



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Anthony Perino to Construct a
Connected Enlargement on the Bed of Green Lake,
Green Lake County, Wisconsin

Case No. 3-SD-95-2098

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND PERMIT

Anthony Perino applied to the Department of Natural Resources for a permit to construct an enlargement connected to Green Lake. On December 20, 1996, the Department of Natural Resources forwarded the file to the Division of Hearings and Appeals for a hearing

Pursuant to due notice, including publication, hearing was held on May 19-21, 1997 at Green Lake, Wisconsin before Mark J. Kaiser, Administrative Law Judge. The parties submitted post-hearing briefs. The last submission was received on June 13, 1997.

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

Anthony Perino, Applicant, by

Donald Leo Bach, Attorney
DeWitt, Ross & Stevens, S.C.
2 East Mifflin Street, Suite 600
Madison, WI 53703

Wisconsin Department of Natural Resources, by

Michael Cain, Attorney
PO Box 7921
Madison, WI 53707-7921

Applicable Law

Sec. 30.19, Stats., provides in relevant part:

(1) PERMITS REQUIRED. Unless a permit has been granted by the department or authorization has been granted by the legislature, it is unlawful:

sailing, hunting, swimming, and water-skiing. The shoreline of Green Lake is approximately 27 miles in length. The majority of the shoreline is developed.

3. Perino purchased the subject property in August, 1993. Since he acquired the property he has extensively renovated the existing house, done extensive landscaping and converted a dry boathouse to additional living space. He has also constructed a seawall composed of steel sheeting along the shoreline in front of the property. The seawall is capped with a concrete walkway and has stone rip rap placed on the bed of Green Lake in front of the seawall.
4. On October 19, 1995, Perino filed an application with the Department of Natural Resources (Department) for a permit to construct an enlargement connected to Green Lake on his property. The purpose of the proposed enlargement is to construct a "wet boat slip." The applicant also seeks permission to dredge a channel on the bed of Green Lake, from the wet-boat slip lakeward to allow ingress and egress of boats to the wet boat slip. The Department and the applicant have fulfilled all procedural requirements of secs. 30.19 and 30.20, Stats.
5. The area in which the Perino property is located is highly developed. However, the landscaping on the properties surrounding the Perino property is mature. The mature landscaping effectively screens the neighboring homes when this portion of the Green Lake shoreline is viewed from the lake. As part of the renovation, Perino removed the mature vegetation and replaced it with new plantings. At the current time, the Perino home is highly visible from Green Lake.
6. The proposed enlargement is thirty feet landward of the existing high water mark, 32 feet wide and four feet deep below the ordinary high water mark. Some preparatory work for the enlargement was completed at the time the seawall was constructed. Sheet pile retaining walls have been constructed on the sides and back of the proposed enlargement. Concrete sidewalks have been constructed on the sides and back of the enlargement and a concrete center pier has been constructed in the middle of the proposed enlargement. The steel retaining wall at the back of the proposed enlargement rises approximately seven feet above the ordinary high water mark. The applicant proposes to cover the back retaining wall with natural stone which will match the retaining walls in front of the Perino house.
7. The water depth of the proposed enlargement will be four feet. The water depth of the dredged channel will also be four feet. The area of lake bed to be dredged is an area 39 feet wide and approximately 35 feet lakeward. The sides of the dredged area will be sloped at a four-to-one ratio.
8. The lake bed in the area to be dredged consists of two- to six-inch cobbles on the surface and sand and small gravel beneath the cobble. Aquatic vegetation is sparse from the shoreline to a distance of twenty feet from the shoreline. From a distance of twenty feet to 35 feet from the shoreline a dense bed of *Valisneria americana* (water celery) exists. *Myriophyllum spicatum* (Eurasian water milfoil), an invasive, nonnative species, and *Ceratophyllum demersum* (coontail) predominate in the area between 35 feet to 100 feet from the shoreline.

9. The proposed dredging will remove the cobblestone lake bottom. The cobblestone bottom is a type of lake bottom used by several species of gamefish, particularly walleye pike for spawning. The cobblestone bottom also provides habitat for numerous macroinvertebrates.
10. The proposed dredging will also remove a portion of the wild celery bed. Wild celery is an aquatic plant used by some waterfowl for food and by fish for cover. The applicant is able and willing to replace the cobblestone on the bottom and plant wild celery to replace any plants destroyed by the proposed dredging. Although there is no basis to doubt the applicant's sincerity, if maintenance dredging is required on a regular basis, maintaining the cobblestone bottom and wild celery bed will be impractical.
11. The nearshore area of Green Lake in the vicinity of the proposed project is used by waders. The proposed dredged channel will present an obstacle to waders attempting to wade past the applicant's property. The applicant agreed as a condition of any dredging permit to erect signs warning waders of the drop-off and advising them that they may go onto his property to walk around the channel. Climbing from the water to Perino's property to walk around the channel will be inconvenient for waders; however, the presence of signs will minimize the safety concerns for waders.
12. The proposed enlargement will negatively impact the scenic beauty of the Green Lake shoreline at the proposed site. The basis for this finding is set forth in the "Discussion" section below.
13. The proposed enlargement conforms to the requirements of laws for the platting of land and for sanitation.
14. The proposed enlargement will not result in any material injury to the rights of any riparian owners on Green Lake.
15. The proposed dredging will negatively impact fish habitat in Green Lake. The impact will be relatively minor; however, the impact of the proposed dredging when considered cumulatively with the impacts of other projects will adversely affect public rights and interest in Green Lake. The basis for this finding is set forth in the "Discussion" section below.
16. The proposed project will not adversely affect water quality nor will it increase water pollution in Green Lake. The proposed project will not cause environmental pollution as defined in sec. 299.01(4), Stats.
17. The Department of Natural Resources has complied with the procedural requirements of sec 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

Discussion

The proposed project has two components, one which requires a permit pursuant to sec. 30.19, Stats., and the other which requires a contract pursuant to sec. 30.20(2)(a), Stats. The first component is constructing an enlargement connected to Green Lake. With respect to the

proposed enlargement, three concerns exist. The first concern, raised by the Department, is that the proposed enlargement will negatively impact wildlife habitat at the site. Witnesses for the Department testified that shore area in the vicinity of the proposed project and the shallow waters adjacent to the shore provide habitat for waterfowl, reptiles, amphibians and small mammals.

The Department witnesses feared that the steel walls of the enlargement will be an impediment and hazard to these animals. This does not appear to be a legitimate concern. The shoreline in the area of the proposed project is highly developed. Any wildlife living in the area is surely adapted to manmade structures and will not be negatively impacted by the proposed enlargement.

The second concern is that the applicant is attempting to circumvent the law to obtain a wet boat shelter on his property. Sec. 30.12(3)(a)6., provides that the Department may grant a riparian a permit to:

Place a permanent boat shelter adjacent to the owner's property for the purpose of storing or protecting watercraft and associated materials, except that no permit may be granted for a permanent boat shelter which is constructed after May 3, 1988, if the property on which the permanent boat shelter is to be located also contains a boathouse within 75 feet of the ordinary high-water mark or if there is a boathouse over navigable waters adjacent to the owner's property.

The applicant had an existing dry boathouse on his property within 75 feet of the ordinary high water mark. The applicant removed the marine rail leading to the boathouse and converted the boathouse to additional living space.

The fact that a boathouse existed on the property would prevent the applicant from constructing a permanent boat shelter on his property. However, sec 30.121(3m), Stats., provides in relevant part:

... [A] person may construct, repair or maintain a single-story boathouse over an authorized waterway enlargement if:

- (a) The boathouse does not extend beyond the ordinary high-water mark as it existed prior to the creation of the enlargement;
- (b) The boathouse covers the entire enlargement; and
- (c) Living quarters or plumbing fixtures are not constructed in the boathouse.

At least theoretically, if a permit for the proposed enlargement was issued, the applicant would be entitled to construct a boathouse over the enlargement. Following this route, the applicant would be entitled to construct a boathouse on a site at which a permanent boat shelter

could not be permitted. In an attempt to assuage the Department's concerns, the applicant agreed that a permit for the enlargement could include a condition prohibiting a permanent roof over the enlargement unless the applicant applies to the Department for a permit.¹

The third concern is the impact of the proposed enlargement on scenic beauty. As mentioned above, the shoreline in this area is highly developed. In this context, scenic beauty does not necessarily mean natural, unaltered views from the lake. Rather, the concern is whether the project is visually intrusive. The proposed enlargement, even if backed with natural stone, will add to the visual intrusiveness of this site. As mentioned above, the Department also raised a concern that after completion, the applicant will seek to cover the enlargement and this will add to the visual intrusiveness of the site.

Admittedly, the wet boat slip, even with covered shore stations will only be marginally more visually intrusive than a pier with similar shore stations. However, the wet boat slip will be permanent while a pier can be removed with little or no trace. Also, piers are a common sight on lakes while wet boat slips are not. As noted in the Findings of Fact, as part of the extensive renovation of the property the applicant removed mature vegetation that screened the house and replaced it with new plantings. Over time this property may again be effectively screened when viewed from the lake; however, the proposed wet boat slips and the walls lining the enlargement can not be screened from the lake. The proposed enlargement and wet boat slips will have a negative impact on scenic beauty on Green Lake.

The second component of the proposed project is the dredging which will create a channel leading to the wet boat slips. The Department opposes the proposed dredging for a variety of reasons. The primary reasons are that the dredged channel will constitute a threat to waders, the dredging will negatively impact on fish spawning in the area, and the proposed dredging will destroy a portion of a wild celery bed. The threat to walleye spawning, the wild celery bed as well as alleged negative impacts on macroinvertebrates and other creatures all relate to a change in the composition of the lake bottom at the site of the proposed dredging.

Currently the lake bed in this area is composed of cobblestone. If the area is dredged to a depth of four feet, the cobblestone will be removed and the bottom at that depth will be sand and small gravel. Additionally, the dredging will remove a portion of the wild celery bed. Both these impacts will negatively impact the quality of this area for walleye spawning and its use by other fish, waterfowl, and macroinvertebrates. The applicant has offered as a permit condition that he will restore the cobblestone on the bottom of the lake and replant wild celery in the area.

¹At this point, the applicant has not indicated any interest in constructing a boathouse over the enlargement; however, if this is his intention, it is questionable whether the condition proposed by the applicant, or a similar condition, would be enforceable. No statute presently exists authorizing the issuance of a permit to construct a boathouse over an enlargement. Therefore, no standards exist to evaluate an application for such a permit. Any determination by the Department could be deemed arbitrary. It also may be significant that the applicant has only agreed to *apply* for a permit prior to constructing a permanent roof over the enlargement. The applicant is not agreeing to not construct a roof unless the Department issues a permit. The applicant in this case has acted forthrightly throughout this process and there is no suggestion that the proposed permit condition is intended to be devious. However, no guarantee exists that a future owner would act with the same integrity.

He also offered to post signs advising waders that they would be able to use his property to get around the dredged channel and to perform the dredging in months when fish spawning is not occurring.

These permit conditions will alleviate the negative impacts of the proposed dredging at the outset. None of the plant or animal species affected is threatened or endangered. Presumably, these species will recolonize the area after the dredging is completed and the cobblestone lake bottom and wild celery bed are restored. The concern is whether sedimentation will necessitate periodic maintenance dredging. If maintenance dredging is required, it is likely that the applicant or a future owner will balk at the additional cost of restoring the cobblestone and wild celery plants after each dredging. Eventually, the property owner will refuse to bear the expense of restoring the lake bottom after each dredging or allow the dredged channel to fill in and abandon the wet boat slips. Therefore it is critical to determine whether such maintenance dredging will be required.

The evidence in the record is that there is little sedimentation occurring at the proposed site currently; however, there is evidence of sedimentation on neighboring properties. David Wentland, an expert for the applicant testified that in his opinion very little sedimentation will occur at the site of the project after the project is constructed. This opinion is primarily based on his observations of the lake bottom at the site as it now exists and the fact the Perino property is partially protected from the longest fetches of Green Lake.

Susan Josheff, an expert for the Department, testified that in her opinion although the lake bottom at the project site is now stable, significant sedimentation will occur at the project site as a result of the proposed dredging and enlargement. This opinion is primarily based on evidence of sedimentation on neighboring properties and the existence of structures which were constructed to protect other boathouses in the area from sedimentation

Although the Perino property is located in a small cove which offers some protection from wave action on Green Lake, it is unlikely that this location explains the current absence of sedimentation. It is more likely that the nature of the lake bottom in the nearshore area adjacent to the Perino project does not trap sediment. Based on the evidence in the record, it is likely that after a channel is dredged, increased sedimentation will occur at the proposed site. This sedimentation will adversely impact walleye spawning in the area either due to recurring dredging or, if maintenance dredging is not undertaken, by sediment covering the cobblestone.

The applicant argues that even if the walleye spawning habitat in this area is adversely affected, this represents only a very minor amount of spawning habitat in Green Lake. On a percentage basis, this is true. However, the cumulative impact of such activities must be considered. The impact of destroying this section of walleye spawning habitat when added to other impacts in Green Lake, adversely affects public interest and rights in Green Lake. The applicant further argues that it is not likely that other property owners will propose similar

projects on Green Lake. This is probably also true. However, the consideration of cumulative impact is not limited to similar projects.

The adverse impact on fish spawning habitat of this project must be considered along with the adverse impacts of other potential projects on Green Lake, such as piers and boat ramps. In Hixon v. PSC, 32 Wis.2d 608, 146 N.W. 2d 577 (1966), the Wisconsin Supreme Court required the Department to consider the cumulative impacts of intrusions into navigable waters. The impacts of the proposed project in the instant manner, like many projects, are relatively minor and difficult to quantify. The Court's intention in Hixon was to require the Department to consider the incremental damage resulting from such projects.

The public interest and rights in Green Lake must be balanced with the riparian rights of the applicant. The applicant's riparian rights include the right to reasonable use of the waters for recreational purposes, the right to use the shoreline and have access to the water, and the right, now conditioned by statute, to construct a pier or similar structure in aid of navigation. Cassidy v. Department of Natural Resources, 132 Wis.2d 153, at 159, 390 N.W. 2d 81 (Ct. App. 1986). At the time of the hearing, the applicant owned one boat and was awaiting delivery of a second boat. The applicant has a permanent pier on his property which will easily accommodate both boats. The applicant has not shown or alleged any necessity for the proposed project in order to exercise his riparian rights.

The applicant correctly argues that sec. 30.19, Stats., does not expressly require that the applicant show a need for the proposed project. However, in general, Chapter 30 projects requires a balancing of the public interest and rights in navigable waters with riparian rights. A project which cannot be justified as necessary for the exercise of riparian rights should not be permitted.

For the above reasons, the application for an enlargement connected to Green Lake and dredging of a channel adjacent to the enlargement is denied.

Conclusions of Law

1. Anthony Perino is an owner of land riparian to Green Lake. Green Lake is a navigable body of water.
2. Pursuant to sec. 30.19(1), Stats., a permit is required to construct the proposed enlargement connected to Green Lake.
3. The proposed enlargement is a type IV action pursuant to sec. NR 150.03(5)(f)2.c., Wis. Adm. Code. Pursuant to sec. NR 150.01(b), Wis. Adm. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.

4. Pursuant to sec. 30.20(1)(a), Stats., no person may remove any material from the bed of any navigable lake without first obtaining a contract as provided in sec. 30.20(2), Stats. Section 30.20(2)(a), Stats., provides the Department may enter into such a contract whenever consistent with public rights.

5. The proposed dredging is a type IV action pursuant to sec. NR 150.03(5)(f)1.e., Wis. Adm. Code. Pursuant to sec. NR 150.01(b), Wis. Adm. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.

6. The applicant has the burden of proof to show that the construction of the proposed enlargement will not injure public rights or interest and that the proposed dredging is consistent with public rights. The applicant has not satisfied this burden.

7. The Division of Hearings and Appeals has authority pursuant to secs. 30.19, 30.20, and 227.43(1)(b), Stats., to issue the following order.

ORDER

IT IS THEREFORE ORDERED that the application of Anthony Perino for a permit to construct a connected enlargement to Green Lake pursuant to sec. 30.19, Stats., and for a contract to remove material from the bed of Green Lake pursuant to sec 30.20, Stats., is hereby denied.

Dated at Madison, Wisconsin on July 30, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
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By: Mark J. 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.

file



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Anthony Perino to Construct a
Connected Enlargement on the Bed of Green Lake,
Green Lake County, Wisconsin

Case No. 3-SD-95-2098

REVISED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Anthony Perino applied to the Department of Natural Resources for a permit to construct an enlargement connected to Green Lake. On December 20, 1996, the Department of Natural Resources forwarded the file to the Division of Hearings and Appeals for a hearing.

Pursuant to due notice, including publication, hearing was held on May 19-21, 1997 at Green Lake, Wisconsin before Mark J. Kaiser, Administrative Law Judge (ALJ). The parties submitted post-hearing briefs. The parties submitted simultaneous initial briefs on June 6, 1997. The applicant submitted a reply brief on June 13, 1997. The ALJ issued a decision on July 30, 1997. The applicant petitioned for judicial review of the decision. On February 27, 1998, the Honorable W.M. McMonigal, Circuit Court Judge Green Lake County, issued an order remanding the matter to the Division of Hearings and Appeals and directing the ALJ to issue a revised decision.

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

Anthony Perino, Applicant, by

Donald Leo Bach, Attorney
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2 East Mifflin Street, Suite 600
Madison, WI 53703

Wisconsin Department of Natural Resources, by

Michael Cain, Attorney
P.O. Box 7921
Madison, WI 53707-7921

Applicable Law

Sec. 30.19, Stats., provides in relevant part:

PERMITS REQUIRED. Unless a permit has been granted by the department or authorization has been granted by the legislature, it is unlawful:

To construct, dredge or enlarge any artificial waterway, canal, channel, ditch, lagoon, pond, lake or similar waterway where the purpose is ultimate connection with an existing navigable stream, lake or other navigable waters

* * *

(4) ISSUANCE OF PERMIT. If the department finds that the project will not injure public rights or interest, including fish and game habitat, that the project will not cause environmental pollution as defined in s. 299.01 (4), that any enlargement connected to navigable waterways conforms to the requirement of laws for the platting of land and for sanitation and that no material injury to the rights of any riparian owners on any body of water affected will result, the department shall issue a permit authorizing the enlargement of the affected waterways.

(5) CONDITIONS OF PERMIT. The permit shall provide that all artificial waterways constructed under this section which are connected to navigable waterways shall be public waterways. The department may impose such further conditions in the permit as it finds reasonably necessary to protect public health, safety, welfare, rights and interest and to protect private rights and property.

Sec. 30.20, Stats., provides in relevant part:

UNLAWFUL REMOVAL. (a) No person may remove any material from the bed of any navigable lake or from the bed of any outlying waters of this state without first obtaining a contract as provided in sub. (2).

* * *

2) CONTRACTS FOR REMOVAL. (a) The department, whenever consistent with public rights, may enter into contracts on behalf of the state for the removal of any material from the bed of any navigable lake

FINDINGS OF FACT and DISCUSSION

1. Anthony Perino (Perino or applicant) owns real property located in Section 27, Township 16 North, Range 13 East, Town of Brooklyn, Green Lake County, with a street address of W1169 Illinois Avenue, Green Lake, Wisconsin 54941. The above-described property is located along the northeast shore of Green Lake, a.k.a. Big Green Lake, a navigable body of water.

2. Green Lake covers an area of approximately 7,346 acres and has a maximum depth of 236 feet. Green Lake supports a variety of recreational activities including boating, fishing, sailing, hunting, swimming, and water-skiing. The shoreline of Green Lake is approximately 27 miles in length. The majority of the shoreline is developed.

3. Perino purchased the subject property in August, 1993. Since he acquired the property he has extensively renovated the existing house, done extensive landscaping and converted a dry boathouse to additional living space. He has also constructed a seawall composed of steel sheeting along the shoreline in front of the property. The seawall is capped with a concrete walkway and has stone rip rap placed on the bed of Green Lake in front of the seawall.

4. On October 19, 1995, Perino filed an application (exhibit 37) with the Department of Natural Resources (Department) for a permit pursuant to sec. 30.19, Stats., to construct an enlargement connected to Green Lake on his property. The purpose of the proposed enlargement is to construct a "wet boat slip." The applicant also seeks permission pursuant to sec. 30.20, Stats., to dredge a channel on the bed of Green Lake from the wet-boat slip lakeward to allow ingress and egress of boats to the wet boat slip. The Department and the applicant have fulfilled all procedural requirements of secs. 30.19 and 30.20, Stats.

5. The proposed enlargement is thirty feet landward of the existing high water mark, 32 feet wide and four feet deep below the ordinary high water mark. Some preparatory work for the enlargement was completed at the time the seawall was constructed. Sheet pile retaining walls have been constructed on the sides and back of the proposed enlargement. Concrete sidewalks have been constructed on the sides and back of the enlargement and a concrete center pier has been constructed in the middle of the proposed enlargement. The steel retaining wall at the back of the proposed enlargement rises approximately seven feet above the ordinary high water mark. The applicant proposes to cover the back retaining wall with natural stone which will match the retaining walls in front of the Perino house.

6. The water depth of the proposed enlargement will be four feet. The water depth of the dredged channel will also be four feet. The area of lake bed to be dredged is an area 39 feet wide and approximately 35 feet lakeward. The sides of the dredged area will be sloped at a four-to-one ratio.

7. The lake bed in the area to be dredged consists of two- to six-inch cobbles on the surface and sand and small gravel beneath the cobble. Aquatic vegetation is sparse from the shoreline to a distance of twenty feet from the shoreline. From a distance of twenty feet to 35 feet from the shoreline a dense bed of *Valisneria americana* (water celery) exists. *Myriophyllum spicatum* (Eurasian water milfoil), an invasive, nonnative species, and *Ceratophyllum demersum* (coontail) predominate in the area between 35 feet to 100 feet from the shoreline.

8. The nearshore area of Green Lake in the vicinity of the proposed project is used by waders. The proposed dredged channel will present an obstacle to waders attempting to wade past the applicant's property. The applicant agreed as a condition of any dredging permit to erect signs warning waders of the drop-off and advising them that they may go onto his property to walk around the dredged channel. Climbing from the water onto Perino's property to walk around the channel will be inconvenient and will probably discourage waders from using this area; however, the presence of signs will minimize the safety concerns for waders.

9. Natural Scenic Beauty The area in which the Perino property is located is highly developed. However, the landscaping on the properties surrounding the Perino property is mature. The mature landscaping effectively screens the neighboring homes when this portion of the Green Lake shoreline is viewed from the lake. As part of the renovation, Perino removed the mature vegetation and replaced it with new plantings. At the current time, the Perino home is highly visible from Green Lake. This is demonstrated in numerous photographic exhibits, such as exhibits twelve through 25, which were submitted by the applicant.

Exhibits twelve through 25 are a series of photographs taken of the Perino property as viewed from the lake. The photographs are taken from increasing distances from the shoreline. Exhibit twelve was taken 75 feet from the shoreline, exhibit eighteen was taken approximately 500 to 600 feet from the shoreline, and exhibit 25 was taken from about "half way across that part of the lake." (Tr., page 31) (Using the Clarkson map (Ex. 64), halfway across that part of the lake would be approximately 3500 feet.) In all these photographic exhibits, the buildings on the Perino property and the steel sheeting installed along the back wall of the proposed wet boat slips are clearly visible.

Exhibits twelve through 25 can be contrasted with Exhibits 27 and 28. Exhibits 27 and 28 are a series of photographs of the Perino property taken prior to the initiation of any of the work performed by Perino. These photographs are taken from a different angle than the angle in Exhibits twelve through 25; nevertheless, it is clear that prior to the work undertaken by Perino the buildings on the property were partially screened from the view of a person looking towards the property from the lake by natural vegetation. This screening was similar to the current appearance of the properties near the Perino property.

The Wisconsin Supreme Court and Court of Appeals have repeatedly held that the enjoyment of natural scenic beauty is a public right. Muench v. Public Service Commission, 261 Wis. 492 (1951), Clafin v. DNR, 58 Wis.2d 182 (1972), Sterlingworth Condominium Assoc. v. DNR, 205 Wis.2d 702 (Ct. App. 1996). In Clafin, the Wisconsin Supreme Court stated:

Specific structures may be determined to be detrimental to the public interest on the ground that they impair natural beauty. This is a proper basis for denial of a permit. The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy. It is entirely proper that that natural beauty should be protected as against specific structures that may be found to mar that beauty.

58 Wis.2d 182, at 193.

Neither Wisconsin statutes nor case law provides a definition of the phrase "natural scenic beauty." Professor Chenoweth, a witness for the applicant, testified that a definition he was given by a Department employee is: "[A] whole scene exhibits natural scenic beauty when, or if it is generally pleasing and if it appears to be unaltered or minimally altered by the influences of society and civilization." (Tr., page 471-72) Although none of the Department witnesses testified that the Department uses this definition in evaluating chapter 30 permit applications, none of their witnesses disputed the definition.

Using this definition Professor Chenoweth argued that the Green Lake shoreline has no natural scenic beauty because the vegetation currently in existence, grass lawns, trees and shrubs, has been planted by man, and, even though this vegetation may mask manmade structures, the "vegetation is itself a manmade influence." (Tr., page 495) Along the same vein, Professor Chenoweth also testified that the photographic exhibits contain nothing that "gives the appearance of being unaltered or minimally altered by the influence of society and civilization. . . . There's nothing here that was pre-European settlement or something like that." (Tr., page 480) Professor Chenoweth instead evaluated the aesthetics of the proposed project. He concluded the proposed project is aesthetically pleasing and fits into the existing environment.

Although the definition of "natural scenic beauty" used by Professor Chenoweth may have been provided to him by a Department employee, this definition, at least as applied by Professor Chenoweth, is not consistent with the use of the phrase by Wisconsin courts. In reviewing a decision to deny permits for a stormwater channelization project, the Court of Appeals stated that:

[E]njoyment of scenic beauty is one of the paramount interests appurtenant to navigable waters. Muench, 261 Wis. at 511-12, 515g, 53 N.W.2d at 522, 55 N.W.2d at 43. That being so, the fact that "beauty" and "aesthetics" are concepts not susceptible to precise measurement, being subjective by nature, cannot be held to prevent the state from protecting those interests. [footnote omitted] They are indubitably proper factors to be considered in the determination of whether permits for a particular project should be granted. The citizens of Wisconsin have given the state the authority to protect the scenic beauty of public waters by means of the permit-granting process. The finding that the aesthetic value of a stream will be impaired by a project is a finding of fact by the examiner which will be affirmed if there is substantial evidence to support it.

Certainly, more is required than a conclusory statement that a project will have a negative effect on aesthetics. Here, the examiner explained how such an effect would result:

The project will destroy the scenic beauty of Lilly Creek as it now exists in its natural state, substituting the sterile, barren look of a concrete or riprap channel for the aesthetic value of a meandering stream with pools and ripples, lined with natural vegetation.

The examiner heard the opinions of several riparian owners regarding the natural beauty of Lilly Creek (which several cited as a principal reason they chose to buy their property) and how the project would negatively affect that beauty. The examiner also saw photographs of the area, which are part of the record on appeal. Substantial evidence supports his findings regarding aesthetics."

Village of Menomonee Falls v. DNR, 140 Wis.2d 579, at 607-08, 412 N.W.2d 505 (Ct.App. 1987).

The court in Village of Menomonee Falls affirmed a finding that the proposed project would impair the aesthetic value of the stream by replacing natural vegetation with concrete and riprap. The natural vegetation affected undoubtedly had been altered by man and was not pre-European settlement. In his post-hearing reply brief, the applicant suggests that the right to the enjoyment of natural scenic beauty is limited to northern lakes. (Reply brief, page 18, citing Clafin). It is also important to note that Village of Menomonee Falls involved a stream in an urban area, not a northern lake.

As mentioned above, the shoreline in this area is highly developed. In this context, scenic beauty does not necessarily mean natural, unaltered views from the lake. Rather, the concern is whether the proposed project will be visually intrusive. The proposed enlargement, even if backed with natural stone, will add to the visual intrusiveness of this site. The testimony of Andy Nelson, a witness for the Department, is more consistent with the concept of "natural scenic beauty" as discussed by the courts. Mr. Nelson testified that

It'd be my opinion that if the area were restored and revegetated, that it would definitely have less impact on natural scenic beauty. The project as it's been constructed thus far, or as it is depicted in the series of simulations in Exhibits 111 through 115, clearly remove elements of natural scenic beauty from the property and cause the loss of that public right to enjoyment. (Tr., page 631)

When asked to compare the impairment to natural scenic beauty resulting from the proposed project with the impairment resulting from the placement of a pier, Mr. Nelson testified as follows:

[W]hile [the pier is] there, it's also less of an impairment than what the wet boat slips would be with that vertical wall behind it, be it steel sheet piling or rock or any, any other bright reflective structure. This, I should note in Exhibit 32 the temporary shore station has a white canopy on it which is fairly common practice on, on this and other lakes. But, for example, if the applicant wanted that to be less, even less noticeable than what it is right now, they could select a tan or brown or light green or something like that which would also tend to blunt its visibility. (Tr., page 640)

Similar testimony was also presented by two citizen witnesses, Tom Kimen (Tr., pages 171, and 177-79) and Chester Possin (Tr., pages 414-15). The wet boat slip, even with covered shore stations will only be marginally more visually intrusive than a pier with similar shore stations. However, the wet boat slip will be permanent while a pier can be removed with little or no trace. Also, piers are a common sight on lakes while wet boat slips are not. As part of the extensive renovation of the property the applicant removed mature vegetation that screened the house and replaced it with new plantings. Over time this property may again be effectively screened when viewed from the lake; however, the proposed wet boat slips and the walls lining the enlargement can not be screened from the lake.

10. The Department also expressed a concern that the applicant is attempting to circumvent the law to obtain a wet boat shelter on his property. Sec. 30.12(3)(a)6 Stats., provides that the Department may grant a riparian a permit to:

Place a permanent boat shelter adjacent to the owner's property for the purpose of storing or protecting watercraft and associated materials, except that no permit may be granted for a permanent boat shelter which is constructed after May 3, 1988, if the property on which the permanent boat shelter is to be located also contains a boathouse within 75 feet of the ordinary high-water mark or if there is a boathouse over navigable waters adjacent to the owner's property.

The applicant had an existing dry boathouse on his property within 75 feet of the ordinary high water mark. The applicant removed the marine rail leading to the boathouse and converted the boathouse to additional living space. The fact that a boathouse existed on the property would prevent the applicant from constructing a permanent boat shelter on his property. However, sec 30.121(3m), Stats., provides in relevant part:

... [A] person may construct, repair or maintain a single-story boathouse over an authorized waterway enlargement if:

(a) The boathouse does not extend beyond the ordinary high-water mark as it existed prior to the creation of the enlargement;

(b) The boathouse covers the entire enlargement; and

(c) Living quarters or plumbing fixtures are not constructed in the boathouse.

At least theoretically, if a permit for the proposed enlargement were issued, the applicant would be entitled to construct a boathouse over the enlargement. Following this route, the applicant would be entitled to construct a boathouse on a site at which a permanent boat shelter could not be permitted. In an attempt to assuage the Department's concerns, the applicant agreed that a permit for the enlargement could include a condition prohibiting a permanent roof over the enlargement unless the applicant applies to the Department for a permit.¹

11. Fish Habitat. The cobblestone bottom is a type of lake bottom used by several species of gamefish, particularly walleye pike, for spawning. The cobblestone bottom also provides habitat for numerous macroinvertebrates. The macroinvertebrates are "an important link in the food chain" (testimony of David Marshall, Tr., page 776) If the area is dredged to a depth of four feet, the cobblestone will be removed and the bottom at that depth will be sand and small gravel.

¹At this point, the applicant has not indicated any interest in constructing a boathouse over the enlargement, however, if this is his intention, it is questionable whether the condition proposed by the applicant, or a similar condition, would be enforceable. No statute presently exists authorizing the issuance of a permit to construct a boathouse over an enlargement. Therefore, no standards exist to evaluate an application for such a permit. Any determination by the Department could be deemed arbitrary. It also may be significant that the applicant has only agreed to *apply* for a permit prior to constructing a permanent roof over the enlargement. The applicant is not agreeing to not construct a roof unless the Department issues a permit. The applicant in this case has acted forthrightly throughout this process and there is no suggestion that the proposed permit condition is intended to be devious. However, no guarantee exists that a future owner would act with the same integrity.

The conclusion that the dredging will negatively impact the quality of the area for walleye spawning and use by other fish, waterfowl and macroinvertebrates was not disputed by the applicant's fisheries expert. Mr. Seegert expressly agreed that the dredged area "would be rendered less suitable for walleye spawning habitat." (Tr., page 257) Rather Mr. Seegert repeatedly dismissed the impacts as negligible (*e.g.* Tr. pages 190, 196 ("negligible effect on fish spawning"), 201 (no "significant effect on aquatic vegetation")). His conclusion that the impacts would be negligible were primarily based on a comparison of the size of the dredging project with the size of Green Lake or, alternatively, a comparison of the size of the project and the littoral zone of Green Lake.

Mr. Seegert calculated that if the channel were dredged out to a distance of 35 feet from the shoreline, the dredged area would constitute .0000062% of the area of Green Lake (Tr., page 192) or .0000238% (Tr., page 193) of the littoral zone of Green Lake. Although these calculations put the proposed object in perspective relative to Green Lake, the statutory criteria are not dependent on amount of available habitat elsewhere and as discussed below the Department is required to consider the cumulative impact of a proposed project.

A water celery bed exists on the lake bed in front of the Perino property. Water celery is an aquatic plant used by some waterfowl for food and by fish for cover. Water celery is recognized as valuable aquatic plant. Mark Sesing testified as follows:

Wild celery has been well established as an extremely valuable plant for waterfowl, for aquatic life, as fish habitat, as a substrate for invertebrate colonization, as a substrate for periphyton colonization, which would be small microscopic plants growing on those larger plants. They serve as cover for forage fish, they serve as cover for game fish, especially perch (Tr. page 730)

The proposed dredging will remove a portion of the water celery bed. If the water celery bed is removed, the area will likely be replaced with Eurasian water milfoil. This conclusion is based on the testimony of Mark Sesing (Tr., page 735). Again, although the applicant did not dispute that a portion of the water celery bed would be removed, his experts discounted the impact of the loss of a portion of a water celery bed because water celery is abundant in Green Lake. The applicant in his post-hearing briefs also argued that Eurasian water milfoil provides the same cover benefit as water celery. The Department admitted that Eurasian water milfoil provides some of the same benefits as water celery; however, water celery is recognized as a valuable plant while Eurasian water milfoil is not.

Mr. Sesing contrasted the value of water celery as opposed to Eurasian water milfoil as follows:

Eurasian water milfoil is — provides various water quality and biological benefits, but at a much less degree than water — wild celery does. Again, in the literature there are repeated references to the value -- the greater value of wild celery in terms of waterfowl use, in terms of invertebrate colonization, in terms of fish habitat, when compared to more monotypical stands of Eurasian water milfoil. An example would be Exhibit 127, which lists the wildlife and plant — lists wildlife values associated with various aquatic plants. And in this case, wild celery is listed as having 16 distinct users, meaning in this case different — it looks like waterfowl and shore birds, with a ranking of 31, which indicates the value of the use to those 16 species. In the case of Eurasian water milfoil — in fact, in case — in the case of the water

milfoil group, which Eurasian water milfoil is one member of, there have been 14 users recorded in this document — or this reference. And the value of the — that group to these 14 species is at a 13, which indicates a much less degree of dependence upon the water milfoil group. (Tr. page 737-38)

The replacement of water celery with Eurasian water milfoil will negatively impact the quality of this area for walleye spawning and its use by other fish, waterfowl, and macroinvertebrates.

12. The applicant has offered as a permit condition that he will restore the cobblestone on the bottom of the lake and replant water celery in the area. These permit conditions may alleviate some of the negative impacts of the proposed dredging at the outlet. However, the record contains insufficient evidence to determine whether these suggested permit conditions would be practical. The applicant offered these proposed conditions during the course of the hearing in order to address some of the Department's concerns. Because the conditions were not offered prior to the hearing, Department witnesses had no opportunity to evaluate them. Nor did the applicant's experts provide any testimony that these conditions, particularly replanting water celery, would likely be successful.

13. Sedimentation. None of the plant or animal species affected is threatened or endangered. Presumably, these species will recolonize the area after the dredging is completed if the cobblestone lake bottom and water celery bed are restored. However, it is likely that over time the dredged area will fill with sediment and organic matter. The evidence in the record is that there is little sedimentation occurring at the proposed site currently. However, Susan Joseff testified that there is evidence of littoral drift on neighboring properties. (Tr., pages 814-18)

It is Ms. Joseff's opinion that the lake bed in front of the Perino property is currently in equilibrium. Sediment is carried onto the lake bed in this area but an equal amount of sediment is transported off. If a channel is dredged, the dynamics will change. The sediment that is carried onto the lake bed in this area will settle into the channel and will not be carried off. Over time the dredged channel and enlargement will be filled with sediment and organic matter. (Tr., page 820) A productive area with a cobblestone bottom will become a less productive area with a silt and sand covered bottom.

David Wentland, an expert for the applicant, testified that in his opinion little sedimentation would occur at the site after the project is constructed. This opinion is primarily based on his observations of the lake bottom at the site as it now exists and the fact the Perino property is partially protected from the longest fetches of Green Lake. Mr. Wentland's opinion is based on much less familiarity with Green Lake than the opinions of Ms. Joseff. Although Mr. Wentland disagreed with the testimony of Ms. Joseff, he did not deny that sedimentation would occur. Mr. Wentland's conclusion regarding the impacts of the project is as follows:

[A]s I said in my interrogatory, I'm not saying that there's not going to be any movement of material whatsoever, but the issue, as I understood it, was one of whether or not this would fill in, would this become unsuitable for passage of a boat both in the water portion as well as into the slip portion. And I mentioned very clearly in my interrogatory that I believed that there — as is any, any shoreline that's not regular, but is irregular, you will have the tendency to have some buildup of material. But was that a

major factor in not being able to do what this project is intended to do, which is to have boat access, and I said, no, it is not. (Tr., page 327)

Mr. Wentland agreed with the Department expert that sedimentation would occur. It is clear his primary concern in evaluating the project was not impacts on fish habitat but whether the wet boat slip would be functional. Although the Perino property is located in a small cove that offers some protection from wave action on Green Lake, it is unlikely that this location explains the current absence of sedimentation. It is more likely that the nature of the lake bottom in the nearshore area adjacent to the Perino project does not trap sediment. Based on the evidence in the record, it is likely that after a channel is dredged, increased sedimentation will occur at the proposed site. This sedimentation will adversely impact the quality of this area as fish habitat.

14. Cumulative Impact. The proposed dredging will negatively impact fish habitat in Green Lake. The applicant argues that even if the fish habitat in this area is adversely affected, this represents only a very minor amount of fish habitat in Green Lake. On a percentage basis, this is true. However, in Hixon v. PSC, 32 Wis.2d 608, 146 N.W.2d 577 (1966), the Wisconsin Supreme Court required the Department to consider the cumulative impacts of intrusions into navigable waters. The impact of destroying this section of fish habitat when considered cumulatively with other projects that negatively impact fish habitat occurring in Green Lake adversely affects public interest and rights in Green Lake.

The applicant argues that it is not likely that other property owners will propose similar projects on Green Lake. This is probably also true. However, the consideration of cumulative impact is not limited to similar projects. In Hixon, the Wisconsin Supreme Court said:

There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever.

32 Wis.2d 608, at 631 (1966).

Even though the above quote from Hixon refers to a little fill here and there suggesting similar projects, the emphasis is on the impact on the body of water, not the project. Therefore, when evaluating cumulative impacts one should not simply compare similar projects, but

projects with similar impacts. In the instant case that would involve projects which negatively impact fish habitat and particularly fish spawning habitat.²

15. The public interest and rights in Green Lake must be balanced with the riparian rights of the applicant. The applicant's riparian rights include the right to reasonable use of the waters for recreational purposes, the right to use the shoreline and have access to the water, and the right, now conditioned by statute, to construct a pier or similar structure in aid of navigation. Cassidy v. Department of Natural Resources, 132 Wis.2d 153, at 159, 390 N.W.2d 81 (Ct. App. 1986). At the time of the hearing, the applicant owned one boat and was awaiting delivery of a second boat. The applicant has a permanent pier on his property that will easily accommodate both boats. The applicant has not shown or alleged any necessity for the proposed project in order to exercise his riparian rights.³

The applicant correctly argues that sec. 30.19, Stats., does not expressly require that the applicant show a need for the proposed project. However, in general, evaluating Chapter 30 projects requires a balancing of the public interest and rights in navigable waters with riparian rights. The Court of Appeals in City of Oak Creek v. DNR, 185 Wis.2d 424, 518 N.W.2d 276 (Ct.App. 1994), acknowledged that balancing is required in reviewing applications for Chapter 30 permits. The court stated:

It is relevant at this point to stress that the City did not apply for a permit from the DNR until the project in question was completed. If the City had applied for the permit first, the examiner's task would have been to balance the public's interests in the waterway against the benefits to be gained from the proposed project. See Menomonee Falls, 140 Wis.2d at 589-90, 412 N.W.2d at 510. Ordinarily, the examiner's determinations would have been based upon observations of the waterway in its natural state, and the expected benefits and predicted condition of the waterway after the proposed alteration. By applying for the permit only after completion of the project, however, the balancing analysis has been turned on its head.

185 Wis.2d 424, at 450

Similarly, in Sterlingworth, the court, citing the decision in Hixon, stated:

² On the subject of cumulative impacts, in his posthearing reply brief the applicant argues that fisherman kill many more walleye, including spawning walleye, than will be killed or affected by the Perino project. (Perino reply brief, page 18) This is undoubtedly true. However, the reason the Department regulates projects such as the Perino project is to protect the public rights in navigable waters. One of these rights is the right to fish. The fact that fishermen kill fish is not inconsistent with the Department's efforts to protect the fish habitat adjacent to the Perino property.

³ It is noteworthy that in the permit application for the permanent pier (exhibit 33), the applicant purpose, need and intended use of the pier is "for aid to navigation, boat mooring and safe loading and unloading of [personnel]. In the application for the proposed project, the applicant describes the purpose, need and intended use of the project as follows: "Boat lifts and slips to be an aid to navigation. Boat slips and lifts to bring boats in off the lake, to protect boats for safe loading and unloading of [personnel]" The proposed project does not serve any purpose which is not already served by the permanent pier.

Both [Sec. 30.12 and 30.13, Stats.,] authorize the DNR to weigh the relevant policy factors which include "the desire to preserve the natural beauty of our navigable waters, to obtain the fullest public use of such waters, including but not limited to navigation, and to provide for the convenience of riparian owners."

205 Wis.2d 710, at 724-25

16. The Department witnesses feared that the steel walls of the enlargement will be an impediment and hazard to animals living along the shoreline. This does not appear to be a legitimate concern. The shoreline in the area of the proposed project is highly developed. Any wildlife living in the area is surely adapted to manmade structures and will not be negatively impacted by the proposed enlargement.

17. The proposed enlargement conforms to the requirements of laws for the platting of land and for sanitation.

18. The proposed enlargement will not result in any material injury to the rights of any riparian owners on Green Lake.

19. Andrew Nelson testified that a possibility exists that because water may stagnate in the proposed enlargement the project may adversely affect water quality in Green Lake. The record contains insufficient evidence to support this conclusion. Accordingly, it is found that the proposed project will not adversely affect water quality nor will it increase water pollution in Green Lake. The proposed project will not cause environmental pollution as defined in sec. 299.01(4), Stats.

20. The Department of Natural Resources has complied with the procedural requirements of sec 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

Ultimate Findings of Fact

Pursuant to sec. 227.47(1), Stats., the ultimate findings of fact in this matter are as follows:

1. The proposed enlargement and wet boat slips will have a negative impact on scenic beauty of the shoreline of Green Lake.
2. The dredged channel leading to the enlargement (wet boat slip) will fill with sediment and organic matter. This will negatively impact the quality of the area for fish habitat, particularly walleye spawning.
3. The proposed dredging will destroy a part of a water celery bed. After the project is completed, this area will most likely become revegetated with Eurasian water milfoil. Eurasian water milfoil is an invasive, nonnative species. The replacement of a portion of a water celery bed with Eurasian water milfoil will negatively impact the quality of the area as fish habitat and decrease the amount of food available for waterfowl.

4. The negative impacts to fish habitat resulting from the dredging will be minor considering the size of Green lake. However, they will have a cumulative impact considered when with other projects on Green Lake, which have or will negatively impact fish habitat.
5. The proposed enlargement conforms to the requirements of laws for the platting of land and for sanitation.
6. The proposed enlargement will not result in any material injury to the rights of any riparian owners on Green Lake.
7. The proposed project will not adversely affect water quality nor will it increase water pollution in Green Lake. The proposed project will not cause environmental pollution as defined in sec. 299.01(4), Stats.
8. The Department of Natural Resources has complied with the procedural requirements of sec 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

Conclusions of Law

1. Anthony Perino is an owner of land riparian to Green Lake. Green Lake is a navigable body of water.
2. Pursuant to sec. 30.19(1), Stats., a permit is required to construct the proposed enlargement connected to Green Lake.
3. The proposed enlargement is a type IV action pursuant to sec. NR 150.03(5)(f)2.c., Wis. Adm. Code. Pursuant to sec. NR 150.01(b), Wis. Adm. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.
4. The Department shall issue a permit for the proposed enlargement if the project will not injure public rights or interest, including fish and game habitat, that the project will not cause environmental pollution as defined in s. 299.01 (4), that any enlargement connected to navigable waterways conforms to the requirement of laws for the platting of land and for sanitation and that no material injury to the rights of any riparian owners on any body of water affected will result. Sec. 30.19(4), Stats. The applicant has the burden of proof for these issues. As set forth in the findings of fact, the applicant has not satisfied this burden.
5. Pursuant to sec. 30.20(2), Stats., a contract for dredging may be issued whenever the proposed dredging is consistent with public rights. The applicant has the burden of proof to show that the proposed dredging is consistent with public rights. As set forth in the findings of fact, the applicant has not satisfied this burden.

6. The proposed dredging is a type IV action pursuant to sec. NR 150.03(5)(f) i.e., Wis. Adm. Code. Pursuant to sec. NR 150.01(b), Wis. Adm. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.

7. The impacts of the proposed project in the instant manner, like many projects, are relatively minor and difficult to quantify. Pursuant to the holding in Hixon v. PSC, 32 Wis.2d 608, 146 N.W.2d 577 (1966), the Department is required to consider the cumulative impacts resulting from such projects. The adverse impact on fish habitat, particularly spawning habitat, of this project must be considered along with the adverse impacts of other potential projects on Green Lake. The negative impacts on fish habitat, particularly walleye spawning habitat, when added to other similar impacts in Green Lake, adversely affects public interest and rights in Green Lake.

8. In reviewing an application for a permit required by Chapter 30, Stats., the Department must balance the benefits resulting from the permit against the injuries to public rights and interests. City of Oak Creek v. DNR, 185 Wis.2d 424, 450 N.W.2d 276 (Ct.App. 1994). The applicant has not demonstrated that he will be prevented from exercising any of his riparian rights if the application to construct the proposed enlargement and dredging is denied.

9. The Division of Hearings and Appeals has authority pursuant to secs. 30.19, 30.20, and 227.43(1)(b), Stats., to issue the following order.

ORDER

IT IS THEREFORE ORDERED that the application of Anthony Perino for a permit to construct a connected enlargement to Green Lake pursuant to sec. 30.19, Stats., and for a contract to remove material from the bed of Green Lake pursuant to sec. 30.20, Stats., is hereby denied.

Dated at Madison, Wisconsin on May 1, 1998.

STATE OF WISCONSIN
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By: Mark J. Kaiser

Mark J. Kaiser
Administrative Law Judge