eventually nineteen acres of the site were filled. As part of the fill project the underground storm drain carrying the unnamed stream was extended unto the subject property and a detention pond was constructed to control stormwater runoff.

5. According to SEWRPC analysis, the peak rate runoff at the 56<sup>th</sup> Street prior to 1980 was 34 cubic feet per second (cfs). As the area upstream from the culvert was developed the runoff increased. By 1988, SEWRPC estimated that the peak runoff had increased to 46 cfs. The retention pond and outlet structure was designed to reduce the peak runoff back to the 1980 level.

6. The detention pond constructed by Donald Pfarr was designed by civil engineers hired by Donald Pfarr according to specifications provided by The Southeastern Regional Planning Commission (SEWRPC). As the subject property was developed, it became necessary to expand the size of the detention pond and modify it from a detention pond to a retention pond (the primary difference is that a detention pond temporarily detains stormwater after a rain event and then drains dry while a retention pond is designed to hold water continuously, the level of water rises during a rain event). The size of the retention pond was increased from approximately five acre-feet to approximately ten acre-feet. The increased size was designed to accommodate a ten year flood, as opposed to a five year flood.

7. The retention structure is an earthen berm along the north property line of the Ansari property. The elevation of the top of the berm is 714.0 feet, MSL. A drop structure has been built within the berm to release the stormwater held in the pond. The drop structure consists of a drop chute (inlet structure), a 60 inch diameter reinforced concrete culvert and an outlet structure which discharges into the south central portion of the Capoun property.

The drop chute is a vertical pipe 84 inches in diameter. The elevation of the top of the drop chute is 710 feet, MSL. The outlet structure also contains a 21 inch diameter horizontal pipe as a separate inlet to the culvert. The intent was for normal stormwater flows to discharge through the 21 inch pipe. In the event of a rainfall that can not be handled by the 21 inch pipe, the water level in the retention pond would rise to the top of the vertical pipe and then discharge through this pipe in addition to the 21 inch pipe. The discharge from the 21 inch pipe was designed to be 34 cfs, the predevelopment peak runoff at the site.

To slow the discharge from small rainstorms and to address concerns raised by George Capoun, a weir with a six inch orifice was constructed across the 21 inch discharge pipe. The top of the weir is at an elevation of 704.15 feet. The six inch orifice is located at an elevation of 702.73 feet, which is the normal water level of the retention pond. The result is that the first 2.5 acre feet of storage of the retention pond is released at a rate of one cfs. A concrete emergency spillway was also constructed east of the outlet structure. The emergency spillway was designed to protect the berm in the event of a 100 year storm or if the outlet structure becomes plugged. The outlet structure and emergency spillway were designed to meet the requirements of the City of Kenosha.

8. Dr. Ansari purchased the property in 1995. He is continuing to develop the property commercially. Dr. Ansari eventually intends to have on the property a mix of mini-warehouses, contractors' buildings and professional office buildings.

9. In late 1996, the fact came to the city's attention that no chapter 30, Stats., permit had been issued for the retention pond. A permit is necessary for the project because it is located within 500 feet of a navigable waterway, Pike Creek. Dr. Ansari was advised of the need for a permit and a cease and desist order was issued. On February 3, 1997, Dr. Ansari filed an application for an after-the-fact permit for the retention pond and the shoreland grading performed to construct the pond.

10. The Department of Natural Resources and the applicant have fulfilled all procedural requirements of sec. 30.19, Stats.

11. George Capoun, Sr., and his son, George Capoun, Jr., (Bob Capoun) operate a driving range and golf academy on the property north of the Ansari property. The Capouns presented anecdotal evidence that since the construction of the retention pond their property has experienced increased flooding. The flooding is greater both in terms of the amount of time water remains on the property and the amount of area which is flooded. The flooding has resulted in the Capouns having to close the driving range for several days in 1997 and also makes retrieval of golf balls on the property more difficult.

12. Intuitively, it is undeniable that more stormwater is entering the Capoun property because of development upstream from the property. However, the retention pond does not affect the volume of water crossing the Capoun property. The purpose of the retention pond is to control the rate of discharge of stormwater and to improve the quality of the stormwater discharged. The quality of the stormwater is improved because slowing the rate of discharge of stormwater allows silt and contaminants to settle in the retention pond thereby creating a cleaner discharge. Slowing the rate of discharge also reduces erosion caused by the flow of stormwater downstream. The only apparent negative impact of the retention pond is that it increases the length of time over which storm water is discharged unto the Capoun property.

13. The Capouns also allege that the outlet structure of the retention pond is not located at the low point of the Ansari property. The effect of this is to increase the amount of Capouns' property over which the stormwater flows. The evidence on this issue is contradictory. However, the undisputed testimony of the applicant's witnesses is that the retention pond and outlet structure were designed to have the outflow at the low point. Because of the applicant's failure to apply for a permit prior to constructing the pond, the retention pond has not been completed. Accordingly, no as-built survey of the project has been performed. After the permit for the project is issued and the project is completed, an as-built survey will be performed and it will be determined whether the outflow is at the low

point of the Ansari property. If the outflow is not at the low point, this defect can be corrected.<sup>1</sup>

14. The project is located in an urbanized area. The record contains no evidence that the project will affect any public rights or interests in navigable waters. Under the existing circumstances, the project will not injure public rights or interest, including fish and game habitat, upon compliance with the conditions in the following permit. No wetlands are impacted by the project.

15. The project will not adversely affect water quality, will not increase water pollution in Pike Creek, nor will it cause environmental pollution as defined in sec. 299.01(4), Stats., upon compliance with the conditions specified in the following permit. To the contrary, one of the purposes of the retention pond is to allow silt and contaminants to settle in the pond. Therefore, the stormwater discharged unto the Capoun property should be somewhat cleaner than the water discharged prior to the construction of the retention pond. The project should have a positive impact on water quality and decrease environmental pollution.

16. No conditions beyond those set out in the following permit are necessary to protect public health, safety, welfare, rights and interest or to protect private rights and property.

#### Discussion

The objector argues that the Department and the Division of Hearings and Appeals (DHA) do not have the authority to issue an after-the-fact permit for this project. The Wisconsin statutes do not expressly authorize or prohibit the issuance of an after-the-fact permit. However, procedures for the issuance of an after-the-fact permit are set forth in Chapter NR 301, Wis. Adm. Code. Pursuant to the procedures set forth in Subchapter II of Chapter 227, Stats., the legislature reviews administrative rules before they become effective. Presumably, therefore, the provisions of Chapter NR 301, Wis. Adm. Code, are consistent with legislative intent. Additionally, after-the-fact permits have been issued in the past and not been set aside by any court on review. Issuance of an after-the-fact permit does not extinguish a violation for constructing the retention pond without a permit. The Department still has authority to commence an enforcement action consistent with its prosecutorial discretion.

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<sup>1</sup> William Kohel, an engineer for the City of Kenosha, suggested the problem may be that the old stream crossed the property line on a diagonal. The berm is parallel to the property line and the outlet pipe is at a right angle to the berm. The result is that the low point of the Ansari property on the south side of the berm does not match up with the low point of the Capoun property on the north side of the berm. The remedy to this problem is to drive the outlet pipe through the berm at an angle so that the inlet of the discharge pipe would be located at the lowpoint of the Ansari property and the outlet would be located at the lowpoint of the Capoun property. No estimate of the cost of this alteration was presented at the hearing. Nor was there any indication of the amount of relief this would provide for the problems the Capouns are experiencing. At this time, there does not appear to be sufficient justification to order this alteration of the outlet structure as a condition of the permit.

The Capouns allege that the project has damaged their property and that Dr. Ansari has created a private nuisance. They cite the Wisconsin Supreme Court's decisions in State v. Deetz, 66 Wis.2d 1, 224 N.W.2d 407 (1974), and Crest Chevrolet, etc. v. Willemsen, 129 Wis.2d 129, 384 N.W.2d 692, (1986), as support for their arguments. In Deetz, the Wisconsin Supreme Court discarded the common enemy doctrine and adopted the reasonable use doctrine regarding the flow of surface waters. The court, quoting Armstrong v. Francis Corp., 20 N.J. 320, 327, 120 A.2d 4 (1956), explained the reasonable use test as follows:

" . . . each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." Deetz, 66 Wis.2d 1, at 14

In Crest, the court further stated "[t]he reasonable use doctrine, unlike the common enemy doctrine, does not allow a landowner the unlimited privilege to divert surface water from his property onto another's property. The doctrine respects a neighboring landowner's *status quo* and affords a landowner who has developed his land, like Crest, to be free from the intentional intrusion of surface water on his property which is the result of a defendant's unreasonable conduct and which impairs the use and enjoyment of his land." Crest, 129 Wis.2d, at 146.

The facts in Crest are easily distinguishable from those in the instant case. In Crest the natural flow of surface water was from the plaintiff's land to the defendant's land and surface water generally accumulated on the defendant's property. In developing his property, the defendant raised the elevation of his property above that of the plaintiff's causing surface water now to accumulate on the plaintiff's property. The court found that the defendant's diversion of surface water to the plaintiff's property an unreasonable action. In the instant case, surface water flowed from the Ansari property to the Capoun property prior to construction of the retention pond. The purpose of the construction of the retention pond is to control the rate of flow of stormwater in the Pike Creek drainage basin downstream from the Ansari property and improve the quality of the discharge into Pike Creek. Based on the evidence in the record, these goals have been accomplished. The construction of the retention pond on the Ansari property has not resulted in more stormwater being discharged unto the Capoun property.

As stated in the objector's posthearing brief, both George and Bob Capoun testified that the accumulation of standing water problem on their driving range "commenced with the urbanization of the [Pike Creek] drainage basin and with the [WEPCo] Project. The Capouns stated that the flooding problem became worse about the time that State Construction commenced the formation of the berm and outfall." (Capoun posthearing brief, page 2) The Capoun brief continues that both Capouns "testified that the flooding problem [on their property] has been greatly exacerbated since the construction of the retention/detention pond in 1995 to 1997." However, the Capouns failed to present an explanation, let alone empirical evidence, regarding how the construction of the retention pond would have caused more flooding on their property.

Assuming the flooding problem on the Capoun property has gotten worse since the construction of the retention pond (and there is no reason to doubt the objector's anecdotal evidence to this effect), the cause of the increased flooding is the continued development upstream from the Capoun property with the creation of additional impervious surfaces. The unavoidable fact remains that the construction of the retention pond on the Ansari property, upstream from the Capoun property, controls the rate of discharge of stormwater unto the Capoun property and this is a benefit, not a nuisance, for the Capouns.

Although the Capouns object to the issuance of an after-the-fact permit for the retention pond and associated grading on the Ansari property, they did not suggest an alternative method to control stormwater discharge at the site or indicate what remedy they are seeking to alleviate the flooding problem on their property. The Capouns repeatedly argued that pursuant to sec. 30.19(5), Stats., the Department has the authority to impose conditions in a permit it finds reasonably necessary to protect private rights and property; however, they failed to suggest any conditions which they believed would protect their property.

In summary, although the Capouns are obviously upset about the increased flooding problem on their property, they have failed to show how this problem is related in any way to the construction of the retention pond on the Ansari property. Additionally, they have failed to suggest any conditions for the permit that would alleviate the flooding problem. The construction of the retention pond on the Ansari property has benefited the Capouns along with other property owners in the Pike Creek watershed downstream from the Ansari property and the after-the fact permit should be issued.

#### CONCLUSIONS OF LAW

1. The project as described in the foregoing findings of fact herein constitutes the construction of a pond ultimately connected to a navigable body of water as provided in sec. 30.19(1)(a), Stats. The grading associated with the construction of the retention pond constitutes grading on the banks of a navigable stream as provided in sec. 30.19(1)(c), Stats.
2. Pursuant to Chapter NR 301, Wis. Adm. Code, the Department has jurisdiction to issue an after-the-fact permit for this project, subject to the conditions stated in the following permit.
3. The project is a type III action under sec. NR 150.03(8)(f)2, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.
4. Pursuant to sec. 30.19(1)(a), Stats., a permit was required for the construction of the retention pond and pursuant to sec. 30.19(1)(c), Stats., a permit was required for the associated grading. The construction of the pond and the grading without permits constitute violations of secs. 30.19(1)(a) and(c), Stats.
5. The construction of the retention pond and the grading in violation of secs. 30.19(1)(a) and(c), Stats., constituted a public nuisance pursuant to sec. 30.294, Stats. This violation is abated by the issuance of the following permit.

## AFTER-THE-FACT PERMIT

Dr. Aftab Ansari is hereby granted under sec. 30.19(1)(a), Stats., an after-the-permit to construct a retention pond within 500 feet of the ordinary high water mark of Pike Creek, a navigable waterway, and to grade in excess of 10,000 square feet adjacent to Pike Creek in the NE ¼ of the SE ¼ of Section 27, Township 2 North, Range 22 East in the City of Kenosha, Kenosha County, subject to the following conditions:

### GENERAL PERMIT CONDITIONS

1. You must notify Pamela Biersach, 3911 Fish Hatchery Road, Fitchburg, Wisconsin 53711, phone (608) 275-3290, before continuing construction and again *not more than 5 days* after the project is complete. A final inspection will be required and you must schedule this final inspection with Ms. Biersach.
2. You must complete the project on or before October 15, 1998. You may not begin or continue construction after this date unless the Department grants a new permit or permit extension in writing.
3. This permit does not authorize any work other than what you specifically describe in your application and plans and as modified by the conditions of this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department.
4. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances or by the U.S. Army Corps of Engineers before starting your project.
5. You must allow free and unlimited access to your project site at any time to any Department employee who is investigating the project's construction, operation, or maintenance.
6. The Department may modify or revoke this permit if the project is not completed according to the terms of the permit, or if the Department determines the activity is detrimental to the public interest.
7. You must keep a copy of this permit and approved plans at the project site at all times until the project is complete.
8. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit.

### SPECIFIC PERMIT CONDITIONS

9. You may resume any Department-approved construction only after the City of Kenosha has approved a specific erosion control plan and construction sequence and inspected and approved the initial erosion control installation. You must submit a copy of the City's approval to the Department.

10. All erosion control devices and installation must meet or exceed the specifications described in Wisconsin Construction Site Best Management Practices Handbook, and the requirements of the City of Kenosha's erosion control ordinance.

11. No construction, except for that associated with erosion control measures, shall occur when excessive precipitation is expected in the immediate future, during periods of heavy precipitation, or when the water level in the pond is at or above capacity.

12. You must maintain an erosion control plan during and after construction. An erosion control plan must include several Best Management Practices and should be routinely inspected and maintained. Inspections shall occur after each rain event exceeding ½ inch rainfall and at least once each week.. Any disturbed bank areas should be revegetated as soon as practicably possible. Disturbance of new areas should be as minimal as possible.

Silt fencing should be placed along any disturbed soil areas to minimize sedimentation. Due to the nature of this site, it may be necessary to employ more than one method of Best Management Practices to stabilize the site and prevent erosion and transport of sediment into the stream. It is the responsibility of the permittee to insure that the methods selected are appropriate for the site conditions.

During construction, any exposed areas not currently under construction should be seeded with a rye or winter wheat cover for stabilization. If vegetation is not possible given the site conditions, alternate methods of stabilization may be used. Silt screens, hay bales, and any other erosion control measures shall be placed as soon as construction begins. Routine inspections shall be made of the erosion control measures. You are responsible for maintaining and repairing any failing measures within twenty-four hours.

Silt screens and other erosion control measures must remain in place until the vegetation has returned and stabilized.

13. You must stabilize disturbed soil with vegetation, or in conjunction with other measures such as mulch or erosion matting, appropriate to conditions at the site, immediately after final grading or if the area will be undisturbed for more than five days.

14. Erosion control measures must be in place at the end of each working day.

15. No excavated or spoil materials may be deposited or stored below the Ordinary High Water Mark of any waterway, in a wetland or in the floodway of any stream.

16. The removal of vegetative cover and exposure of bare ground shall be restricted to the minimum amount necessary for construction. Areas where soil is exposed must be protected from erosion by seeding and mulching, sodding, diversion of surface runoff, installation of straw bales or silt screens, construction of settling basins, or similar methods as soon as possible after removal of the original ground cover and no later than when construction is completed.

Any area where topsoil is exposed during construction shall be immediately seeded and mulched to prevent soil from being eroded and washed into the waterway.

17. Any "emergency" changes must be approved by the Department prior to implementation. The Department must be notified in writing. This information can be transmitted through the U.S. Mail or fax machine.

18. The maximum streamward encroachment of the project is limited as indicated on the plans. Additional encroachment will be considered a violation and may result in fines, permit revocation, and site restoration.

19. All excavation for the construction of the detention pond must be removed by equipment which is designed to minimize the amount of sediment that can escape into the water. Equipment must be properly sized so that excavation conforms to the plans submitted and allows the work to be done from the land rather than in the waterway.

20. When construction is complete, the detention pond and outlet elevations must be the same as identified on the plans. It is the permittee's responsibility to provide a certified as-built survey attesting to these elevations. This survey must be submitted to the department no less than 30 days after construction is complete.

21. The permittee is to provide a detailed description outlining the scheduling of the construction work. The schedule should identify the different phases anticipated in the construction as well as proposed dates for phase completion. This construction schedule should identify specific dates for the grading, excavation, erosion control implementation, and outlet installation. Those phases of the project that have been completed prior to the issuance of this permit shall be identified on this schedule as completed.

Your schedule should include contingency plans in the chance there is a large storm event. The contingency plan would address "emergency" erosion control or diversion plans.

22. The permittee or an appointed agent shall prepare weekly status reports and shall surrender the information on request to Department representatives. These reports shall include description of site conditions, status of erosion measures, and any repair work performed.

These reports shall continue until the project is complete and the Department has made a final site inspection of the project.

Dated at Madison, Wisconsin on April 14, 1998.

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By: Mark Kaiser  
MARK J. KAISER  
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 sec. 227.48, Stats., 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 secs. 227.52 and 227.53, Stats
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
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 therefor in accordance with the provisions of sec 227.52 and 227.53, Stats. 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. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227.52 and 227.53, Stats., to insure strict compliance with all its requirements