Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application of the George and Pearl Fisher Estate, Represented by Georgette Bates, for Water Quality Certification for Placement of Fill in Wetlands in the Village of Pleasant Prairie, Kenosha County, Wisconsin	Case No. IP-SE-2004-30-0189RP

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER GRANTING WATER QUALITY CERTIFICATION

Georgette Bates, representing the George and Pearl Fisher Estate, filed an application with the Department of Natural Resources for water quality certification pursuant to Section 401 of the Federal Clean Water Act and Wis. Admin. Code § NR 299, to discharge fill materials in 0.018 acre of wetland adjacent to Lake Michigan for the purpose of constructing a residential driveway. The proposed project is located in the SE ¼ of Section 30, Township 1 North, Range 23 East, Village of Pleasant Prairie, Kenosha County, Wisconsin.

The Department of Natural Resources approved the application for Water Quality Certification with modifications as outlined in a letter to Georgette Bates dated March 1, 2005. Mr. Alan Zahn filed a petition for a contested case hearing pursuant to Wis. Stats. § 227.42.

On March 13, 2006, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on May 1, 2006, at Kenosha, Wisconsin, before Jeffrey D. Boldt, administrative law judge (the ALJ).

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

Wisconsin Department of Natural Resources, by

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Georgette Bates, by

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FINDINGS OF FACT

1. The George and Pearl Fisher Estate, represented by Georgette Bates, 412 Clara Street, Sun Prairie, Wisconsin, 53590, filed an application with the Wisconsin Department of Natural Resources for water quality certification under Section 401 of the Federal Clean Water Act, Wis. Stat. §§ 281.15 and 281.37, and Wis. Admin. Code ch. NR 299.

2. The proposed project is located in the SE ¼ of Section 30, T1N, R23E, Village of Pleasant Prairie, Kenosha County. The property address is Lot 3, Block 20 in Carol Beach Estates Subdivision Unit 2, Tax Parcel Number 93-4-123-304-0240. The project consists of the placement of a maximum of 570 square feet (0.013 acres) of fill for the purposes of constructing a residential driveway to access the upland portion of the site to construct one residential home. The driveway will cross an area of wetlands and fill an area approximately 38 feet long and 15 feet wide.

3. The Department evaluated this proposal and determined that the project would meet the standards found in Wis. Admin. Code §§ NR 299.04 and NR 103.

4. This property was purchased by George and Pearl Fisher in 1948. In 2004, Ms. Bates (the applicant) inherited the property. The applicant proposes to construct a driveway for related construction of a residential lot. The original application was for a driveway, 22 feet wide by 32 feet in length. However, when the DNR reviewed the application, they limited the

footprint to 15 feet wide by 32 feet in length. The applicants accept this limitation and the current application reflects this reduced width.

5. The purpose is to provide access to an upland, buildable residential lot. The upland area is at the center of the lot, and can not be reached without crossing a wetland area.

6. There are no practicable alternatives to the proposed fill that would allow for access to the upland portions of the lot to meet the project purpose of residential construction. The applicant does not own any other properties in the area and there is no other means of access. The DNR has a general policy of permitting driveway fills of wetlands if it is necessary to access an otherwise buidable lot—so long as there are no other unusual factors. (Hopkins)

7. There are serious problems with flooding in Carol Estates Unit 2. The objectors introduced numerous photos which demonstrate the extent of flooding in the area. (Exs. p. 23; p. 24) Certainly, this flooding constitutes both a nuisance and a safety hazard for young children living in the neighborhood. However, the question currently before the Division is whether filling in this small driveway area would detrimentally impact wetland functional values, including flood storage. Ms. Hopkins opined that it would not, particularly in light of the placement of a culvert that allows water flow. Further, the Village of Pleasant Prairie has primary responsibility in management of these problems. (Ex. 15) Several recent efforts to address the storm water management problems have been considered in recent years. Hopkins noted that an effort to ditch storm water and place storm sewers was not approved by area residents. In her opinion, the problems were related to storm water management and the high groundwater table in the area. The placement of fill with a culvert for the driveway would not have an impact upon flooding in the area. (Hopkins)

8. The DNR Area Water Management Specialist, Heidi Hopkins, testified that she conducted a field assessment of the project site. Hopkins completed the Rapid Assessment Form. (Ex. 12) The area was described as a wetland characterized by low to medium functional values. Hopkins noted that the wetland was not hydrologically connected to Lake Michigan, and therefore did not impact water quality or shoreline protection. Further, there was no groundwater discharge connection or spring associated with this wetland. Mr. Johnson opined that the project would result in the loss of wetlands, but that the project "should have minimal impact on wildlife." (Ex. 13) Hopkins concluded that the placement of "a maximum of 570 square feet" of fill for the driveway would meet the applicable standards set forth in NR 103 and NR 299. (Ex. 8) Hopkins worked with the area wildlife manager, Marty Johnson, to suggest the reduction in the driveway width and its relocation to the far south end of the property to minimize wetland impacts.

9. The objectors raised a concern about potential cumulative impacts from this fill. The total amount of wetland fills approved by the DNR in Carol Beach Estates Unit 2 in recent years consists of at most .02 acres, reflecting two driveway fill permits of .01 acres each. (Ex. 15) No wetland fills for direct residential construction have been approved in this area. It is therefore highly unlikely that significant cumulative impacts will occur. Additionally, the DNR, in cooperation with the Nature Conservancy, has purchased or obtained conservation easements over 640 acres of land as part of the Chiwaukee Prairie Land Use Management Plan. (Ex. 15)

Given these facts, there is no substantial risk of detrimental cumulative impacts to wetlands associated with approval of this water quality certification.

10. Based upon the testimony at hearing, the Division has modified the permit conditions to require that the permit holder or any subsequent owner of the property shall keep the culvert clear of debris to allow the free flow of water under the driveway. Further, Ms. Hopkins opined that the culvert placed by the Village should be reduced to 15 feet in length to match the reduced width of the driveway. The permit has been modified to required reduction or replacement of the culvert to reflect the 15 feet width.

11. The proposed project with the conditions set forth below will meet the standards set forth in NR 103 and NR 299.

DISCUSSION

The objectors raised numerous reasonable concerns, mostly relating to secondary and cumulative storm water storage impacts, about authorizing even this small wetland fill given longstanding problems with flooding and storm water runoff. The concerns of the objectors relating to storm water runoff and flooding were anything but frivolous. However, there was unrefuted expert testimony which demonstrated that the proposed driveway fill would meet the standards for water quality certification. The energy and efforts of the objectors would be better spent in helping the Village develop a workable storm water runoff plan. This 15 foot by 32 foot driveway fill will not impact flooding in the area to any significant degree. There was unrefuted expert testimony that the proposed fill would meet all applicable standards set forth in NR 103 and NR 299. Therefore, the certification must issue.

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 Wis. Admin. Code NR 299.05(6) and NR 103.

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 mean 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 applicants do not own any other property in the area, and have no other legal access to the upland portion of this lot. 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. The project area is in an area of special natural resource interest within the meaning of NR 103.04. The project meets the standards set forth in the special area management plan.

6. 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 extremes; (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; (f) habitat for resident and transit wildlife species; and (g) recreational, cultural, educational, scientific and natural scenic view values and uses. See Wis. Admin. Code NR 103.03.

7. 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 GRANTING WATER QUALITY CERTIFICATION

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:

1. The applicant shall notify the Wisconsin Department of Natural Resources of his intent to start the discharge at least five business days prior to the beginning of the discharge. Within 5 business days after the completion of the discharge, the applicant shall notify the Department of Natural Resources of the completion of the discharge.

2. The applicant shall allow the Wisconsin Department of Natural Resources reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.

3. The applicant is responsible for obtaining any permit or approval required by municipal zoning ordinances or by the Corps of Engineers before starting the project.

4. Authorization hereby granted by the Department is not transferable. The fill area is limited to the 15 by 32 foot footprint approved by the Department. The culvert shall be placed

in accordance with the proposed plan. The existing culvert shall be reduced or replaced to conform to the permitted 15 foot width. The permit holder or any subsequent owner shall keep the culvert free of debris to allow the free flow of water.

5. No other portion of the wetland may be disturbed beyond the area designated in the plans and the square footage of area approved by this Certification.

6. You are not allowed to temporarily or permanently stockpile any of the excavated material in the wetland.

7. No portion of the bank or upland, which is altered or disturbed, and, as a result, unstable may remain unprotected for more than 7 days.

8. The removal of vegetative cover and exposure of bare ground must 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.

9. Construction shall be accomplished in such a manner as to minimize erosion and siltation into surface waters and as specified in the plans and procedures that are part of or approved pursuant to this permit. All erosion control measures must meet or exceed the approved Storm Water Construction Technical Standards found on the Department's Runoff Management Website:
http://dnr.wi.gov/org/water/wm/nps/stormwater/techstds.htm#Construction developed by the Department under Wis. Admin. Code chs. NR 151.31.

10. You must supply a copy of this permit to every contractor associated with this project.

Dated at Madison, Wisconsin on June 2, 2006.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

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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 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. 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.