

Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Manual Code 3565.1 for
The Approval Authorizing the Department
of Natural Resources to Grade More Than
10,000 Square Feet on the Bank of North
Lake, Install a Boat Ramp Structure and
Two Outfall Structures on the Bed of
North Lake, Install Four Culvert Crossings
Over Wetlands, and Fill Up to 0.16 Acres
of Wetlands for Construction of a Public
Boat Launch on North Lake And Adjacent
Property Located in the Town of Merton,
Waukesha County.

Case Nos. IP-SE-2009-68-05745
IP-SE-2009-68-05746
IP-SE-2009-68-05747
IP-SE-2009-68-05748
IP-SE-2009-68-05749
IP-SE-2009-68-05750

RRNA POST HEARING BRIEF

Respectfully submitted this 10th day of February, 2012.

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RRNA POST HEARING BRIEF

I. INTRODUCTION

While the DNR fervently wishes it were otherwise, this case is not about diffuse surface water or storm water. This case is about DNR's failure to comply with the Chapter 30 permitting requirements in its issuance of a "Manual Code Approval" granting itself permission to construct a boat launch on North Lake. DNR's failure is twofold. It did not apply Chapter 30 to its intended placement of substantial amounts of fill material into what the DNR itself acknowledges are "navigable waters" in order to expand the access road to the launch site. And it did not apply Chapter 30 in connection with its intended construction of a "football field-sized" asphalt parking lot in the middle of a residential neighborhood on North Lake (the "grove of trees" and the adjacent area of the proposed parking lot).

A.

DNR's reason for not applying Chapter 30 to the access road is its assertion that since the navigable waters that will be filled are only "wetlands" it need only meet the requirements of NR103. In this brief, the RRNA will demonstrate that the equivalent of a §30.12(3m)(b) permit was required for three reasons.

First, as the evidence clearly shows, and the DNR admits, a part of the access road will be built in navigable water, thus requiring compliance with Chapter 30. Second, the undisputed evidence was that a part of the access road will be built in the *lakebed* of North Lake. Third, the evidence will also show that a part of the access road will be built in a stream.

B.

DNR's reason for not applying the Chapter 30 requirements to the proposed parking lot construction is that, based upon its eyeball observations of the area during the dry season, it concluded that the area was not "navigable." The evidence at the hearing demonstrated however, that a portion of the proposed parking lot area was "navigable-in-fact" on a recurring basis. DNR never attempted to assess that area's navigability during times when it was filled with water, and it never even bothered to ask neighbors about this.

Furthermore, the law in Wisconsin clearly provides that when navigable waters expand into an area, the rights of the public under the public trust doctrine correspondingly expand as well. Thus, any area into which North Lake flows is a part of North Lake. In addition, the evidence demonstrated that the area in which the water accumulates is slough, which in part receives water from North Lake.

C.

There are approximately 100 citizens who own property in the Reddelien Road neighborhood,¹ many of whom are members of the Reddelien Road Neighborhood Association, Inc. (the “RRNA”) and forty of whom are also petitioners in this case. For all of the citizens of Reddelien Road, who are also riparian owners on North Lake,² this case is not about public access. Those citizens don’t oppose public access; in fact, they favor it.

The reason the Reddelien Road citizens have mounted a challenge to the actions of the DNR has everything to do with their love of North Lake, the beautiful wetland complex next to North Lake and their neighborhood. They didn’t want to do this; the people who live along Reddelien Road are for the most part of modest means that have in effect been forced to fight with their own government. This case has imposed a terrible burden on the citizens of Reddelien Road which is heavier than any tax.

However, those citizens know that the DNR has carelessly damaged North Lake in the past,³ and they know that the DNR has failed to take even the most fundamental steps to insure that their neighborhood will not be harmed by the building of a 1500 foot long access road and a football field-sized parking lot in the middle of a pristine wetland complex, right next to their neighborhood. For example, as will be demonstrated *infra*, the DNR never even attempted to conduct a rudimentary flood

¹ Reddelien Road lies immediately to the East and South of the proposed DNR boat launch on the Kraus Site.

² The DNR purchased the Kraus Site and, to that extent, is just another riparian owner on North Lake.

³ See *Froebel v. DNR*, 217 Wis. 2d 652, 579 N.W.2d 774 (1998). Then Court of Appeals Judge Nettlesheim was very critical of what the DNR did to North Lake in *Froebel*, stating in part: “We join in the ALJ’s criticisms of the DNR’s practices in this case. We would expect the DNR, as the protector of this state’s natural resources and the chief enforcer of our laws protecting those assets, to abide by the rules which it imposes and enforces on others. We also would expect it to abide by the promises and representations it makes to the public regarding its own activities.” *Id.* at 673.

flow analysis to determine how its construction project will impact Reddelien Road, nor did they evaluate the cumulative and secondary impacts to navigable water that would result from the construction of their proposed access road.

The DNR has acted as though it has contempt for the citizens of Reddelien Road. It has never bothered to discuss its plans with those citizens, let alone negotiate with them, and it has threatened to inflict great financial harm on those citizens because they have dared to stand up for their rights under the law.⁴

STATEMENT OF FACTS

The DNR applied to itself for approval of the boat launch at what has come to be known as the “Kraus Site,” which is the subject of this case. On November 4, 2010, it issued itself a “Manual Code 3565.1 Approval” authorizing it to construct the boat launch. Ex. 1-001.⁵ This Approval (hereafter the “MC Approval”) only provides the DNR with authority to:

- 1) Grade more than 10,000 square feet on the bank of the lake;
- 2) Install a boat ramp and 2 outfall structures on the bed of the lake;
- 3) Install 4 culverts crossing over wetlands; and
- 4) Place fill in up to .16 acres of wetland.

Ex. 1-002.

⁴ On January 20th DNR sent the NLMD and the RRNA a draft motion which called their effort to protect their neighborhood and the ecology of North Lake “laughable” and threatened to seek actual attorney fees and costs from the citizens of Reddelien Road if they didn’t drop their lawsuit. This is a clear violation of the Civil Rights of the citizens of Reddelien Road because it amounts to attempted coercion by a state agency by means of a threat to severely punish those citizens for attempting to exercise their clear rights under the law. This unconscionable threat will be dealt with in a different forum.

⁵ In their briefs, the RRNA will adopt the following nomenclature when referring to the record. Each volume of the hearing before Judge Boldt will first be referenced, with “TR1” standing for the September, 19th transcript, “TR2” for the September 20th transcript, “TR3” for the September 21st transcript, “TR4” for the October 31st transcript and “TR5” for the November 1st transcript. The TR reference will be followed by a page reference (e.g., TR1, pp. 15-16). Where a hearing exhibit is cited, the TR and page reference will be followed by a “Ex.” reference, if appropriate, or the exhibit will cited just by exhibit number. When citing to a deposition transcript, the name of the deponent will be followed by the deposition date and page reference. For example, a citation to page 10 of Mr. Wood’s deposition will be styled “Wood, 8-26, p. 10.” When there is a citation to a deposition exhibit, an “Ex.” reference will be added.

The MC Approval does make a finding of fact that “North Lake and portions of its wetland complex are navigable-in-fact at the project site and are impacted by the proposed project.” Ex. 1-002.⁶ But, as acknowledged by the DNR, the MC Approval did not provide the equivalent of a Chapter 30 “navigable waters” permit to either the proposed access road fill or the parking lot construction. In issuing the MC Approval the DNR has stated that it did not apply Chapter 30 to the two areas which are at issue here because: (1) as the navigable waters along the access road are also “wetlands,” it was only required to comply with Wis. Admin. Code NR 103 (concerning “Water Quality Standards for Wetlands”) (Wakeman Deposition No. 2, 10-17, pp. 19, 44-46); and (2) none of the parking lot area” is “navigable and in-fact.” Hudek, 8-25, pp. 113-114.

The RRNA filed a Petition for a Contested Case Hearing (“Petition”) as to the MC Approval on November 22, 2010. The RRNA asserted in that Petition that the DNR had not taken certain navigable waters at the Kraus Site into consideration when issuing its MC Approval. For example, *See* RRNA Petition, Section IIB i & ii, pp. 8-10. RRNA’s Petition stated in part:

Petitioners object to the Permit because it was issued in violation of Wis. Stats. §30.12 ... which requires a permit to build structures or place deposits on the bed of navigable waters. The DNR asserts that it considered the navigable waters of North Lake and its wetland complex in issuing the Permit. However, Petitioners maintain that there are additional navigable waters which the DNR failed to identify and thus failed to consider in issuing the Permit.

⁶ In addition, the MC Approval does find that North Lake is an Area of Natural Resource Interest under NR §1.05(3) because it “contain(s) endangered or threatened species or aquatic elements identified in the Wisconsin Natural Heritage Inventory.” *Id.* The MC Approval acknowledges that members of the public have expressed concern that development of the Kraus Site will cause flooding and block natural drainage. Ex. 1-003, 8D. In addition, the MC Approval acknowledges that members of the public have expressed concern that development of the Kraus Site will impact the natural scenic beauty of North Lake. Ex. 1-003, 8K.

Id. at p. 8.

Based on its Petition, the RRNA sought a contested case hearing on eight issues. Issue Number 2 of the RRNA's Petition reads as follows.

2. Did the DNR properly assess the impact to navigable waters from the proposed development? In particular:
 - a) Does the area marked in orange in attached Exhibit E contain navigable waters within the meaning of Wis. Stats. §30.10(2)?
 - i. If so, does that render the Permit invalid?
 - ii. Should the DNR be required to conduct further navigability tests?
 - b) Does the Permit identify impacted navigable waters with sufficient specificity?

Id. at p. 32.

On December 13, 2010, the DNR granted a contested case hearing as to Issue Number 2. The North Lake Management District ("NLMD") also filed a petition seeking a contested case hearing asserting that the DNR's issuance of the Manual Code Approval failed to apply Chapter 30 to certain navigable waters located at the site of the proposed boat launch site, which the DNR accepted on December 23, 2010.

The Petition of the NLMD asserted in relevant part:

The agency action(s) or inaction(s) which is/are the basis for the request for a hearing is/are: ... For the reasons set forth below, this Decision is deficient on its face and as applied to the facts: ... c. The WDNR acknowledges that North Lake 'and portions of its wetland complex. are navigable-in-fact at the [Department Site]' and are impacted by the Proposal... However, the WDNR failed to identify precisely which portions of the Department Site are navigable-in fact and failed to consider additional navigable waters at the Department Site which should have been factored into the WDNR's Decision, because permits are required to build structures or place deposits on the bed of navigable waters. See Wis. St at. §§ 30.10(2), 30.12, 30.20, and 281.31(1). Thus, the WDNR has not fulfilled its responsibilities under Wisconsin Statutes chapters 30 and 281 and the Public Trust Doctrine

NLMD Petition, ¶ 12.c. at pp. 6, 8-9.

There is a dispute of material fact, and the disputed facts are: set forth throughout this Petition, including, in particular, Paragraph 12 and the following:... b. The WDNR erroneously fails to identify navigable waters at the Department Site. See, also Paragraph 12.c... d. The WDNR erroneously determines that the Proposal will not impact lake bed at the Department Site. See, also Paragraphs 12.c.

NLMD Petition, ¶¶ 16(b) and 16 (d), at p. 24).

The two petitions were consolidated and a consolidated hearing on the petitions of both the NLMD and the RRNA was conducted in late 2011 (hereafter, “the hearing”). ALJ Boldt identified the issues at the start of the hearing as set forth in NLMD counsel’s prehearing brief,⁷ which were derived from the Petitions of both the NLMD and the RRNA.

It is important to place the proposed parking lot into perspective. A very large football-field sized piece of asphalt is going to be dropped into a neighborhood (*see* Ex. 12, below).

⁷ Those nine issues were as follows:

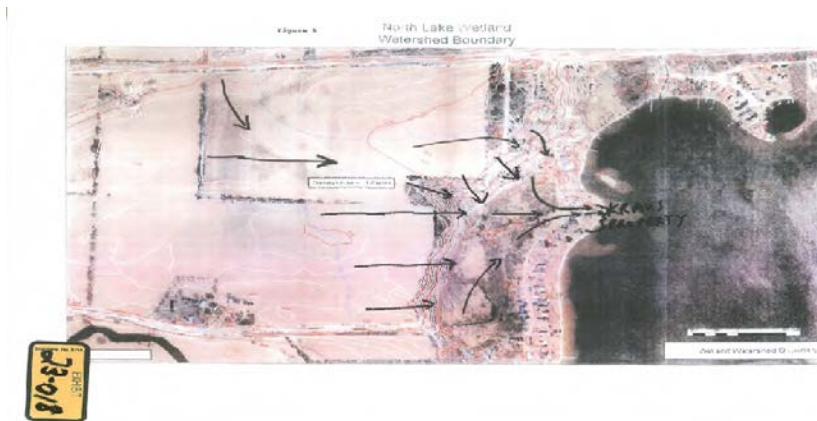
- 1) Was the DNR correct when it determined that there are no navigable water bodies on or adjacent to the Site, except for North Lake, an unnamed ditch/swale/stream on the North side of the Site and a large wetland complex west of the site?
- 2) Does the area circled in orange on RRNA Ex. D contain navigable waters?
- 3) If yes, does the presence of navigable waters within the orange circled area render the Manual Code Approval of proposed activities in navigable waters on the Site invalid?
- 4) Will the DNR’s Proposal impact navigable waters located on the Site?
- 5) Does the Manual Code Approval identify navigable waters impacted by the activities approved in the Manual Code Approval with sufficient specificity?
- 6) Did the DNR understate the Proposal’s impact on navigable waters at the Site?
- 7) Did the DNR fail to properly identify which portions of the Site are navigable and lake bed?
- 8) If yes, does the additional impact on navigable waters under the Manual Code Approval of the proposed activities in navigable waters on the Site render the Manual Code Approval invalid?
- 9) Did the DNR fail to consider additional navigable waters at the Site which should have been factored into the DNR’s decision, because permits are required to build structures or place deposits on the bed of navigable streams?

TR1, pp. 22-23.

PROPOSED DNR SITE BOAT LAUNCH



As can be seen from Ex. 12 (above), this parking lot is going to be sandwiched in between two residential homes, the one to the south belonging to the Hansons and the one located to the north belonging to Tom Peters. Cf. TR1, p. 189. In addition, the DNR's proposed parking lot is to be placed in the exact location where water ebbs and flows between the wetland complex and North Lake. TR1, p. 275. *See* Ex. 23-018 (which is pictured below).



Based on the testimony of Dr. O'Reilly and other experts, this parking lot will act like a plug blocking the natural flow of water from farm fields to the west (marked by arrows in Ex. 23-018) into the wetland complex and then funneling down into the

swale or unnamed stream and thence into North Lake. TR2, p. 62. Dr. O'Reilly testified extensively as to what would happen if the proposed parking lot were placed in the location pictured in Ex. 12. TR2, pp. 58-62 and 80-84. One of the principle reasons for the flood flow analysis under §30.12(3m)(b) is to insure that upstream property owners are not damaged by a construction project. Id.

There are other significant facts derived from the testimony at the hearing in this matter and those additional facts will be referenced throughout the following arguments of this brief.

STATEMENT OF ISSUES

While the ALJ tentatively identified nine somewhat overlapping issues at the start of the hearing. They boil down to the following two primary issues:

- 1) Will the DNR's proposed placement of fill Impact navigable waters along the access road in connection with the expansion and rerouting of that road?
- 2) Are any parts of the area in which DNR proposes to construct the parking lot - the "grove of trees" and the area immediately adjacent to it - "navigable in fact" such that Chapter 30 applies?

ARGUMENT

I. THE DNR IS SUBJECT TO THE SUBSTANTIVE REQUIREMENTS OF CHAPTER 30.

There is nothing within the four corners of Chapter 30 which states that it does not apply to the DNR. In particular, there is nothing in §§30.10 or 30.12, Wis. Stats., from which non-applicability to the DNR can be inferred. In fact, Manual Code 3565.1 (TR4-36, Ex. 203) explicitly states as follows:

All [DNR] projects, where Chapters 30 and 31, and Chapters NR 103, 115, 116, 117 or 118, Wis. Adm. Code, would apply **if built by a**

private individual, must receive the approval of the district office prior to construction. **Decisions will be based on the standards in the appropriate statutes and administrative rules that would apply to similar privately sponsored projects** [Emphasis supplied].

Any claim that Chapter 30 does not apply in all respects to the DNR would be wrong. On September 19, 2011, the ALJ in this case opened the hearing by observing:

The specific legal standards that we referenced in the notice were the substantive requirements of Wisconsin Statutes 30.01(4m), 30.10(1) and (2), 30.12(3m) and (c), as well as the Manual Code that we referenced earlier.... **[T]hese are the substantive requirements that the Department has imposed upon itself** [Emphasis supplied].

TR1, pp. 19-20.

DNR itself acknowledged at the hearing that it considered itself to be subject to Chapter 30's substantive requirements. Mr. Hudek, who has handled between 150 and 200 Chapter 30 or water quality certification applications each year (TR4, p. 132), offered the following testimony:

Q. Are the standards the same for when you're reviewing a Manual Code approval as opposed to a private party permit?

A. Whether it's a Manual Code approval or whether it's a private application, we review the activity in light of the applicable standard.

Q. So the same project is treated identically the same? ...

A. Yes.

TR1, pp. 206-207. *See also* TR4, p. 194.

Mr. Wakeman, who testified that he had handled hundreds of Chapter 30 applications during his lengthy career at DNR (TR4, p. 9), additionally testified:

Q. At what point does this Manual Code approval discuss or talk about Chapter 30 approval?

A. In the paragraph under sponsor it talks about the project has been reviewed and found to be consistent with the standards of Chapter 30, 281 and Wisconsin Stats. and Chapters 102, 103, 150, 151, 216, 299, 320, 329 and 341 of the Wisconsin Administrative Code.

Q. And so that means, in other words, that the agency, the DNR, acknowledges the fact that it is bound by the standards in Chapter 30...

A. It is consistent with the standards of those statutes and codes, correct.

TR4, pp. 62-63.

Chapter 30 applies by its terms to everyone. Wis. Stats. §30.12(1)(a) states that “no **person** may ... deposit any material or place any structure upon the bed of any navigable water where no bulkhead line⁸ has been established [Emphasis supplied].” Wis. Stat. § 281.01(9) defines “person” to mean “an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, **state agency** or federal agency [Emphasis supplied].”

The Legislature did not exempt the DNR from any part of Chapter 30. In *Milwaukee v. Firemen’s Relief Association*, 42 Wis. 2d 23, 165 N.W.2d 384 (1969), the Supreme Court found that a statute is “applicable to all legal entities, **including all branches of government, unless specifically exempted by the Legislature** [Emphasis supplied].” *Id.* at 39. The Supreme Court offered the following explanation for its decision:

The theory that the government is different than other litigants and always fair remains a carryover from the theory that ‘the king can do no wrong.’ It needs no documentation to assert that the sovereign on occasion, willfully or not, does do a wrong, and in its dealings with citizens is not infrequently subject to criticism of the public and correction by the courts.... In a democracy, the purpose of the courts should be to insure that government, as well as the citizen, live under the law.

Id. at 40.

⁸ No “bulkhead line” has been established at the site. TR4, p. 74.

II. NR 103 CAN NEVER “TRUMP” CHAPTER 30.

According to the DNR, when wetlands and navigable waters overlap, it applies Chapter 30 to the proposed placement of “structures” into the “navigable wetlands” and it applies NR103 to proposed “fill.” Wakeman Deposition No. 2, 10-17, p. 36. That is what DNR did here with respect to its proposed placement of fill into the navigable wetlands in connection with the proposed expansion of the access road. In essence, DNR’s position is that NR 103 “trumps” Chapter 30 when the navigable water to be filled is found within the boundaries of a wetland, such as the so-called “navigable wetlands” at the Kraus Site.

By taking this approach, DNR has disregarded the express statutory language of Chapter 30.12(1)(a) which on its face makes clear that Chapter 30 applies to both “structures” and “materials.” It provides that unless a permit has been issued “under this section,”

[N]o person may ... (a) deposit any **material** or place any structure upon the bed of any navigable water. ... [Emphasis supplied]

Article IX, Section I of the Wisconsin Constitution protects navigable waters in trust for the public. The Legislature promotes this public trust in navigable waters in part through Chapter 30. In fact, Chapter 30 is a codification of the public trust doctrine. *See State v. Trudeau*, 139 Wis. 2d 91, 101-102, 408 N.W.2d 337 (1987).⁹ To

⁹ *See also In re Crawford County Levee & Drainage District v. Hutson*, 182 Wis. 404, 196 N.W. 874 (1924), where our Supreme stated:

[I]t is not a question of state policy as to whether or not we shall preserve inviolate our navigable waters.... We are the trustee of the navigable waters within our borders ... And this trust we cannot diminish or abrogate by any act of our own. Neither the state nor this court has anything to do with the wisdom of the policy of keeping inviolate our navigable waters. The supreme law [embodied in the Wisconsin Constitution] so directs, and its mandate not only justifies but compels the continuance of the policy.

suggest that an agency rule could ever supersede a statutory mandate which codifies a constitutional doctrine is most improper.¹⁰ Beyond that, an agency rule in the administrative code can never trump any statute.

If an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid. In *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659, the Supreme Court overturned an agency rule, stating in part: “An agency interpretation is not reasonable if it contradicts either the language of a statute or legislative intent. In those cases in which a conflict arises between a statute and an administrative rule, the statute prevails.” *Id.* at ¶72.¹¹

Indeed, it is hornbook law that since a legislative body is the source of an agency's power, “the provisions of a statute will prevail in any case of a conflict

Id. at 409.

¹⁰ In fact, courts have recognized that the Public Trust Doctrine's protection of navigable waters is broad and extends beyond the boundaries of a navigable body of water. In *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 2011 WI App 115, 336 Wis. 2d 677, 803 N.W.2d 853 (2011), the Court said:

It is well-established that the public rights protected under the public trust doctrine do not stop at the edge of the beds of navigable waters. **Lands adjacent to or near navigable waters exist in a special relationship to the state,** declared the court, and ‘are subject to the state public trust powers.’ *Id.* at 18-19. [Emphasis supplied].

Id. at ¶¶51-52.

¹¹ And there are very definite limits on the extent to which an agency can claim “implied power” under a statute. As the Wisconsin Attorney General said in an opinion to one of the first Secretaries of the DNR, at 68 Op. Atty. Gen. 264 (1979):

In the absence of an express grant of authority, the question of what powers may be ‘fairly implied’ by an enabling statute must be addressed in light of the maxim that such statutes are to be ‘strictly construed to preclude the exercise of power which is not expressly granted,’ *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978); *Racine Fire and Police Commission v. Stanfield*, 70 Wis. 2d 395, 399, 234 N.W.2d 307 (1975). And, if doubts remain, ‘any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority.’ *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971).

Id. at *8-9.

between a statute and an agency regulation.” 1A Sutherland on Statutory Construction, §31.02 (4th Ed. 1985).

Nowhere in NR 103 is there anything to the effect that it supersedes Chapter 30 when navigable water is encountered in a wetland.¹² When questioned about his justification for not applying Chapter 30 to the proposed access road construction in the navigable wetlands, Mr. Wakeman, a senior member of the DNR staff, stated:

Q. Is there [any place] in NR 103 that you are aware of that it says that Chapter 30 doesn't apply to navigable wetlands?

A. Not to my knowledge.

Q. Is there [any place] in NR 103 that you are aware of that navigable wetlands are referenced?

A. Without having to read the whole document again and refresh my memory, I don't – I don't believe so.

TR4, pp. 77-78.

In short, DNR's position that NR103 somehow “trumps” Chapter 30 whenever there are navigable wetlands is contrary to the law.

III. IT IS UNDISPUTED THAT THE PROJECT WILL IMPACT NAVIGABLE WATERS ALONG THE ACCESS ROAD.

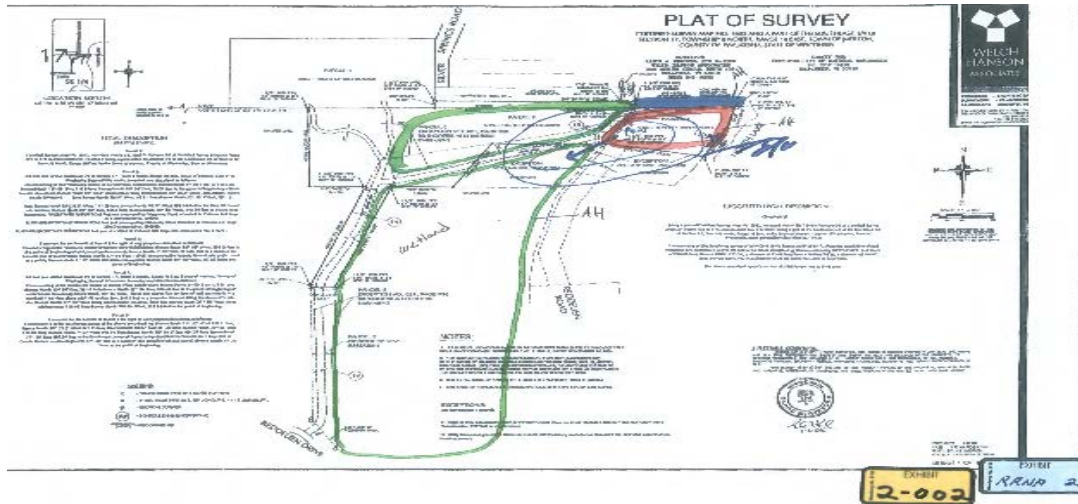
Ex. 2-002 is set forth on the next page as it appeared when it was first received into evidence at the hearing, before any marking were placed on it during the hearing. Without the other markings placed on the above exhibit during the hearing, one can

¹² In Fact, according to an article on the DNR webpage by Michael Cain, former staff counsel for the DNR:

The specific program Statutes and regulations will control the application process for projects to be reviewed under NR 103. For example, a Chapter 30 application will be processed under normal procedures. The wetland water quality standards contained in NR 103 will be factored into that review process ...

From Michael Cain, *A Template for Reasoned Environmental Planning* (2007) located on the DNR website at: <http://dnr.wi.gov/wetlands/documents/TemplateEnvPlanNR103.pdf>.

readily identify the various geographical components which compose the wetland complex of which the Kraus Site is a part.



(i) The Proposed Access Road Expansion is in an area that is “Navigable.”

At the hearing, a stipulation between all the parties was arrived at concerning the areas noted on Ex. 2-002, in particular the area in blue constituting the unnamed stream or channel, and the areas within the two green circles (for which the DNR coined the term “navigable wetlands”). Mr. Harbeck recited the terms of that stipulation on the record as follows:

MR. HARBECK: Okay. And I will do it in reference to Exhibit 2-002. The DNR and the petitioners have stipulated that the areas in green, both to the south of the access road which runs towards the lake and to the north of the access road, are navigable and also consist of wetlands, and the area in blue that connects to the northern green area, which has sometimes been referred to as a channel, is navigable and also consists of wetlands. So the areas that we’re talking about are immediately adjacent to the access road. On either side of the access road, Area 1 is just north of the access road, Area 2 starts just south of the access

road as it passes from west to east. The areas adjacent to that access road are navigable¹³

TR1, p. 231.

(ii) The Navigable Wetlands Interact with Each Other & Other Water.

The navigable wetlands within the areas reflected on Ex. 2-002 extend far beyond the boundaries of the Kraus Site, and there is testimony that the entire area of the wetlands complex is 14 acres (TR4, p. 167.), while the area of the Kraus Site is just over six acres. TR5, p. 278.

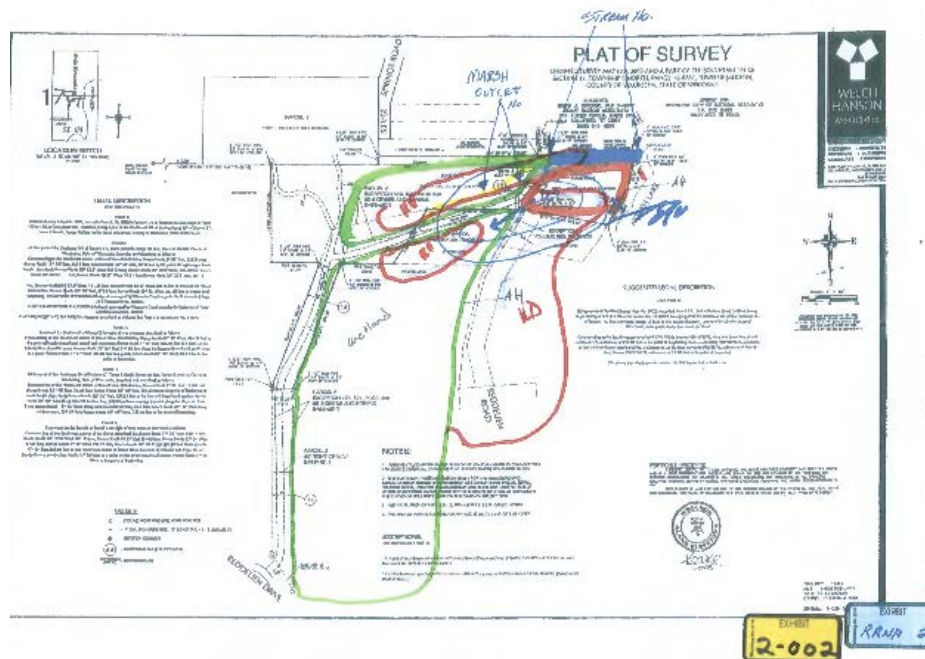
There is evidence that the northern navigable wetlands (in the small green circle) interact with the southern navigable wetlands (in the large green circle). TR3, p. 32. There is testimony that water from the 100 acres of farm fields to the west empty into the navigable wetlands (TR3, pp. 140-141), but because no flood flow analysis has been done (TR1, p. 214 and TR2, pp. 48-49), there is no evidence concerning the amount, duration of frequency or water flow from the farm fields into the wetlands. Also, the DNR did not present any evidence of how its project would affect the ability of the wetland complex to filter out farm nutrients before they reach North Lake.

There is evidence that water from the proposed parking lot area flows into and out of the navigable wetlands (TR5, pp. 267-268, Ex. 212). In fact, the arrow on Ex. 2-002 pointing southwest from the proposed parking lot was placed there by DNR Engineer Wood to show the flow of accumulated water from the area of the proposed parking into the southern navigable wetland. TR5, p. 314; Wood, 8-26, p. 18, 36-37. As explained further, *infra*, Mr. Wood has determined that when water accumulates in

¹³ By Area 1, Mr. Harbeck was referring to the small green circle on Ex. 2-002 to the north of the location of the proposed access road, and by Area 2 he was referring to the large green circle on 2-002 south of the location of the proposed access road.

the area of the proposed parking lot, it moves from the parking lot through the navigable wetlands and into the swale or unnamed stream (shown on Ex. 2-002 by a solid blue line on the northern boundary of the Kraus Site), and thence into North Lake. However, because no flood flow analysis has been done there is no evidence concerning the amount, duration or frequency of water flow from the proposed parking lot into the southern navigable wetlands.

Below is Ex. 2-002 after it had markings placed upon it by witnesses at hearing. As the testimony at the hearing showed, the large green circle (the one to the south) on Ex. 2-002 lies immediately to the west of a substantial portion of Reddelien Road, which is circled in red on Ex. 2-002 above and which lies to the south of the proposed parking lot and to the east of large green circle.



Again, as noted, the DNR has not conducted a flood flow analysis anywhere on the wetland complex of which the Kraus Site is a part. TR1, p. 214 and TR2, pp. 48-49. Moreover, the DNR admits that it has never conducted any study to determine

what might happen to Reddelien Road if the construction of their project increases the water in the southern navigable wetland located within the large green circle on Ex. 2-002. TR4, p. 244-245.

(iii) Before Granting Approval for the East-West Proposed Access Road, the DNR had to satisfy all of the Criteria in Wis. Stats. §30.12(3m)(b).

The DNR did not obtain the equivalent of a Wis. Stats. §30.12(3m)(b) permit for any part of the access road, despite the fact that the DNR clearly admits that a portion of the access road will be located in navigable water. *See* TR4, p. 125, Hudek, 8-26, pp. 62 & 149, discussed *infra*. Wis. Stats. §30.12(3m)(b) provides, in part, as follows:

The department shall issue an individual permit to a riparian owner for a structure or a deposit pursuant to an application under par. (a) **if the department finds that all of the following apply:**

1. The structure or deposit will not materially obstruct navigation.
2. The structure or deposit will not be detrimental to the public interest.
3. The structure or deposit will not materially reduce the flood flow capacity of a stream [Emphasis supplied].

In issuing the MC Approval, the DNR acknowledged that it did not apply any of these criteria to any part of the access road because of its position that only NR103 applied. It conceded that it had only acquired the equivalent of Chapter 30 approval in the following areas:

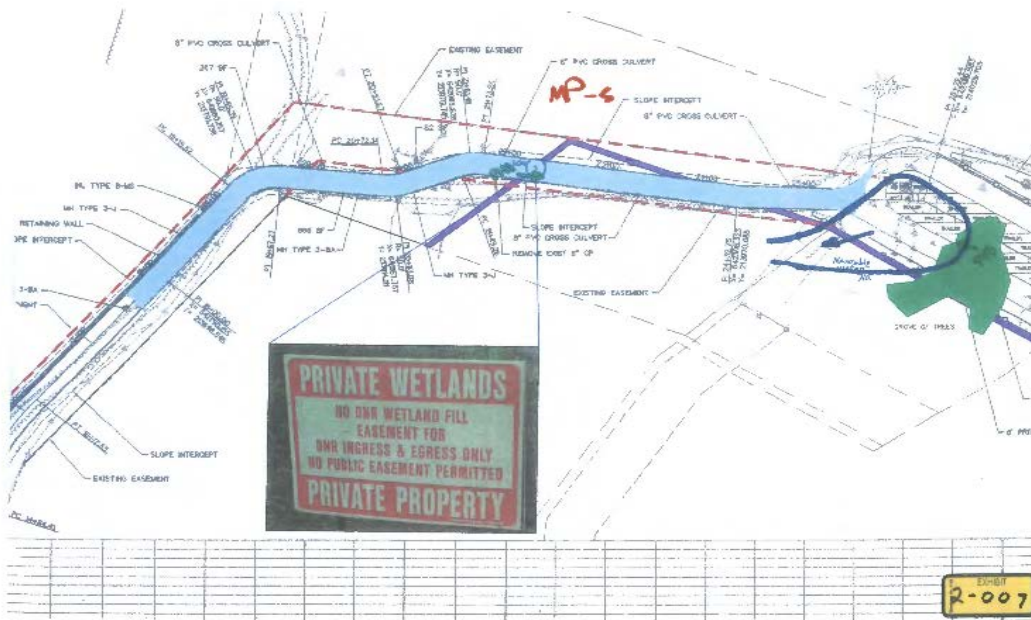
1. The boat launch structure on the bed of North Lake;
2. The 2 outfall structures at North Lake.
3. The 4 culverts under the access road; and

- The “grading” where the parking lot will be located (but not the placement of fill into that area or the asphalt parking lot itself).

See Wakeman Deposition No. 2, pp. 7-11.

(iv) It was Undisputed that Navigable Water will be Impacted in the Area of the Proposed Access Road.

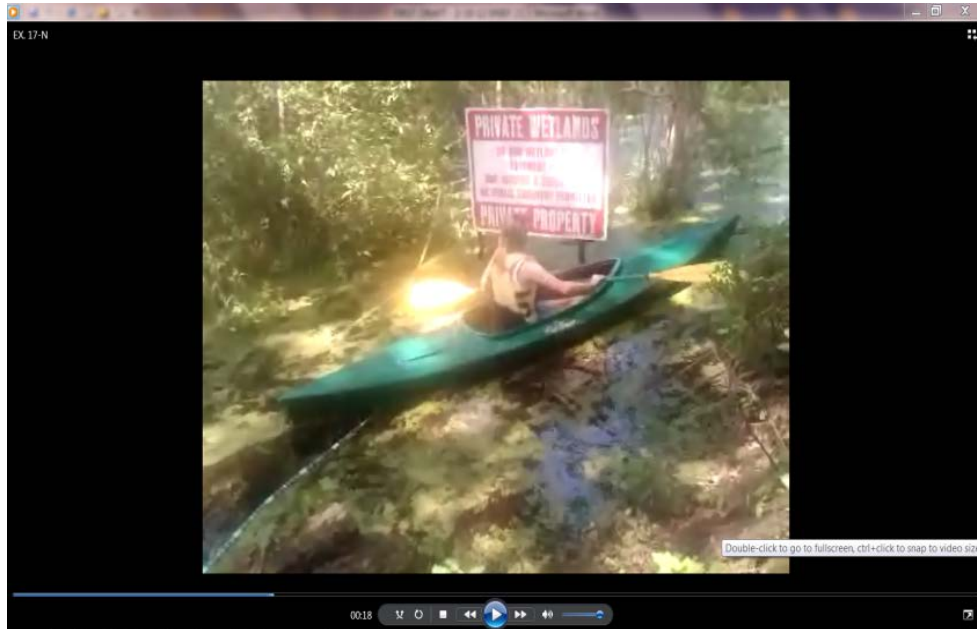
One need only look at Ex. 2-007 (below), in light of the testimony, to see that the proposed access road expansion will impact navigable waters. (Again, DNR does not dispute this - it just says it didn't need to apply Chapter 30 because the area where the road will cross navigable water is also wetlands).



According to Surveyor Powers (TR1, p. 51), the boundary line of the northwest corner of the Hanson property is marked in purple on Ex. 2-007. According to Powers the light blue line on Ex. 2-007 represents the proposed access road. TR1, p. 53.¹⁴ The RRNA conducted a navigability-in-fact test in the area of the sign visible in Ex. 2-007.

¹⁴ Paul Geise testified that the planned access road “consist(s) of a 22-foot wide hot mix asphalt pavement, a one-foot wide gravel shoulder on either side of that pavement and then a planned slope, curve or retaining wall...” TR2, pp.210-211.

The video of the navigability-in-fact test is in Ex. 17N (below) revealed a great deal more than just navigable water. An outtake from Ex. 17N of the navigability-in-fact test appears below:



Ex. 17N shows a young woman (Paige Hanson) paddling in the navigable water of the unnamed stream past a sign. As is clear from Ex. 2-007, that sign is located right in the middle of where the proposed access road will cross the northwest corner of Hanson’s property.

It shows that the water has been there for a considerable period of time (as Paige Hanson testified, at TR1, p. 131, that is duckweed on the surface of the water). According to Ms. Hanson (TR1, p. 130), the current was flowing from east to west (from North Lake into the wetland complex) the water was about two feet deep. TR1, pp. 130-131.

The DNR conceded that the area where Ms. Hanson was paddling in Ex. 17N was in fact navigable water. Mr. Wakeman testified:

Q. [W]hat I'm trying to get at is where the young girl was paddling and she paddled past the sign, was there or was there not a bed and bank?

A. There's bed and bank and an ordinary high water mark.

Q. So that would be navigable water?

A. Yes.

TR4, p. 125.

As a matter of law, the area where the proposed access road expansion crosses the northwest corner of Hanson's property is navigable and thus Chapter 30 applies.

IV. IT IS ALSO CLEAR THAT THE PROPOSED ACCESS ROAD WILL BE BUILT IN THE LAKEBED OF NORTH LAKE.

There is yet another reason why Chapter 30 applies to the proposed access road expansion. The uncontroverted evidence was that the swale or unnamed stream on the northern boundary of the Kraus Site (the area in blue leading into the area in green north of the road, where a portion of the access road will be expanded) is below the ordinary high water mark of North Lake and that the waters of North Lake move into and out of this area. Therefore, it is part of the *lake bed* of North Lake.

Initially, the RRNA wishes to call attention to some of the testimony of Mr. Hudek, given at his deposition before the hearing (all deposition transcripts have been admitted into evidence. *See* TR5, p. 312). In referring to what became Ex. 2-002 at the hearing (discussed *supra*), Mr. Hudek gave the following additional testimony at his deposition:

10	Q	So both the northern green circle, southern green
11		circle <u>and the blue line, which denotes a stream,</u>
12		<u>are navigable waterways?</u>
13	A	<u>Navigable, that would meet the definition of the</u>

14 | State, correct [Emphasis supplied].

Hudek, 10-25, p. 62.

Later in his deposition Mr. Hudek was asked to discuss his understanding of the swale in relationship to North Lake. He gave the following testimony:

18 | Q Okay. So as to that location, that would be below
19 | the ordinary high water mark and considered to be
20 | part of the public trust?
21 | A I would consider the swale as a navigable waterway
22 | subject to the public trust.

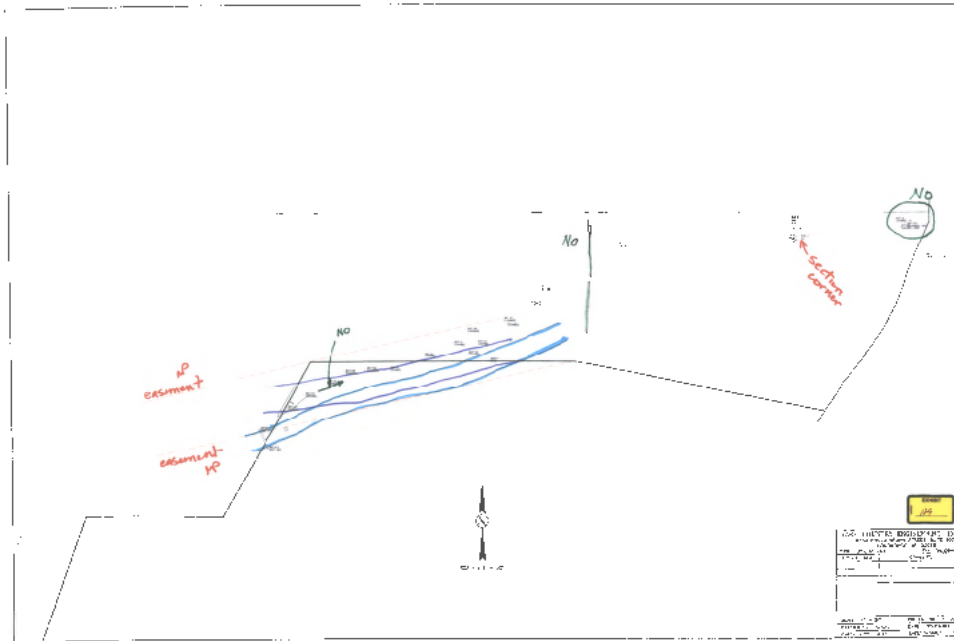
Id. at 149.

The evidence also demonstrated that the profiles of the topography in the swale, or unnamed stream, to the north of the Kraus Site are below North Lake's ordinary high water mark ("OHWM"). Testifying about Ex. 16-001, Surveyor Powers observed that the contours on that exhibit show a swale which is a defined channel that carries water from one point to another and that is below the ordinary high water mark of North Lake. TR1, pp. 99-100.

According to Dr. O'Reilly, the blue line on the north side of Exhibit 2-002 is a stream. "[T]here is a bed and bank on both the north and south sides of the channel. It's clearly observable in the field. It's clearly observable on the topographic maps ... taken by Kapur and Associates and I believe it has all the characteristics of a stream channel." TR2, p. 49:19-25.

Elevations in the bed of this stream channel show "that the bed of that channel is below the ordinary high water mark of the lake and that it's my opinion that this

stream channel is part of the lakebed." TR2, p. 86. More can be understood about the elevations and the ordinary high water mark by studying Ex. 129, below:



If a very close view is made of Ex. 129 (above) one can see where Mr. Powers drew the location of the proposed parking lot in purple on that exhibit and one can also see that the purple line clearly crosses the northwest corner of the Hanson property where Paige Hanson is seen paddling her kayak. With a very close inspection of Ex. 129, one can also see that where Ms. Hanson was paddling, and for a considerable distance to the west and east of that location, is below the ordinary high water mark of North Lake. One can also see that the swale where she was paddling leads directly into the swale or unnamed stream on the northern boundary of the Kraus Site and thence into North Lake.

Dr. O'Reilly also testified, that "all of the bed elevations are below the ordinary high water mark established by Robert Wakeman of the Wisconsin DNR, so they're below 897.76." *Id.*, p 87. Dr. O'Reilly further testified that "the channel running along

the north side of the property from the lake to where the sign was shown ... in the testimony of [Paige] Hanson, which is in that triangle area where the easement crosses the Hanson property, ... that location is below the ordinary high water mark." TR2, p. 127.

Mr. Tom Peters (the neighbor to the North of the Kraus Site) testified that he sees water flowing both east and west from North Lake into the swale, and then back into North Lake. *Id.* at 277-278. When the water gets high enough in the wetlands, the water will flow east into the lake. *Id.* When North Lake gets high enough, the water direction reverses and water flows from the lake into the wetlands and ultimately into the area pictured in Exhibit 35-001 (discussed *infra*). DNR Engineer Pete Wood testified that he thought "Mr. Peters actually made a good summary of this." TR5, p. 256. The entire matter of the mechanics of how North Lake interacts with the swale is discussed further *infra*.

The evidence was undisputed that the swale or unnamed stream was below the OHWM of North Lake. Because the swale or unnamed stream is below the ordinary high water mark of North Lake it is in fact the *lakebed* of North Lake, and that determination does not depend on whether the swale is navigable. According to *State v. Trudeau*, 139 Wis. 2d 91, 408 N.W.2d 337 (1987):

An area need not be navigable to be lakebed. If the land is part of the navigable lake, then the fact that the specific area cannot be navigated is irrelevant.... Lakebed may be heavily vegetated by plants rising far above the water. The court of appeals stated in *Houslet v. Natural Resources Department*, 110 Wis. 2d 280, 287, 329 N.W.2d 219 (Ct. App. 1982): **‘[T]he public interest in and title to the navigable waters in this state attaches to more than the open and perpetually navigable waters contained in lakes, rivers and streams. It extends to areas covered with aquatic vegetation**

within the ordinary high water mark of the body of water in question.’ Public ownership of the bed applies whether the water is deep or shallow [Emphasis supplied].

Id. at 103-104.

Therefore, whether one calls it an “unnamed stream,” a “swale” or a “ditch,” according to *Trudeau* it is part of the *lakebed* of North Lake insofar as it is lower than the ordinary high water mark of North Lake. Wet or dry, it is subject to the public trust. In fact, the *Trudeau* Court made it unmistakably clear that §30.12 must be read as controlling the water in the swale when it wrote the following:

Section 30.12 and ch. 30, Stats., generally codify a number of common law doctrines regarding the ownership of the beds of navigable waters. ‘The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, *up to the* line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, **in trust to hold the same so as to preserve to the people forever** the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.’ **This is as true of the beds of the Great Lakes as it is of lesser inland waters** [Emphasis supplied].

Id. at 101.

Thus, the swale or unnamed stream to the north of the Kraus Site is subject to Chapter 30 because it is lakebed.

V. PORTIONS OF THE AREA WHERE THE PROPOSED PARKING LOT WILL BE LOCATED ARE “NAVIGABLE IN FACT.”

i. When there is a Dispute as to the Navigability of an Area, the Only Test is the “Navigable-in-Fact” Test.

DNR’s Andrew Hudak was responsible for determining whether any areas to be impacted by the DNR’s proposed construction project were navigable. Hudek, 8-25, p. 44; TR1, p. 156. When Mr. Hudak undertook this determination at the Kraus Site, he

was 26 years old and had been employed by DNR in this capacity for only two years.

Id. Mr. Hudak testified that in making navigability determinations, he primarily relied upon DNR's Waterway and Wetland Handbook (Ex. 1B-001) (TR1, p. 166). In pertinent part, that manual provides:

The best evidence of navigability is whether a lake or stream is navigable in fact.... The test of navigability is whether you can float a canoe or duck skiff down the stream. Obstacles or interruptions to navigation such as brush, fallen trees, tight meanders, do not make a stream not navigable-in-fact by themselves [Emphasis supplied].

This manual also confirms that there need be no minimum size to the area under consideration. Be it a lake, stream, a "tiny spring pond," or an "isolated wetland pond," "any body of water capable of floating a canoe is valuable and should be considered navigable."

The real issue to be considered when evaluating lakes and ponds (including wetlands) is whether they are 'navigable-in-fact' by the above criteria. Although one might argue that there should be some minimum cut off size for a body of water to be considered navigable, **any body of water capable of floating a canoe is valuable and should be considered navigable.** To support this conclusion, consider the resource value associated with **even a tiny spring pond or isolated wetland pond.** They have fishery and/or wildlife values and preserving these values is in the public interest even if they are not readily accessible to the public [Emphasis supplied].

Both DNR's Hudak and Wakeman agreed with this statement. TR1, p. 183, TR4, pp. 104-05. Wisconsin case law is consistent with these propositions, and further holds that the area under consideration need not always be navigable, but merely need to be navigable on either a recurring basis or "of sufficient duration to make it conducive to recreational uses." *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, 301 Wis. 2d 321, 733 N.W.2d 287:

The test for navigability is whether the body of water is ‘capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.’ [citations omitted] **The test ‘does not depend on whether [the body of water] is always navigable, or whether its navigability is due to natural conditions.’ ‘The test is whether the navigability is regularly recurring or of a sufficient duration to make it conducive to recreational uses[Emphasis supplied].’**

Id. at ¶11, fn. 8.

A water body that is navigable-in-fact is one that “has periods of navigable capacity which ordinarily recur from year to year, e.g. spring freshets, or has continued navigable long enough to make it useful as a highway for recreation....” *DeGayner & Co. v. DNR*, 70 Wis. 2d 936, 946-47, 236 N.W.2d 217 (1975). Mr. Hudak agreed that intermittent periods of navigability was all that was necessary. *Hudak Dep.*, 8-26, p. 75. Finally, even if the area is shallow or covered with vegetation, it is nevertheless subject to the public trust. “For the purposes of determining the extent of control of the public trust ‘it is immaterial what the character of the stream of water is. It may be deep or shallow, clear or covered with aquatic vegetation.” *State v. Trudeau*, 139 Wis. 2d 139 Wis. 2d 91, 101-102, 408 N.W.2d 337 (1987), quoting from the case of *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914).

ii. A Portion of The Area Where the Parking Lot is to be Constructed Meets the Criteria of Being “Navigable-in-Fact.”

The RRNA introduced substantial evidence that the area where the DNR proposed to place the parking lot (the area in and around the grove of trees) is “navigable-in-fact.” A number of witnesses testified that water was both of sufficient depth to float a canoe or kayak in it, and that water levels reached that depth on a recurring basis. Among this evidence were three navigable-in-fact tests. The first one

was performed by Paige Hanson, the neighbor immediately to the south of the parking lot area, in the summer of 2011. That test is portrayed in the video contained in Ex. 17F. An outtake from that video is set forth below.



Mr. Wakeman was asked how far someone had to row in order to show that a body of water was navigable at his first deposition. According to Mr. Wakeman, “There is no standard or no requirement. If you are able to put your kayak in or your canoe in and go 10 feet and have to get out and walk five feet and get back in and navigate some more, that would be adequate to show its navigability. Wakeman Dep. 10-26, p. 13. Paige Hanson testified that she saw water high enough to navigate in the grove of trees “every year or close to every year.” TR1, p. 154.

In addition, Mr. Tom Peters, who has resided for many years in the home to the immediate north of the Kraus site, testified at length on his observations over the years about the recurring waters in the proposed parking lot area. He produced several pictures, one of which is set forth below and was marked as Ex. 35-001 at the hearing. Mr. Peters testified that Ex. 35-001 (set forth on next page) is how the area of the proposed parking lot looked in April of 2006. TR1, p. 263. He testified that the picture in Ex. 35-001 is looking north from the Hanson property toward the swale and his

residence. *Id.* at 265. **He testified that he weighs 180 pounds and that on two different occasions rowed a 60 pound canoe from the swale south to the area where he took this picture.** *Id.* at 267-268. He testified that the grove of trees is immediately to his right in this picture and that he could have easily rowed into that grove of trees. *Id.* at 269. He testified that the water was eighteen inches deep or more. *Id.* at 268. Mr. Peters testified that he saw water this deep at least once every two years. *Id.* at 270.



Mr. Tom Schwartzburg, brother-in-law of Fritz Hanson, testified to seeing this much water in the same location annually as long ago as the 1950s and as recently as in early 2011. TR2, pp. 183-184. Rob Moebius, who has lived in the Reddelien Road neighborhood since 1973, testified regarding Exs. 34-001 to 34-004, which were of the same location, taken in March of 2011. TR5, pp. 369-372. He testified to seeing large amounts of water in the same location several times a year. TR5, pp. 370-371.

Dr. O'Reilly testified that the area portrayed in Ex. 35-001 had a bed and bank. "Yes, and the beds and banks are easily seen on Exhibit 15 (same as Ex. 210A) which

was an exhibit put together by Mr. Pete Wood of the DNR where he has drawn a red line around this depressional area that's approximately a foot to a-foot-and-a-half deep." TR2, p. 143.

While Dr. O'Reilly's testimony is that the depressional area depicted in Ex. 210A and Ex. 15 (which exhibits are discussed, *infra*) does not have a very high bed and bank, it is well to remember the testimony that Mr. Hudak gave at his deposition concerning what constitutes a "bed and bank." According to Mr. Hudak:

Q. But when we're talking bed and bank, how high, low is a bed and bank? Are we talking about something that's got to be six inches high or a foot or two feet? Could it be as low as an inch or two?...

A. I can relate to historic sites I've seen, and the bed and bank can be any discernible change in substrate. And whether that's an elevation of zero inches or whether that's an elevation of six feet, it's highly variable, per se.

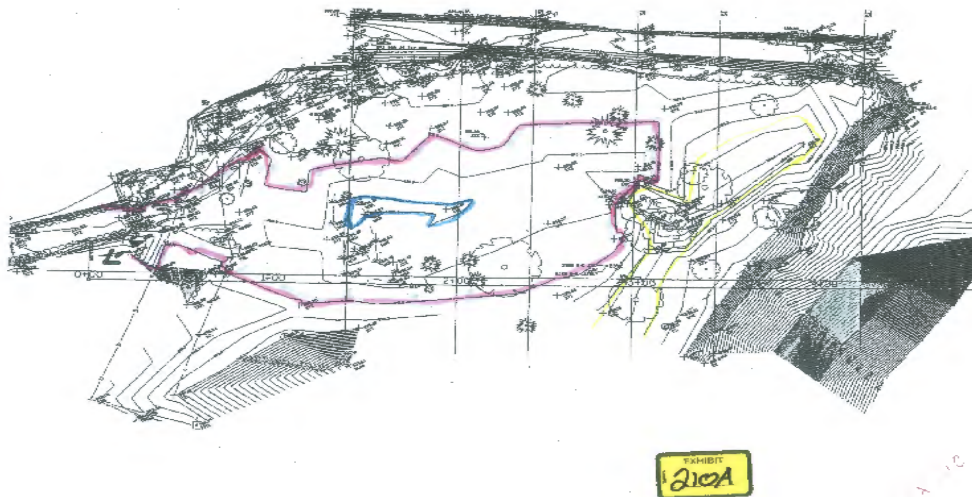
Hudak Dep., 8-25, p. 100.

(iii) The Water in the Area of the Parking Lot is Not Only from Melting Snow or Rainfall - It Comes from North Lake.

There is compelling and substantial evidence that much of the water which fills the area where the proposed parking lot will be located comes from North Lake. Mr. Peters testified that the water in this area was not from rain water simply accumulating in the depression. Instead, following a rainy period he witnessed North Lake rise and, after three or four days, water began to flow into the swale from North Lake. TR1, pp. 270-271. He testified that it would first flow into the wetlands to the west of his home and then into the area pictured in Exhibit 35-002. *Id.* at 271-272. Peters further

testified that he sees water flowing both east and west over the berm next to North Lake. *Id.* at 277-278. When the water gets high enough in the wetlands, the water will flow east into the lake. *Id.* When North Lake gets high enough, the water direction reverses and water flows from the lake into the wetlands and ultimately into the proposed parking lot area pictured in Exhibit 35-001, which is also the area of the depression depicted in Exhibit 210A. *Id.* Mr. Wood testified that he thought “Mr. Peters actually made a good summary of this.” TR5, p. 256.

Mr. Wood, a storm water engineer with the DNR, determined that when water accumulates in the area of the proposed parking lot, it generally moves from the parking lot through the navigable wetlands and into the swale, and thence into North Lake. Mr. Wood testified that Exhibit 210A (*see* below) represents the approximate area where the proposed parking lot will go. TR5, pp. 252-253.



The area surrounded with a red line on Ex. 210A represents what Mr. Wood refers to as a “depression” located in a significant part of the area of the proposed

parking lot. According to Mr. Wood, that depression overlaps with what has been referred to as the grove of trees. TR5, p. 259. In his capacity as DNR storm water Engineer Mr. Wood was charged with identifying where waters might accumulate on a given site, and where they might flow. TR5, p 255. Mr. Wood concluded that water would tend to accumulate in the depression from time to time. TR5, p. 260. He testified that the depression was like a bowl. TR5, p. 258.

Mr. Wood testified that when the water became high enough it would flow out of that bowl to the southwest along the line of the arrow he drew on Ex. 210A toward the area of the southern navigable wetland. Id. at 257-258. It must be emphasized that this is based on the testimony of a DNR storm water engineer, whose expertise involves tracing water flows for the Agency. Ex. 210A must be considered with another of Mr. Woods maps, Ex. 212, pg. 2. . Wood testified that Ex. 212 (set forth below) shows the probable flow of a drop of water after it leaves the depression depicted in Ex. 210A. TR5, p 263.

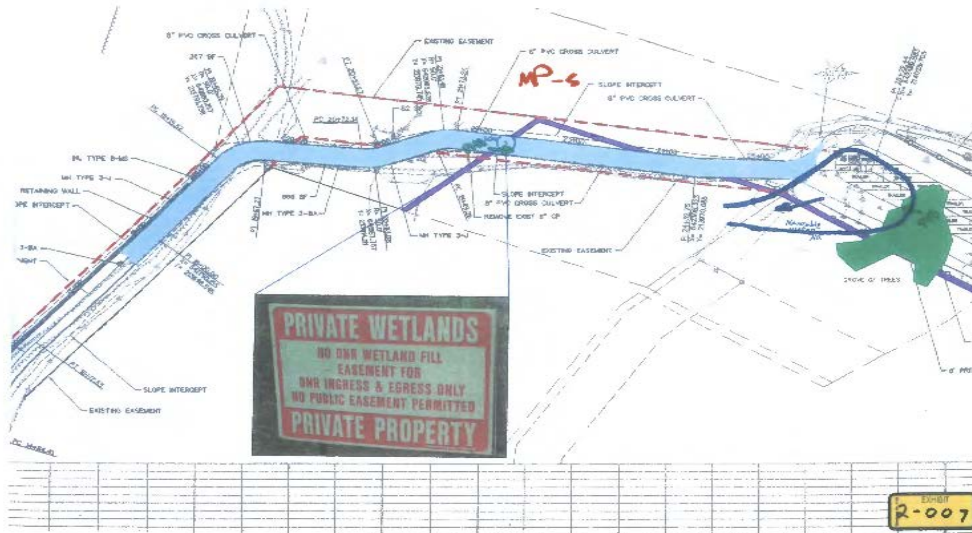


According to Mr. Wood, the flow from the exit from the depression (denoted on Ex. 212 as a broken green line) would for a while follow a southwest trajectory into the large navigable wetland, and it would then turn north and follow an easterly trajectory out through the swale on the northern boundary of the Kraus Site into North Lake. TR5, pp. 267-268.

According to Mr. Wood, water could flow into the depression from the wetland: “The opposite could occur when water increased to, you know, I’m going to say about a foot of depth in the larger wetland complex [the one surrounded by a large green circle on Ex. 2-002] to the west. It could overflow towards the DNR depressional area.” TR 5, p. 270, He also testified that if water rises high enough in North Lake it could also flow into this depressional area. TR5, p. 271.

Dr. O’Reilly also testified that there was a two way flow of water from and into North Lake at the berm on the eastern edge of the northern swale. TR2, p. 56. He testified further that when water flowed west from North Lake into the swale it would follow the green arrow on Ex. 212 back into the wetlands and the depressional area where the proposed parking lot will be located. TR2, pp. 78-81. In fact, it was his opinion that the water in the depressional area was lake water, and he based his opinion in part on the testimony of Mr. Wood and Mr. Peters. TR2, pp. 78-79. There is also substantial evidence that water from the proposed parking lot flows into and out of the navigable wetlands. TR5, pp. 267-268, Ex. 212. In fact, the arrow on Ex. 2-002 pointing southwest from the proposed parking lot was placed there by Mr. Wood to show the flow of accumulated water from the area of the proposed parking into the southern navigable wetland. TR5, p 314; Wood, 8-26, pp. 18, 35-36. Dr. O’Reilly

offered additional testimony about the ebb and flow of North Lake with reference to Ex. 2-007. Another copy of Ex. 2-007 is set forth below.



According to Dr. O'Reilly: "For the record, on Exhibit 2-007 in blue pen I just marked the approximate area, and I will quantify the approximate area because this exhibit does not show any contour lines or spot elevations, but an approximate area of this depression that I argue is a navigable stream and I put an arrow showing the direction of flow towards the larger wetland." TR2, p. 142.

(iv) Regardless of the Reason, if the Level of a Lake Rises the Rights of the Public Follow the Lake Water.

Wisconsin courts have long recognized that the state's jurisdiction over state waters flows with the water. If the area covered by the waters expands, either by raising the water level via impoundment or increasing the area into which the water can flow by enlargements or connections, the state's jurisdiction expands to that area as well. *See Mendota Club v. Anderson*, 101 Wis. 479, 78 N.W. 185 (1899) (holding that the public's right to navigate waters extends to any depth, extent and breadth of such waters). If the public volume or expanse of navigable waters is increased, the

public right to use the water is increased correspondingly. *Klingeisen v. DNR*, 163 Wis. 2d 921, 927, 472 N.W.2d 603 (Ct. App. 1991). Long ago, our Supreme Court stated that where the waters of a navigable lake are raised the public and the riparian owners enjoy the same rights in and upon those waters. *Haase v. Kingston Co-operative Creamery Association*, 212 Wis. 585, 587, 250 N.W. 444 (1933). The public does not need to establish its rights to use the water of a navigable body by adverse possession or prescription, but has navigability rights immediately. According to *Village of Pewaukee v. Savoy*, 103 Wis. 271, 79 N.W. 436 (1899), when a lake level rises and covers land, such land immediately became subject to use by the public as a part of the natural lake bed, not by permission of the owner of the paper title, but by the same right that the public used any other part of the lake. The owner of the land possesses no right to exclude the public so long as the waters of the lake were caused to flow over the same. The principle is well settled that if the volume of navigable waters is increased, the public right is correspondingly increased. *Id.* at 276-77.

**(v) A Portion of the Area in the
Proposed Parking Lot is in fact a Slough.**

If the parking lot area is a “slough,” “bayou,” or “marsh outlet,” then in that case the parking lot area does not need to be a “stream” for there to be a valid declaration of navigability under §30.10(1) or (2). Mr. Wakeman testified that the DNR had not defined a slough. TR4, p. 73. Prior to the hearing, Mr. Hudak had no idea what a slough was.

Q. Do you happen to know how the DNR defines slough?

A. I've never heard the term ‘slough’ before. Can you explain exactly what you mean by that?

Q. Okay. Slough, slough. S-L-O-U-G-H, slough.

A. To my understanding, there's no regulatory definition of a slough.

Q. And how about a marsh?

A. To my knowledge, there's no regulatory definition for marsh for navigable waterways.

Q. And how about a bayou?

A. Similarly.

Hudak Dep., 8-26, p. 35.

Dr. O'Reilly testified that a slough is a "depression or a hollow." TR2, p. 19.

Mr. Peters clearly testified that the area of the parking lot fills up with water from North Lake when the lake is high, and that water likewise flows out of the parking lot area back into the lake from time to time. TR1, pp. 277-278.

Mr. Wood agreed with this characterization (TR5, p. 256.) and further testified to a depression in the parking lot area, which he clearly identified in Ex. 212A with a red circle, which was close to over overlapped with the grove of trees. TR5, pp. 257-259. Dr. O'Reilly agrees that there is a depression in the area of the grove of trees. TR2, pp. 78.

At times the water in the parking lot is not directly connected to North Lake and is often dry. However, it is regularly connected to the Lake, directly or indirectly. In effect and in fact, because of that connection the evidence establishes that the area where the parking lot will be located functions as part of a drainage system which receives water from North Lake when the lake is high, and likewise receives runoff water from the farmland to the west before it drains into North Lake when the lake is low. The case law is consistent with this area being a slough.

There is one modern Wisconsin case we have found that discusses sloughs. *Holtz & Krause v. DNR*, 85 Wis. 2d 198, 270 N.W.2d 409 (1978), was a modern

case¹⁵ involving the abandonment of a solid waste disposal site. There were three sloughs located within 1000 feet of the landfill and which were characterized in the *Holtz* decision using the following words: “Within a thousand feet of the south and west boundaries of the landfill are three sloughs connected to the Eau Claire flowage. The sloughs are shallow, stagnant, and have a high level of eutrophication. The DNR determined, and it is not contested on appeal, that the sloughs are all navigable waters [Emphasis supplied].” *Id.* at 201. Eutrophication means that they were grown over with vegetation. In other words, no less an authority than the DNR has found that the fact that an area is shallow, stagnant and covered in vegetation does not mean that it cannot be characterized as a slough and declared navigable.

In *Hidden Hollow Ranch v. Fields*, 92 P.3d 1185 (MT 2004), the Supreme Court of Montana stated in 2004 that a slough formed by seepage from irrigation is a watercourse, stating in part as follows:

Where . . . vagrant, fugitive waters have finally collected and reached a natural channel, and thus lose their original character as seepage, percolating, surface, or waste waters, and flow with such regularity . . . whether from rains raising the surface of a lake until it overflows . . . **or water of a slough fed by seepage from irrigation**, the waters flowing in such [a] natural channel constitute a watercourse within the meaning of the law of water rights.

Id. at ¶31 [Emphasis supplied].

In *Prichard v. Hink*, 574 S.W.2d 30 (Mo. 1978), the Missouri Court of Appeals stated that one accepted definition of a slough is a "backwater." *Id.* at 33. The Court went on to say: “[T]he trial court concluded from the evidence and exhibits that the

¹⁵ Some ancient Wisconsin cases have touched on the subject of sloughs. See *Black River Improv. Co. v. La Crosse Booming & Transp. Co.*, 54 Wis. 659, 11 N.W. 443 (1882) and *In re Crawford County Levee Drainage Dist. V. Hutson*, 182 Wis. 404, 196 N.W. 874 (1924)

slough in question ‘is a dry branch except when there is runoff water or backup water from the river or runoff surface water.’” *Id.* In *Solomon v. Congleton*, 245 Ark. 487, 432 S.W.2d 865 (1968), the Supreme Court of Arkansas stated that a slough is defined as a “depression in a prairie, often dry, forming part of the natural drainage-system, sometimes deeply miry... [It also has been defined as] “A stagnant swamp or reedy inlet, small bayou, water channel, or pond in which water backs up, or which is filled by freshets.” *Id.* at 489.

In *Boll v. Ostroy*, 25 S.D. 513 (1910), the South Dakota Supreme Court observed: “The slough on the defendant's land was during some seasons dry, and the land cultivated, but at the time the suit was instituted this slough, embracing, as before stated, about 30 acres, was covered with water to a depth of from 4 to 8 inches, and therefore was not in a condition to be used for farming purposes, unless drained.” *Id.* at 517. Sloughs can often be dry. According to *U.S. v. Sargent County Water Resource Dist.*, 876 F. Supp. 1090 (D. N.D. 1994): “The sloughs would fill with water in periods of high precipitation, and drain entirely in periods of drought. In times of drought or low precipitation, farmers took advantage of the opportunity to put some of the land within the sloughs to use, mainly by haying. In times of high precipitation, such as now, water levels prevent the use of any of the land for farming...” *Id.* at 1102.

A number of courts have recognized sloughs are often part of a natural drainage system that helps to keep rivers and lakes from overflowing their banks. *Cf. Jones v. Des Moines & Mississippi River Levee Dist. No. 1*, 369 S.W.2d 865 (Mo. Ct. App. 1963), where the Court observed:

Keg Slough did have a confluence with Fox and Hemp Sloughs and all then emptied into the Fox River. The reasonable inference from the evidence of confluence with other sloughs and a common mouth in the Fox River is that, in greater amount during high water than at regular flow but nevertheless steadily, these sloughs were fed in part by back-up water from the Fox River.

Id. at 874-875.

In *James v. U.S.*, 111 Ct. Cl. 89, 76 F. Supp. 99 (Ct. Cl. 1948), the Court provided a description of sloughs which fits very closely with what is happening throughout the Kraus Site, especially in the area of the parking lot:

In the area of such overflow, the river flowed through numerous side channels, branch channels, reaches of backwater, and sloughs, in addition to the main channel, such extra channels being referred to generally as 'sloughs.' Some of the sloughs form networks; some have dead ends; some receive only backwater, and some receive water from the river and return it to the river at lower points, either directly or through connecting sloughs. Some sloughs branch off other sloughs. Some carry river water whenever there is water in the main channel; others carry river water only at higher river stages.

Id. at 91. *See also Johnson v. Metropolitan Life*, 71 S.D. 155 (1946) ("The natural drainage is northeasterly, that is, from the defendant's land to the plaintiff's land. On the defendant's land are two **sloughs or depressions** and the **land is well filled with water or dry, depending upon the season and the time of the year.**" [Emphasis supplied]. *Id.* at 156); *see also Rudolph v. Atkinson*, 156 Neb. 804, 58 N.W.2d 216 (1953) ("The amount of water in the slough varies but when sufficient has collected therein from rains or other sources it overflows in a slight depression or swale toward the road. The slough overflows when the water therein gets about a foot deep." *Id.* at 807-808). Because the depression in the proposed parking lot area is consistent with being a slough, the only issue is whether it is navigable-in-fact. (See Wis. §30.10(2) "... all ... sloughs ... which are navigable in fact for any purpose whatsoever are

declared navigable.”) As is demonstrated above, there is uncontroverted evidence that it is.

(vi). Although there is a Bed and Bank in the Parking Lot Area where the Water Accumulates, a well-defined Bed and Bank is not Essential.

There is also evidence of Legislative intent indicating that navigable water does not require a well-defined bed and a bank. Dr. O’Reilly testified that “marsh outlets” are the same as “marshes.” TR2, pp. 137-138. The Legislature specified in Wis. Stats. §30.10(2) that “all streams, sloughs, bayous **and marsh outlets**, which are navigable in fact for any purpose whatsoever, are declared navigable [Emphasis supplied].” This provides valuable insight into the thinking of the Legislature because a marsh does not have a defined bed and a bank. A marsh, like a swamp, does not flow in a channel. *See, e.g., State v. Adelmeyer*, 221 Wis. 246, 265 N.W.838 (1936) (“These streams had well-defined banks before entering the marsh, but thereafter spread over the surface and became surface waters.” *Id.* at 253); *see also Ryan v. Southern Natural Gas Co.*, 1987 U.S. Dist. Lexis 9910 (E.D. La. 1987), where the Court found “the marsh at that time was a stable low-energy hydrologic system, with no channelized flow of water through the area.” *Id.* at *2. The same can also be said of sloughs. *Turner v. Big Lake Oil Co.*, 62 S.W.2d 491 (Tex. Ct. App. 1933) (“[I]n order for there to be a natural water course, there must be a channel, consisting of well-defined bed and banks... The general rule is that ravines, swales, sloughs, swamps, and marshes are not water courses.” *Id.* at 493).

Therefore, when the Legislature used the words “bayou,” “slough” and “marsh outlet” in Wis. Stats. §30.10(2) as equivalents for “stream” they were underscoring the

fact that wherever navigable water is located it must be protected under the Public Trust Doctrine, without regard to whether there is a well-defined “bed and bank.”

(vii) The DNR has the Burden to Refute the Uncontroverted Evidence that a Portion of the Proposed Parking Lot Area is Navigable-in-Fact.

In *State v. Bleck*, 114 Wis. 2d 454, 338 N.W.2d 492 (1983), the Supreme Court reached the following conclusion: “The state contends that once it proves navigability in fact, the petitioners' have the burden to persuade by the evidence that the body of water is [not navigable] in order to defeat the state's jurisdiction. We agree.” *Id.* at 459. There is no reason why the State should have it both ways. When a private citizen establishes that waters are navigable-in-fact, the burden should likewise shift to the State to prove that those waters are not navigable. When it is applying for the equivalent of a §30.12 permit, the DNR should be treated just like every other citizen.

(viii) The DNR Failed to Properly Assess the Navigability of the Parking Lot Area.

The DNR never performed a navigability-in-fact test in the area where the parking lot is to be constructed, nor did it undertake any flood flow analysis. It did not present any evidence contradicting the testimony of any of the witnesses described above.

Despite owning the Kraus Site since 2005 the DNR never visited the property during periods of high water in order to undertake a navigability-in-fact test. There also is no evidence that the DNR ever attempted to interview adjacent owners to inquire about the potential location of any navigable water on the Kraus Site or to ask about the site characteristics in times of high water or back flow from North Lake.

Mr. Hudak, who was responsible for determining navigability at the Kraus Site, admitted that he conducted no navigability-in-fact tests at the Kraus Site before issuance of the MC Approval. Hudak Dep., 8-25, p. 26. At his deposition, Mr. Hudak gave the following testimony:

17 | **Q** **And have you ever attempted to float a skiff or**
18 | **any type of canoe or boat in that area?**

19 | **A** **I have not.**

20 | **Q** **In fact, as I understand your testimony, there's**
21 | **never been an effort to float a skiff or a boat**
22 | **anywhere on the Kraus -- the former Kraus**
23 | **property, is that correct?**

24 | **A** **That is correct.**

25 | **Q** **So all we really have to answer for whether or**

1 | **not -- or to the extent of which navigability**
2 | **exists anywhere on the Kraus site would be your**
3 | **judgment?**

4 | **A** **That would be correct.**

Hudak Dep., 8-25, pp. 76-77.

Mr. Hudak further testified at his deposition that he did very little to investigate whether there was a “bed and bank” in this area.

Q. What did you do to determine whether or not there was a bank there or not?...

A I used professional judgment through the course of site investigation to rule out the presence of bank and bed. ...

Q. Did you make any effort to determine whether or not there was a difference in substrate between what's inside the [grove of trees and] what's outside?

A. Substrate as far as visual only. But as far as substrates are concerned, no tests or study were done.

Q. So let me see if I understand you correctly. [Y]ou're testifying then that you never did anything to confirm whether there was a bank -- whether there was or wasn't a bank there, other than your observations?

A. No tests were completed other than my professional judgment.

Hudak Dep., 8-25, pp. 113-114.

Mr. Wakeman testified that there were two ways to determine navigability. One was by means of a “navigability-in-fact” test, and the other was by means of a “navigability-in-opinion test.” Wakeman Dep., 8-25, p. 11.

However, Mr. Wakeman’s “navigability-in-opinion” methodology does not find support in the case law dealing with navigability determinations where the issue is disputed. In *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987), the Court noted that the navigability-in-fact test is the “keystone” for determining whether a body of water is navigable. *Id.* at 589.

The *Menomonee Falls* Court then went on to carefully survey the history of how navigability has been determined over the years in Wisconsin in order to come to terms with a determined effort by the Village of Menomonee Falls to argue for an alternative method of determining the navigability of Lilly Creek. The *Menomonee Falls* Court concluded:

The Village argues that navigability in fact, or the pure ability to float a recreational boat or skiff, is not the sole test of navigability and that other factors must be considered and weighed in a decision regarding navigability.... , Stats. The term ‘navigable waters’ within the meaning of ch. 30, Stats., for the purpose of establishing the state's jurisdiction, means waters that are navigable in fact. *See State v. Bleck*, 114 Wis. 2d

454, 459, 338 N.W.2d 492, 495 (1983). This rule is based on the legislature's declaration of navigability in Section 30.10....

Id. at 585-586.

The *Menomonee Falls* Court observed that at least since 1952 it has been the law in Wisconsin that any stream is navigable-in-fact if it is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes. *Id.* at 586. The Court goes on to underscore that the navigability-in-fact test is the **only** test which the courts will recognize for determining navigability. In the Court's words: "The *Bleck* case is a recent post-*DeGayner* confirmation that **navigability-in-fact is the exclusive basis** for [the] State's regulatory and enforcement jurisdiction [Emphasis supplied]." *Id.* at 591. In *Menomonee Falls* the DNR recognized this fact and conducted the required navigability-in-fact test. Here the DNR has never even attempted such a test.

Therefore, by means of three navigability-in-fact tests, the RRNA has provided substantial and uncontroverted proof that portions of the area where the proposed parking lot will be built are navigable-in-fact. DNR's only evidence to the contrary is Mr. Hudak's "judgment" based upon his observation of that area during dry times.

Because DNR did not consider any portion of that area to be navigable, it concededly did not apply Chapter 30 to the proposed parking lot structure and associated fill. By not applying Chapter 30, its Manual Code Approval is invalid.

CONCLUSION

Chapter 30 applies to "navigable waters," be they stand alone or in wetlands. DNR's intention to place fill into what the DNR admits are the navigable waters along

the access road renders the MC Approval invalid. The evidence also demonstrated that portions of the area where the parking lot is to be built are navigable-in-fact, and DNR offered no countervailing evidence other than its opinion based upon observing that area when it was dry. This also renders invalid the MC Approval. The permit should thus be vacated and remanded with instructions that DNR subject its application to comprehensive Chapter 30 review.

Respectfully submitted this 10th day of February, 2012.

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