



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Application of David Cappelle  
for Water Quality Certification to Place Culverts in  
and fill .06 Acres of Wetland on Property Located  
in the Town of Morrison, Brown County,  
Wisconsin

Case No. 3-NE-02-0236LF

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**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER APPROVING WATER QUALITY CERTIFICATION**

Pursuant to due notice, a hearing pursuant to Wis. Stat. § 227.42 was held in Green Bay, Wisconsin, on July 21, 2003 before Jeffrey D. Boldt, administrative law judge (the ALJ). The parties requested an opportunity to submit written briefs, the last of which was received on August 15, 2003. In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

David and Nora Cappelle (the applicants or the Cappelles), by

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Wisconsin Department of Natural Resources (the DNR), by

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**FINDINGS OF FACT**

1. David A. and Nora Cappelle, 2139 Dickinson Road, Apt. 9, De Pere, Wisconsin 54115 have filed an Application with the Wisconsin Department of Natural Resources for water quality certification under § 401 of the Federal Clean Water Act, Wis. Stat. §§ 281.15 and 281.37, and Wis. Admin. Code Chapter NR 299 and NR 103.

2. The proposed project is located in the Southeast Quarter (SE ¼) of the Southwest Half (SW 1/2) of Section 4, Township 21 North, Range 21 East, in the Town of Morrison, Brown County, Wisconsin (the “Project Site”). (Ex. 5)

3. The Cappelles, acquired title to the following real property consisting of approximately 80 acres (the “Original 80”) on October 11, 2001:

The South half (S 1/2) of the Southwest quarter (SW ¼) of Section 4, Township 21 North, Range 21 East, except part used for road purposes, in the Town of Morrison, Brown County, Wisconsin. (Ex. 5)

Ms. Cappelle testified that substantial areas of the property were flooded when they viewed the property before purchase.

4. The proposed project consists of discharging fill materials into .06 acres of wetland for the purpose of road access to a single family residential building location, which is on an upland portion of the Project Site. (Ex. 5; Jim Hadley) The “project purpose” is to gain access to a buildable lot. The Cappelles plan to build a house and garage in the northeast corner of the property. The proposed activity is not a wetland dependent activity, in that construction of a single family residence is not of a nature that requires a location in a wetland to fulfill its basic purpose. (See: NR 103.07(3))

5. Through Northern Environmental Technologies, Inc., their consultants, the Cappelles submitted an application for the project to the Department of Natural Resources (“DNR” or “the Department”) with a letter of transmittal dated March 6, 2002. (Ex. 5) The Department determined that March 11, 2002 was the date the application was complete. (Ex. 10-NR p. 1; Jon Brand) The DNR issued a decision denying water quality certification on June 20, 2002. The Cappelles filed a timely Petition for Hearing under Wis. Stat. § 227.42. Darrell Bazzell, Secretary of DNR, issued a determination on July 19, 2002 that the Cappelles’ Petition met the requirements of Wis. Stat. § 227.42 and granted the request for a contested case hearing.

6. The proposed project involves improving access to a lot on which the applicants plan to construct a home. The proposed gravel driveway will start at Highway 96 immediately west of the southeast property corner of the Project Site and run north along the existing hedgegrove that grows along this property line. For the first approximately 490 feet north of the Highway 96 centerline, the proposed gravel driveway follows the edge of a former farm field that is dominated by Reed-Canary Grass. From approximately 490 feet to 680 feet north of the Highway 96 centerline, the proposed driveway enters an area marked as wetland on the WDNR Wetland Inventory Map filed at the Brown County Zoning Department. The wetland inventory boundaries correspond well with the presence of wetland drainage patterns. The wetland inventory designates the wetland E1K (Emergent/wet meadow/persistent/ wet soil palustrine) which reflects the condition of the wetland when the arial photograph used for the wetland inventory was taken. (Ex. 5-Jim Hadley)

7. An existing unimproved grassy lane (the existing lane) crosses the wetland on the Project Site at the location of the proposed upgraded driveway (approximately 490 feet to 680 feet north of the Highway 96 centerline). The existing lane has an approximately 12-inch steel culvert at the south end of the crossing (the "South Culvert") as well as a stone ford (the "North Stone Ford") made from large field and quarry stones at the north end of the crossing, approximately 510 feet and 660 feet north of the Highway 96 centerline, respectively. The existing unimproved lane elevation is approximately 0.5 feet to 1 foot above the surrounding wetland, apparently due to historic filling by prior owners. (Ex. 5, 11, 12; Jim Hadley; Jon Brand)

8. In January 2002, the Cappelles sold and conveyed approximately 40 acres of the Original 80 consisting of the Southwest Quarter of the Southwest Quarter of Section 4, Township 21 North, Range 21 East, in the Town of Morrison, Brown County, Wisconsin, to their son, Darrell R. Cappelle, in accordance with an agreement which pre-existed the Cappelles' purchase of the Property. Following this transfer, the Cappelles continued to own the 40 acres on which the proposed project was to be situated ("the Project Site"). However, they no longer owned the adjacent 40 acres to the west of the Project Site (the "West 40"). Both the Project Site and the West 40 front on their south borders on State Highway 96. The West 40 also has frontage on its west boundary on Pleasant View Road. (Ex. 5; Nora Cappelle and Jim Hadley)

9. In late January and early February, 2002, the Cappelles, requested a navigability determination for the unnamed tributary to the Branch River on the Property. On April 11, 2002, DNR issued a determination that the water course was navigable. (Ex. 6-NR; Jim Hadley)

10. The Cappelles submitted an application to the Department of the Army, St. Paul District, Corps of Engineers for authorization to discharge fill material in connection with the Project. Conditional authorization was obtained from the Corps of Engineers on March 11, 2002. (Exs. 9) Such authorization is contingent upon the state granting water quality certification prior to the fill.

11. Northern Environmental submitted a flood plain analysis for the Project Site dated March 27, 2002, revised May 21, 2002 and May 28, 2002. (Ex. 8-NR p. 1) On June 3, 2002, DNR concluded that "this analysis, with revisions, meets the requirements of NR 116 and can be used by the community for compliance with their flood plain ordinance." (Ex. 8-NR p. 1) Northern Environmental submitted the flood plain analysis, as revised, to the Brown County Zoning Department through a letter dated June 5, 2002. (Ex. 8-NR p. 2) A site layout showing existing and proposed features was also submitted to DNR. (Ex. 8- NR p. 3)

12. An old stone foundation and the remains of a metal roof and drilled well are situated on the Project Site in the location intended by the Cappelles as the location of their new residence. The foundation, roof remains and well evidence the previous existence of a building on the Project Site. Plat maps from 1889 and 1952 indicate that a structure existed in the approximate location of the stone foundation on the Project Site for many years, apparently dating back at least to 1889. (Ex.s 2-5; 16-20; Jim Hadley; Nora Cappelle)

### Practicable Alternatives Issues

13. At the time the Cappelles decided to convey the West 40 to their son, the Cappelles testified they were unaware of any specific practical alternative to the Project involving an easement across the West 40. They did not retain an easement across the West 40. (Nora Cappelle) However, for purposes of this decision the Division is assuming that such an easement could be obtained from their son. The sale of the 40 acres came after the time that the Cappelles were aware of the need to consider “practicable alternatives” to the proposed driveway, and it would be inappropriate to allow an applicant to do an end-run around the “practicable alternatives” requirement by means of a self-inflicted hardship. (Brand) Jon Brand of the DNR testified that he informed Mr. Cappelle on or about November 25, 2001, two months before the sale, that access across the west 40 was an alternative. Further, Mrs. Cappelle admitted that her son was willing to sell back “rights to build the road” if necessary. (Ex. 13NR)

14. Subsequent to issuance of the DNR’s decision on June 20, 2002, Mrs. Cappelle sent a letter to Jon Brand of DNR questioning the practicability of the alternative access from Pleasant View Road. In this letter, Ms. Cappelle contended that the proposed alternative would have adverse environmental impacts and adversely affect cropland. She also indicated that the cost of implementation of the alternative would be \$103,188 to \$132,880, which would add \$64,188 to \$93,800 to the cost of the driveway and to the cost of the Cappelle’s intended construction of a home on the Project Site. (13-NR pp. 1-6)

15. The Cappelle's intend to construct a house on the Project Site consisting of 1,700 to 2,000 square feet at a cost of \$75.00 to \$100 per square foot. (Nora Cappelle) The construction costs for the house, accordingly, range from a low of \$127,500 (1,700 x \$75) to a high of \$200,000 (2,000 x \$100); the average of these two estimates is \$163,750. Adding this amount to the estimated \$39,000 cost of the original proposed project results in a total estimated project cost of \$220,750. The Pleasant View alternative would increase that cost by \$71,000 (\$110,000 - \$39,000), increasing the total project cost to \$273,750, an increase of overall Project costs of approximately 35%.

16. Based on the uncontested testimony of James Hadley, P.E., the cost to the project of constructing the alternative route would be approximately \$110,000. (Ex. 12; Jim Hadley) The construction costs for the project as originally proposed is approximately \$39,000. (Exs. 5, 12; Jim Hadley) Implementation of the Pleasant View alternative, accordingly, would increase the cost of the access portion of the overall project nearly three fold, assuming that the house and garage are constructed in the northeast corner of the property. If the home could be constructed closer to the western property boundary, this would reduce this cost by nearly half.

17. Implementation of the Pleasant View alternative would result in a significant loss of cropland on the West 40. (Ex. 11; 13-NR pp. 1-6; Jim Hadley; Nora Cappelle)

18. Construction of an access from Pleasant View Road across the West 40 would be complicated by the deep top soil at this location (1 to 2 feet deep) and the need to install fill to bring the driveway above the Branch River flood elevation. A preliminary flood plain study,

which has not been reviewed by DNR, indicates that a driveway from Pleasant View Road could be sited within the flood plain which, if approved by DNR, would allow placement of fill. These unreviewed flood plain studies put the Branch River 100-year elevation between 871.5 and 871.9 feet – National Geodetic Vertical Datum (“NGVD”) from Pleasant View Road to the proposed home. The existing grade over this area ranges from 869.3 to 871.1 feet – NGVD. (Ex. 12; Jim Hadley)

19. It is unsafe and impractical for almost one-half mile of driveway to be submerged by spring flooding on the Branch River, even if it is within the flood fringe. This overtopping would be much deeper, further, longer and more dangerous compared to Section 4 Tributary with 0.5 square mile watershed) than the overtopping of the driveway along the existing agricultural road. (Ex. 12; Jim Hadley)

20. For construction of the Pleasant View Road alternative, on average 4 to 5 feet of fill and roadbed will have to be installed to replace topsoil and raise the grade above the Branch River 100-year flood elevation. (Ex. 12; Jim Hadley)

21. The Pleasant View alternative could affect the drainage of water from the hillside on the north one-half of the southwest quarter of Section 4, T21N, R21E. Receding floodwaters as well as rainfall runoff that currently drain south as sheet flow or shallow upland flow from this area would have to flow in culverts under the driveway if this alternative were implemented. At least six culverts would be required. Culverts under the driveway could concentrate the flow, requiring grass swales south of the driveway to the wetlands north of the Branch River. Where these grass swales would discharge into the wetland, additional erosion is likely to occur. The wetland along the north bank of the Branch River would become wetter near the grass swale discharges and drier between the grass swale discharges, which would affect the wetland’s flora. (Ex. 12; 13-NR, pp. 1-6; Jim Hadley; Nora Cappelle)

If the Pleasant View alternative were implemented, the fields in the north one-half of the southwest one-quarter would not drain as well and would likely become wetter. The alternative would be likely to impede drainage under the driveway; and to compact sediments under the driveway, reducing groundwater flow towards the Branch River. (Ex. 12; Jim Hadley) The fields south of the proposed Pleasant View Road would be divided by at least six grassed swales, which would make farming on approximately 12 acres of the southwest quarter of the southwest one-quarter of Section 4, T21N, R21E, and approximately 11 acres on the Project Site Property, uneconomical. (Ex. 12; Jim Hadley) At \$65 per acres rental fees, 11 and 12 acres provides \$780 and \$715 income per year to the respective landowners. (Ex. 12; also see 13-NR pp. 1-6)

22. Because of the greater convenience it affords, the existing lane would likely continue to be used for access to the Project Site, conditions permitting, typically including the summer, fall and winter and portions of the spring, depending on the vehicle used. The effect would be the creation of two roads on the Property. (Ex. 12; Jim Hadley)

23. Taking into account “cost” and the other factors set forth above, the Pleasant View Road alternative is not a reasonably practicable alternative to the proposed Project. (Ex. 5;

12; 13-NR pp. 1-6; Jim Hadley; Brian Lennie; Nora Cappelle) This is true whether the house is sited at the northeast corner of their property, or at a site closer to the Pleasant View alternative.

24. Another alternative suggested by DNR at the hearing would involve location of the Cappelles' house south of the wetlands on the Project Site. However, this site was ruled out in the fall of 2001 due to the proximity of the flood plain, the Branch River, and the wetland on the Project Site. The existing ground level in the extreme northeast corner of the Project Site is at least 5 feet higher in elevation than any site south of the wetland (Ex. 6) The extreme northeast corner of the Project Site was the site of a substantial structure on the Property. Location of the Cappelles' house south of the wetland on the Project Site creates a much greater risk of flood damage to the home. It places the house and septic approximately 50 feet from the wetland, 100 feet from the Section 4 Tributary and 200 feet from the east channel of the Branch River, increasing the potential that house, lawn and septic contaminant flow and runoff will go into the Branch River, Section 4 Tributary, or wetland. This suggested alternative home site probably lacks a suitable septic field site, and its soils are poor for building foundations, footings, and basements. Finally, the owner of the Project Site will still need access to the north half of the property and therefore would still have a need to use the existing driveway or lane across the wetlands on the Project Site. (Ex. 12; Jim Hadley; Nora Cappelle)

Siting a house south of the wetland on the Project Site is not a "practicable alternative." (Ex. 12; Jim Hadley; Nora Cappelle)

25. Alternatives were also considered regarding installation of a clear span, 9 foot span by 14 foot wide, at the north end of the wetland crossing and two 34 inch by 24 inch by 18 inch culverts at the south end, retaining a 90 foot stretch of existing grade in the center as originally proposed at an estimated cost of \$70,000. Again, according to Mr. Nikolai, DNR Wildlife Specialist, installation of such a clear span would not significantly contribute to reptile and amphibian connectivity. This alternative would require an additional permit to span a navigable waterway. Accordingly, the additional cost and difficulty without benefit is not justified and this is not a reasonably practicable alternative. (Ex. 12; Jim Hadley; Brian Lennie; Richard Nikolai)

26. Another alternative was considered involving clear spanning the entire wetland crossing with a 185 foot span, 12 feet wide at an estimated cost of \$218,000 representing an increased cost over the original Project of \$179,000. Such extensive bridgework would also likely require extra expense for maintenance. According to Mr. Nikolai, only such extensive clear spanning would fully address his connectivity concerns with regard to amphibians and reptiles. However, the proposed solution would add barriers to other wildlife such as deer, requiring them to reroute their movements. Installation of this suggested alternative would require the owners to obtain an additional permit to build a bridge across a navigable stream. The primary concern expressed by Mr. Nikolai with respect to the use of culverts to minimize the impact of connectivity was that the culverts might act as "funnels" concentrating the reptiles and amphibians thereby enhancing their vulnerability to predators such as hawks and raccoons. Such concentrations occur in nature due to natural topographic features and arguably benefit the predators in question, including migratory birds. (Lennie) None of the reptiles and amphibians on the Project Site is Endangered or Threatened. At most, the project may result in a slight

decline in numbers but will not result in a significant detrimental loss of any species from the Project Site or from the adjacent wetland. Overall, the enormous additional cost for clear span are not justified by the speculative possible reduction of the already minimal adverse impact on amphibian and reptile connectivity in the wetland. (Ex. 12; Jim Hadley; Brian Lennie, Jon Brand; Richard Nikolai)

27. A preponderance of the credible evidence demonstrates that none of the above proposals are “practicable alternatives” to the proposed driveway project. (Exs. 5, 12, Hadley, Lennie, Nikolai)

28. Three other alternatives were considered. First, improvement of the existing Stone Ford, maintaining the current passageway for amphibians and reptiles between the stones in the ford, and adding additional passageways (connectivity) via culvert installation at a cost of \$4,000 to \$16,000. This plan was not sufficiently fleshed out to determine whether or not it was practicable. Second a concrete box culvert (9 foot span by 2 foot rise by 14 foot long) at the north end of the wetland crossing and two, 35 inch by 24 inch by 18 inch culvert at south end, retention of a 90 foot stretch of existing grade and center as originally proposed, which would add approximately \$15,000 to the cost of the project. While this alternative may in fact be practicable, there was little in the record to support implementation of this alternative over the third related alternative, which costs significantly less.

The third alternative included installation of five 24 inch rise by 35 inch span culverts, set six inches deeper to provide a muck natural bottom, two at the south end/existing culvert location and three at the north end/stone filled location of wetland crossing at an estimated additional cost to the project of \$4,000. The increased cost is reasonable relative to the overall cost of the project. DNR Wildlife Biologist Nickolai testified that bottomless culverts were “much better” because they made a more natural substrate available to reptiles and amphibians and other wildlife. However, there was no expert testimony from either side opining that more than two culverts are necessary. On its face, it would appear preferable because having a greater number of culverts that are better suited to the life cycle of affected amphibians would to some degree ameliorate concerns about “funneling” them to areas ripe for predation. Accordingly, there is not substantial evidence in the record to justify requiring five culverts as a condition of the certification. However, there is sufficient evidence to require that the culverts be placed as bottomless culverts. (Nickolai)

#### Wetland Issues

29. The Soil Survey of Brown County, Wisconsin (1974) classifies the soil within the wetland crossing as Pella silt loam (“PE”), a “poorly drained soil.” The segment of proposed driveway immediately north of Highway 96 (approximately 150 feet) is also mapped as Pella silt loam. North and south of the wetland crossing, though not exactly coincidental with the Wetland Inventory Boundary, the soils are mapped as Kibbie silt loam, 1% to 3% slope (KnA), a “somewhat poorly drained soil.” (Ex. 5; Jim Hadley; Brian Lennie)

30. The wetland on the Project Site is created by the flow of the tributary that drains Section 4 of T21, NR 21E into the Branch River (the “Section 4 Tributary”). The Section 4

Tributary is shown as an intermittent stream on United States Geological Survey Morrison 7.5 Minute Quadrangle Map. When present, the flow in the vicinity of the existing driveway appears to be broad and dendritic. Where the existing driveway crosses the wetland, low flows appear to pass through the Stone Ford on the north end of the driveway; higher flows probably pass over the top of the driveway. (Ex. 5; Jim Hadley)

31. The proposed upgraded driveway will have its surface at the same grade as the existing driveway for a 90-foot section in the center of the wetland crossing. At the north and south ends of the wetland crossing, two 18-foot long 18-inch rise by 24-inch span pipe arch corrugated steel culverts will be installed at the locations of the existing Stone Ford and South Culvert respectively. These culverts will be located approximately 150 feet apart, approximately 510 feet and 650 feet north of the Highway 96 centerline, respectively. The culverts will carry low flows from the Section 4 Tributary. Higher flows will overtop the 90 foot long section of the driveway installed at the existing grade. This will maintain the existing pattern of water flow through the wetland while also complying with the NR 116 requirement of not significantly impacting the water surface off the property during the 100 year flood. (Ex. 5; Jim Hadley)

32. The culverts will be installed so that their invert elevations will be 0.5-foot below the elevation of the wetland both upstream and downstream of the existing driveway at the location of each culvert. This will require excavating portions of the existing driveway to a depth of 1 to 1.5 feet below the existing driveway surface, which is approximately 0.5 to 1 feet above the wetland surface upstream and downstream of the existing driveway. Additional excavations to a depth of 0.25 to 1 foot will be conducted to remove material so that the road bed may be improved for the 10 foot by 90 foot segment of the proposed driveway that would be installed at grade. Excavated materials will be used as fill surrounding the home site in the northeast corner of the Project Site, an upland area. (Ex. 5; Jim Hadley)

33. As part of the proposed project, fill will be replaced to a minimum depth of 1 foot above the top of the culverts, resulting in an elevation approximately 2.5 feet above the surrounding wetland grade at the culverts. The side slope grade will be 2 to 1, resulting in 5-foot wide side slopes on either sides of the culverts, the proposed new side slopes would diminish to 0-foot wide where the proposed driveway returns to the existing grade for 90-feet in the center of the proposed wetland crossing. Figure 3 to Ex. 5 at the hearing provides a conceptual sketch of a typical culvert installation for the proposed upgraded driveway. (Ex. 5; Jim Hadley) Small backhoes and front-end loaders (for example, a BobCat®), dump trucks and shovels will be used during the proposed driveway upgrade. The vegetation disturbed by heavy equipment will be restored as described below. (Ex. 5)

34. The original application called for paving as part of the driveway upgrade within the wetland. Subsequent to the issue of connectivity primarily for amphibians and reptiles being raised by the DNR at a December 2002 meeting, paving within the wetland was removed from the proposal. Compared to a paved driveway, a gravel driveway within the wetland will (a) have lower daytime surface temperatures, reducing sunning by cold-blooded animals and (b) allow weeds to grow in portions of the driveway providing more cover. (Exs. 5 and 12; Jim Hadley; Brian Lennie; Richard Nikolai)

35. Proposed erosion control measures during construction of the proposed Project are: (a) upgrading the driveway in approximately 50 foot segments, completing erosion measures on each segment prior to proceeding to the next segment; (b) installing  $\frac{3}{4}$  inch crushed stone gravel over the 10 foot wide top of the driveway; (c) protecting all new side slopes of the upgraded driveway with erosion control netting and seeding with native facultative wetland grasses; (d) the original application (March 6, 2003; Ex. 5), proposed rip-rap at the culvert inlets and outlets. Rip-rap is not necessary for erosion control in this case and literature indicated it can prevent access to culverts by amphibians and reptiles, so rip-rap was dropped from the proposed project in January 2003; and (e) protecting any exposed dirt in uncompleted portions of the driveway within the wetland from flowing water using hay bales secured with wooden stakes. (Exs. 5 and 12; Jim Hadley, Brian Lennie)

36. The proposed crossing will not adversely affect either the flow or the storage of storm and flood waters within the wetland. The water surface elevation during the 100-year flood will not be significantly impacted compared to the existing condition. Brown County Zoning Ordinances require that the project comply with NR 116. (Ex. 5; Jim Hadley)

37. The two culverts and road installation grade as described above are expected to maintain the existing drainage patterns of the wetland and hydraulic functions. (Ex. 5; Jim Hadley)

38. The proposed project will not significantly affect the ability of the wetlands to filter or store sediments, nutrients or toxic substances. The proposed restoration of 0.2 acres to bottomland forest to compensate for the proposed project along with the proposed conversion of approximately 4-acres of agricultural land, a 40-foot strip along the agricultural field/wetland boundary, to forest in a Brown County Conservation program will improve filtration of these substances. (Ex. 5; Jim Hadley; Brian Lennie)

39. The two culverts and road installation at grade as described will maintain the broad low velocity flow that currently exists (approximately 1 to 2 feet per second during flood events), preventing erosion. In areas in the vicinity of the culverts, velocities may reach 3 to 4 feet per second during flood events, which the existing vegetation can withstand (Ex. 5; Jim Hadley)

40. The proposed project will not significantly alter the connections (for wildlife) between the upstream and the downstream portions of the Section 4 Tributary compared to the existing driveway. (Ex. 5; Jim Hadley; Brian Lennie)

41. The proposed project is not expected to significantly affect habitat for aquatic organisms. (Ex. 5; Jim Hadley; Brian Lennie)

42. The proposed project, including the reforestation work, will either have no effect, or improve human use function values. Hunting and bird watching should be improved. Cultural, scenic, educational, and scientific uses will not be affected. (Ex. 5; Jim Hadley; Nora Cappelle; Brian Lennie; Jon Brand; Richard Nikolai)

43. The proposed project will not result in contamination of the wetland with debris, odor, color, or taste creating materials, or toxic/harmful contaminants. It will not affect the aquatic chemistry of the wetland (pH, temperature, dissolved oxygen, etc.). Only sand and crushed stone will be used as fill. Material removed from the wetland (soil or historically placed fill) will be stored in upland areas at least 100 feet from the wetland and ultimately used as fill near the homesite, over 200 feet from the wetland. (Ex. 5; Jim Hadley; Brian Lennie)

44. The proposed culverts and driveway installation for 90 feet at the existing grade will maintain the existing wetland hydrological conditions. (Ex. 5; Jim Hadley; Brian Lennie)

45. The existing driveway/lane is already a barrier to surface waters at certain levels, interrupting the flow of surface waters and, to a lesser extent, groundwater. The North Ford mitigates this impediment to some extent, as does the South Culvert, but the South Culvert was plugged at the time Mr. Nikolai visited the Property. Accordingly, installation of the proposed culverts will enhance circulation of water within the wetland located east and west of the existing and upgraded driveway. (Exs. 5, 12, 15-NR p. 1; Jim Hadley; Brian Lennie; Richard Nikolai)

46. As amended, the proposed project will have no significant environmental impacts. (Ex. 5, Hadley; Lennie) The significant modifications add requirements as follows: a) that bottomless culverts be placed; b) a maintenance plan to keep them free of debris; c) submissions of a revised plantings plan acceptable to the DNR; and d) approval of the buffer and reforestation plan by the DNR

## DISCUSSION

The applicants have carried their burden of demonstrating that there are no “practicable alternatives” to the proposed fill in providing a driveway to the buildable lot in the area of the prior building site. The “alternatives analysis” submitted by the applicant, considered numerous alternatives, several suggested by the Department. (Ex. 12) However, the most obvious alternative, re-routing the driveway off Pleasant View Road, is simply not economically viable given the expense involved in creating the nearly half mile long driveway from Pleasant View. (Findings 15-30) The other principal alternatives involve the creation of large clear span bridges over the un-named tributary. (Ex. 23) Both of the proposals are simply too expensive to be “practicable alternatives” within the meaning of Wis. Admin. Code § NR 299.02(7). The regulation mandates consideration of “cost” as one element of the whether such an alternative is practicable. (Accord: NR 103.07(01) The construction of either a \$218,000 or a \$70,000

bridge over this small tributary would be overkill relative to the slight environmental risks at stake in this matter.

The primary concern is with respect to the “funneling” of reptiles and amphibians through the culverts, thereby giving predators an advantage. There was no evidence of any endangered species being vulnerable in this area. While a few more amphibians and reptiles may be lost due to this “funneling” effect, such a consequence does not justify the economic hardship which the proposed alternatives would place on the applicants.

Given that there are no “practicable alternatives,” the issue is whether the proposed gravel driveway would result in “significant adverse impacts” to wetland functional values. The applicants carried their burden of proof on these issues as well, so long as the conditions set forth below are followed.

The proposed reforestation plan was not submitted as a formal wetland mitigation plan. However, given the applicants good faith offer to undertake this work, it is appropriate to consider it in connection with approval of water quality certification. The proposed plan has, accordingly, been made a condition of the certification. The Order for Certification also requires approval of such plans by the DNR.

#### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification and grading permit cases pursuant to Wis. Stat. §§ 227.43(1)(b) and 30.19 and Wis. Admin. Code NR 299.05(6).

2. The proposed fill for construction of a driveway is not a wetland dependent activity within the meaning of Wis. Admin. Code §§ NR 103.07(2) and NR 103.08(4)(a)(1), because said construction is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. No practical alternatives to the fill proposal exist which would not adversely impact wetlands and will not result in other significant environmental consequences. See Wis. Admin. Code § NR 103.08(4)(a)(2). Practical alternatives means available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes. Wis. Admin. Code NR 103.07(1). The cost of pursuing other alternatives would be impractical.

4. The Applicants have shown that the project activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality, or other significant adverse environmental consequences within the meaning of Wis. Admin. Code NR 103.08(4)(c).

5. Specifically, the proposed project will not have significant adverse effects on (a) storm and flood water, storage and retention in the moderation of water level fluctuation

extreme; (b) hydrologic functions including the maintenance of dry season stream flow, the discharge of groundwater to wetland, the recharge of groundwater from the wetland to another area and the flow of groundwater through a wetland; (c) filtration or storage of sediments, nutrients and toxic substances that would otherwise adversely impact the quality of other waters of the state; (d) shoreline protection against erosion through dissipation of wave energy and water velocity and anchoring of sediments; (e) habitat for aquatic organisms in the food web including, but not limited to, fish, crustaceans, mollusks, insects, annelids, planktonic organisms, and the plants and animals upon which these aquatic organisms feed and depend upon for their needs and life stages; (f) habitat for resident and transit wildlife species, including mammals, birds, reptiles and amphibians for breeding, resting, nesting, escape cover, travel corridors and food; and (g) recreational, cultural, educational, scientific and natural scenic view values and uses. See Wis. Admin. Code NR 103.03.

6. The Project Site is not located in, nor will the project adversely affect a wetland in an area of special natural resource interest as listed in Wis. Admin. Code NR 103.04. See Wis. Admin. Code NR 103.08(4)(b).

7. The proposed project activity meets the standards found in Wis. Admin. Code NR 299.04 and Water Quality Certification should be granted.

8. The Division of Hearings and Appeals has the authority pursuant to Wis. Admin. Code NR 299.05 to deny, approve or modify a water quality certification if it determines that there is a reasonable assurance that the project will comply with standards enumerated in Wis. Admin. Code NR 299.04. The Division is satisfied that there is a reasonable assurance that the project will comply with said standards, based upon a preponderance of the evidence as a whole, and with the required modifications.

## ORDER

The project activity meets the standards found in Wis. Admin. Code NR 299.04 and NR 103 and Water Quality certification is granted subject to the following conditions:

- A. The Applicants shall notify the DNR of their intent to start the discharge at least five business days prior to the beginning of the discharge. Within five business days after the completion of the discharge, Applicant shall notify the DNR of the completion of the discharge.
- B. The Applicants shall allow the DNR reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.
- C. The Applicants are responsible for obtaining any permit or approval required by municipal zoning ordinances or by the Corps of Engineers before starting the Project.

- D. The authorization hereby granted by the DNR is not transferable.
- E. Fill material shall be discharged to only the .06 acres of wetland identified in the Application received by the DNR on March 11, 2002. The driveway shall consist of gravel and not be paved.
- F. Silt screen shall be placed prior to any discharge of fill material and road construction activities. The silt screen shall be placed at the limits of wetland fill and remain in place until road construction activities have been completed. No disturbance beyond this point shall occur. All work shall be undertaken using DNR approved Best Management Practices.
- G. This certification shall only be applicable to the Project as proposed in the March 6, 2002 Application, with the modifications noted in Findings of Fact above.
- H. The applicants shall submit revised plans acceptable to the DNR that include the following modifications:
  - a. The applicants shall submit a plan to keep all culverts free of debris. To provide a more natural substrate, all culverts shall be placed as “bottomless culverts” as described in Finding #28.
  - b. The applicants shall submit a revised plantings plan acceptable to the DNR that describes proposed plantings in better detail.
  - c. As part of the proposed project, an approximately 20 foot wide strip of bottomland forest will be restored on either side of the area where the driveway crosses the wetland. The applicant shall submit plans acceptable to the DNR in connection with this restoration project. Where areas within the aforementioned 24 foot strip already have a good tree cover, or where the ground is too wet for planting trees, reforestation of an equal area will be conducted in the Reed-Canary Grass dominated meadows south of where the driveway crosses the wetland or the agricultural field north of this crossing. The aerial photograph in the July 15, 2003 Addendum to the Alternative Analysis shows the proposed restoration areas north and south of the crossing. (Ex. 12) The size of saplings, final spacing of plantings (after 3 years) and planting

techniques shall conform to the Brown County Conservation Department's conservation reforestation program on the Property during the first year, and be based on experiences from the first year in subsequent years. (Ex. 5)

Dated at Madison, Wisconsin on September 8, 2003.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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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 Department of Natural Resources 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 therefor 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. 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.