



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

In the Matter of the Reddelien Road Neighborhood
Association, Inc.'s Challenge to the Department of
Natural Resources' Conveyance of Coverage
Under WPDES General Permit No. WI-S067831-3

Case No. IH-12-02

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Madison, Wisconsin on April 18-19, 2012, Jeffrey D. Boldt, administrative law judge presiding. The parties requested the opportunity to file written briefs, the last of which was received on May 29, 2012.

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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Reddelien Road Neighborhood Association, Inc., by

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FINDINGS OF FACT

1. The Wisconsin Department of Natural Resources (Department or DNR) proposed a project to construct a public boat on North Lake. The boat launch site is located on the northwest side of North Lake, off Reddelien Road. The project location is the SE ¼ of Section 17, Township 8 North, Range 18 East, in the Town of Merton, Waukesha County, Wisconsin. On November 1, 2010, the Department received a Construction Project Consolidated Permit Application or Notice of Intent relating to stormwater discharges at the construction site. On November 4, 2010, the Department of Natural Resources issued WPDES General Permit No. WI-S067831-3.

2. There is no automatic right to a hearing for a general storm water discharge permit and the DNR denied the request for a contested case proceeding under § 227.42, Stats. The Reddelien Road Neighborhood Association, Inc. requested a Motion to Remand pursuant to Wis. Stat. § 227.57(1) before the Waukesha County Circuit Court. On January 6, 2012, the Honorable J. Mac Davis issued an Order granting the Motion to Remand under Wis. Stat. § 227.57(7) for a hearing before the Division of Hearings and Appeals.

3. On February 1, 2012, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

4. The Order further set forth the following three issues to be addressed. The issues and a summary of the ruling are as follow:

1. Does the proposed development authorized by the Hartsook Decision comply with Wis. Admin. Code NR § 151.12(5)(a)? In particular:

a) Should the access road proposed in the Permit be considered in new “development” rather than a “redevelopment” under Wis. Admin. Code NR §§ 151.002(39) and 151.12(5)(a)?

Summary Ruling: No, the access project was properly classified as redevelopment because of the existing uses of the gravel driveway road. Under DNR guidance, “driveways” are to be considered redevelopment. Even mowed urban lawns are considered as redevelopment. (Wood; Ex. 35) Further, the Department did classify the parking lot as new development.

However, the classification nomenclature is not an absolute category, but allows for flexibility within project design and administration of the stormwater permitting program. Finally, the classification of the project is not as significant as the fact that the project as a whole will comply with the TSS removal standards. (Harstook)

- b) Does the Permit comply with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2?

Summary Ruling: Yes. (Harstook; See above)

- 2. Does the proposed development authorized by the Hartsook Decision comply with Wis. Admin. Code NR § 151.12(5)(b)? In particular:

- a) Are the culverts proposed in the project plans adequate to handle the volume of water that will flow out of the wetland complex on and adjacent to the Kraus Site?

Summary Ruling: Yes, the proposed plans submitted by Kapur and Associates meet BMP requirements for all design specifications, including culverts. (Harstook; Ex. 16)

- b) Will the proposed parking lot act as a stopper, preventing water from the wetland complex on and adjacent to the Kraus Site from draining into North Lake via the Kraus Site and instead divert it onto neighbors to the south of the Kraus Site?

Summary Ruling: No. (Harstook)

- c) Will this surcharge septic systems and cause flooding in the Reddelien Road Neighborhood?

Summary Ruling: These issues are outside the scope of this general storm water permit review, but there was no evidence which supported such a conclusion other than speculation. (Harstook)

- 3. Does the Hartsook Decision comply with Wis. Stat. § 281.15 and Wis. Admin. Code NR § 299.04(1)(b)? In particular:

- a) Will the storm water treatment system for the roadway remove oils, grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff?
- b) Will the failure to do so increase pollution in the Reddelien Road Neighborhood and to North Lake?

The third issue subject to the Remand Order asks the Department to impose certification requirements that specifically must be waived by the Department's own rules. The third issue is dismissed as a matter of law.

- 5. DNR Storm Water Program Coordinator James Bertolacini provided undisputed expert testimony regarding the Department's long-standing practice and

policy with respect to the interplay between NR 103(wetland water quality standards) and NR 151 (runoff management) and the general storm water permitting program in particular. Bertolacini testified that rather than imposing specific standards for runoff, the ch. NR 103 language has consistently been addressed (in all DNR issued general storm water permits) by general narrative-type storm water discharge limitations and implementation of storm water practices. Bertolacini described further its context within the NR 151 language qualifying TSS reductions requirements to the maximum extent practicable given the site constraints that exist. By contrast, the wetland permitting process analyzes whether DNR should authorize placement of fill in the wetland, and the practicable alternatives analysis is a step in that permitting process. The storm water runoff permitting process analyzes impacts that are secondary to the wetland fill—the impacts to water of the state (including wetlands) of runoff from the project. The MEP language in NR 151 illustrates how the storm water staff’s analysis must be distinct from that of the wetland staff. (Ex. 01-117)

6. Further, the testimony of both James Bertolacini and DNR Water Resources Engineer Bryan Hartsook make clear that it would be impracticable to measure specific effluent limits from a discharge as variable as storm water runoff. Storm water staff do not—and indeed cannot—create specific standards pursuant to a ch. NR 103 Water Quality Certification analysis as part of a storm water runoff permit.

7. Mr. Hartsook testified that he relied on the indication by wetland water quality staff that a ch. NR 103 alternatives analysis had been conducted to the Department’s satisfaction on the wetland fill issue. All that was left of ch. NR 103 for Mr. Hartsook to consider in his review of the DNR stormwater plan were the generic and narrative standards that apply to runoff. Mr. Hartsook testified that ch. NR 151 identifies protective area performance standards which are designed to protect and promote the non-numeric wetland water quality standards found in ch. NR 103. The protective area performance standards require an applicant to minimize the area of hard surface placed within a specified setback distance from wetlands and surface waters. The standards further require an applicant to treat runoff from hard surfaces within the protective area to the maximum extent practicable. DNR’s review of the storm water management plan prepared by Kapur and Associates considered this protective area performance standard. It found that the project complied with the practicable alternative analysis required by § NR 103.08(4). None of the petitioners’ witnesses were able to carry their burden of proof to establish that the proposed storm water plan violates any specific requirement of NR 103.

8. James Bertolacini testified that DNR regulations and policy on ch. NR 103 for runoff management require that applicants achieve the greatest TSS reduction that they can after considering site constraints (i.e., the “maximum extent practicable”). Hartsook was convincing that the project complied with the maximum extent practicable language in ch. NR 151. The plans were more than sufficient given the site constraints.

9. The petitioners argue that the DNR erred in characterizing the roadway expansion as redevelopment rather than as new development. The access project was

properly classified as redevelopment because of the existing uses of the gravel driveway road. Under DNR guidance, “driveways” are to be considered redevelopment. Bertolacini noted that driveways become impervious from the weight of vehicles compacting soils. Further, even the development of urban lawns for construction projects are to be considered redevelopment under DNR guidance. (Ex. 35) Further, the Department did classify the entire parking lot as new development.

However, the classification nomenclature is not an absolute category, but allows for flexibility within project design and administration of the stormwater permitting program. The classification is not as significant as the fact that the project as a whole will comply with the TSS removal standards. (Harstook)

10. The proposed plans submitted by Kapur and Associates meet BMP requirements for all design specifications, including culverts. (Harstook; Ex. 16)

DISCUSSION

It must first be noted that in the entire history of the program, the DNR has never denied a general storm water permit related to a construction project. (Bertolacini) This small well-designed boat ramp project would be an absurd place to start. DNR Storm Water Engineer Bryan Harstook described the design as considerably “better than average” in terms of meeting storm water management program goals.

The testimony made it clear that storm water runoff is a highly variable effluent which simply cannot be subject to numeric standards relating to the specific pollutants identified in the remand order. The Department’s longstanding approach to the interplay between storm water management and NR 103, as well as the exemption from NR 299, reflect this practical reality.

The DNR’s categorization of the existing gravel drive, which will be paved, as redevelopment and the proposed parking lot area as development comported with DNR Guidance. (Ex. 35) Further, the petitioners’ emphasis on the classification of the particular segment of the roadway is misplaced. As Hartsook testified, the plan had been designed to overcompensate in some areas (by achieving performance beyond the designated TSS removal standards) so as to yield a “better than average” TSS removal for the entire project. In the general permit he issued, Mr. Hartsook complied with the standards of ch. NR 151 to look at the project as a whole for TSS standards that can be achieved to the maximum extent practicable given the site constraints that are present. His testimony was clear that the plans presented in the application for general permit coverage treated storm water to the maximum extent practicable on the site, given soil types, the flat surface area and the boundaries of the easement. (Harstook)¹

¹ Hartsook suggested the possibility of adding a low cost baffle steel plated device to catch even more TSS particles; this idea should be considered but is not necessary to meet NR 151 requirements. (Harstook)

Several of the issues raised by the petitioners come precariously close to being frivolous as a matter of law. In particular, there is a very specific exemption from Wis. Admin. Code ch. NR 299 for Chapter 283 storm water permits, such as the instant general permit, set forth in NR 299.01(2)(c). As a matter of law, the DNR is instructed to: “Waive certification for any activity which the department finds will result in no discharge, any wastewater discharge associated with an activity which will be regulated by the permit authority under ch. 283, Stats., or any activity that does not fall within the purview of the department's authority.” The third issue subject to the Remand Order thus asks the Department to impose certification requirements that specifically must be waived by the Department’s own rules. That issue is dismissed as a matter of law.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) to review cases referred to it for hearing by the Department of Natural Resources.
2. For purposes of NR 151, "development" means residential, commercial, industrial or institutional land uses and associated roads. Wis. Admin. Code NR 151.002(11) The DNR properly characterized the proposed parking lot as (new) development.
3. For purposes of NR 151, “redevelopment” means areas where development is replacing older development. NR 151.002(39) The DNR properly characterized the existing gravel driveway as “redevelopment.” This complied with DNR guidance on this topic. (Ex. 35)
4. The Permit and project as a whole complies with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2, and with peak runoff discharge standard under Wis. Admin. Code NR § 151.12(5)(b).
5. Boat landings are exempt from the vegetative buffer protective area requirements of NR § 151 pursuant to NR § 151.12(5)(d)4.c.
6. As a matter of law, the DNR is instructed in NR 299.01(2)(c) to.: “Waive certification for any activity which the department finds will result in no discharge, any wastewater discharge associated with an activity which will be regulated by the permit authority under ch. 283, Stats., or any activity that does not fall within the purview of the department's authority.” The third issue subject to the Remand Order thus asks the Department to impose certification requirements that specifically must be waived by the Department’s own rules. The third issue is dismissed as a matter of law.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the permit remain in full force and effect as issued, and the petition for review be DISMISSED.

Dated at Madison, Wisconsin on July 18, 2012.

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 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.

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