



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

In the Matter of the Petition for Contested Case
Hearing Regarding After-the-Fact Wetland
Individual Permit Application IP-NE-2023-71-
0090 to Place Temporary and Permanent Fill into
Forested, Shoreland, Floodplain Wetlands
Adjacent to Lake Butte des Morts in the Town of
Oshkosh, Winnebago County

DHA Case No. DNR-24-0002
DNR Case No. DNR-23-046

DECISION

The PARTIES to this proceeding are:

████ and █████ by
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PROCEDURAL HISTORY

On or about March 24, 2023, █████ and █████ (Petitioners) filed an after-the-fact individual wetland permit application with the Wisconsin Department of Natural Resources (DNR) under Wis. Stat. § 281.36 for the placement of fill into wetlands on the Petitioners' property located at Government Lot 3, Section 32, Township 19 North, Range 16 East, Town of Oshkosh, Winnebago County (Permit Application IP-NE-2023-71-0090). DNR denied the application by order dated September 11, 2023.

On October 10, 2023, the Petitioners filed a petition for a contested case hearing with the DNR to review the denial pursuant to Wis. Stat. §§ 227.42 and 281.36 and Wis. Admin. Code ch. NR 2. DNR partially granted the request for a contested case hearing by letters dated November 9, 2023 and February 15, 2024. On February 27, 2024, the Division of Hearings and Appeals

received, for filing, an original request for hearing from the DNR. Administrative Law Judge (ALJ) Andrea Brauer was assigned to preside.

On March 8, 2024, an informal telephone conference was held, pursuant to Wis. Admin. Code § NR 2.12(1), to address the scheduling of the case. The parties agreed to extend the 90-day period for holding the hearing, pursuant to Wis. Stat. § 281.36(3q)(g), and agreed to a scheduling order for briefing on summary judgment. The Petitioners subsequently filed a motion for partial summary judgment, which the ALJ denied by order dated June 13, 2024.

Formal prehearing conferences were then held on July 24, 2024 and August 6, 2024, at which time the parties to the proceeding were identified pursuant to Wis. Admin. Code § NR 2.08(5), the issues for hearing were discussed, and the hearing and other deadlines were scheduled.

Pursuant to due notice, the contested case hearing was held on December 9 through 11, 2024 in Appleton, Wisconsin. Notice of the hearing was published pursuant to the requirements under Wis. Admin. Code § NR 2.08(5). Testimony was heard from [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED]. The hearing was digitally recorded. The record includes the digital recordings and Exhibits 1-3, 6-11, 13, 15, 17-20, 23-25, 27-34, 101-142, 144-167, 169, 172-173, and 175-176. The parties filed post-hearing briefs as closing argument on January 24, 2025.

ISSUES FOR HEARING

Pursuant to Wis. Admin. Code § NR 2.055, the issues for hearing in this matter are as certified by the DNR in its November 9, 2023 and February 15, 2024 letters granting this contested case hearing. In those letters, the DNR granted a hearing on two of three claims brought by the Petitioners, which DNR identified as follows:

First Claim: “The Petitioners’ March 24, 2023, individual permit application identified the proposed project’s wetland impacts to be 19,785 square feet (0.45 acres). The Department hereby **grants** a hearing on the issue of whether it properly applied the requirements under Wis. Stat. § 281.36(3b) and (3m) to that application. Insofar as the First Claim seeks to challenge the Department’s March 21, 2023, decision that Petitioners’ project was not eligible for a wetland general permit, the claim is not timely under Wis. Admin. Code § NR 2.05 and is therefore **denied**.” *DNR’s Nov. 9, 2023 Letter Granting Contested Case Hearing.*

“The First Claim includes the question of whether the permit decision erroneously applies Department authority under Wis. Stat. § 281.36(3b) and (3m) by asserting jurisdiction over an area the Petitioners allege they have not filled or impacted.” *DNR’s Feb. 15, 2024 Supplemental Grant Letter.*

Second Claim: “The Department hereby **grants** a hearing on the issues of whether the proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid

wetland impacts and whether all practicable measures to minimize the adverse impacts to wetland functional values will be taken (Wis. Stat. § 281.36(3n)(c)1. & 2.).” *DNR’s Nov. 9, 2023 Letter Granting Contested Case Hearing.*

“The Second Claim includes the question of whether the permit decision erroneously applied Department authority under Wis. Stat. § 281.36(3n) in its practicable alternatives analysis.” *DNR’s Feb. 15, 2024 Supplemental Grant Letter.*

DNR denied the Petitioners’ third claim, which DNR determined presented questions of law that were already granted in the first and second claims. The Petitioners were informed of their right to appeal the DNR’s partial denial of their hearing request but chose not to do so.

The issues for hearing were further discussed at prehearing conferences held on March 8, 2024, July 24, 2024 and August 6, 2024, at which time the parties agreed that the issues as stated in the DNR’s contested case hearing grant letters are correct. Accordingly, those were the issues identified in the Notice of Hearing, which was published as a Class 1 notice pursuant to the requirements under Wis. Admin. Code § NR 2.08(5).

Pursuant to Wis. Admin. Code §§ NR 2.13(3)(b) and HA 1.17(2), the Petitioners have the burden to prove both claims by a preponderance of the evidence.

FINDINGS OF FACT

1. In 2018, the Petitioners purchased a property located at 2947 Ryf Road, Oshkosh, Wisconsin for the purpose of building a single-family residential home. The property, which consists of over six acres of land and abuts Lake Butte des Mortes, was undeveloped at the time of purchase. (Ex. 101) (██████████ Hearing Testimony)
2. The property is partially covered in wetlands. A wetland delineation was performed in 2017 by McMahon Associates, Inc. (McMahon) at the direction of the prior property owners (“2017 delineation”). The 2017 delineation identified three wetlands on the property totaling 2.21 acres. (Ex. 107, p. 5-7, 11)
3. By letter dated November 21, 2017, DNR confirmed the 2017 delineation pursuant to Wis. Stat. § 23.321. DNR’s wetland confirmation was based on an October 20, 2017 field site visit performed by DNR staff ██████████ who concurred with the identified wetland boundaries. (Ex. 108, 155) (██████████ Hearing Testimony)
4. After purchasing the property, the Petitioners hired McMahon to develop and construct a new home on the property. In June 2020, McMahon developed a site plan for the Petitioners based on the 2017 delineation. The site plan provided for the construction of a single-family house, attached garage, retaining wall, and driveway. Under the site plan, all of the structures were placed outside of the identified wetland areas, thus avoiding all potential wetlands impacts under the 2017 delineation. (Ex. 101, p. 12; Ex. 122, p. 2-3, 8-9) (██████████ Hearing Testimony)

5. McMahon subsequently began construction of the Petitioners' home later in 2020. Construction was completed in 2022. During construction, the Petitioners modified the site plan, moving the location of the driveway and retaining wall and constructing a detached garage along the driveway. As a result of the site modifications, part of the detached garage was placed in the wetlands, as was a portion of the retaining wall and driveway. (Ex. 103; Ex. 29, p. 191; Ex. 122, p. 8) (██████████ Hearing Testimony)
6. The Petitioners explained that they relocated the driveway and garage to avoid cutting down three mature ash trees, as well as possible considerations regarding the grade of the driveway. The retaining wall was moved to avoid exposure to a utility box. (Ex. 101, p. 11-14; Ex. 119) (██████████ and ██████████ Hearing Testimony)
7. On March 23, 2022, DNR received a notification from the Winnebago County zoning office asserting that it appeared the Petitioners' project had resulted in unauthorized fill into wetlands. (██████████ and ██████████ Hearing Testimony)
8. DNR water management specialist ██████████ and DNR conservation warden ██████████ first visited the site on March 25, 2022 to investigate the alleged wetland fill. (Ex. 113-114) DNR determined, based upon the site visit and follow-up investigation, that the Petitioners' project had resulted in unauthorized impact to wetlands, and DNR initiated a stepped enforcement action against the Petitioners. (Ex. 117, 134, 139, 140) ██████████ and ██████████ visited the site again in April and October 2022. (Ex. 119-120, 132-133) Ultimately, ██████████ informed the Petitioners that they would be required to remove all of the wetland fill, including removal of the detached garage and other structures in the wetlands. He further informed the Petitioners that the project would not likely be permissible because the original site plan prepared by McMahon was a practicable alternative that avoided all impacts to wetlands. (██████████ and ██████████ Hearing Testimony)
9. On March 20, 2023, McMahon requested, on behalf of the Petitioners, after-the-fact coverage for the project under a wetland general permit. (Ex. 111) By email response, ██████████ informed the Petitioners that general permit coverage would not be approved because DNR estimated that the Petitioners had impacted over 10,000 square feet of wetlands. (Ex. 136; *see* Ex. 106, p. 1) The Petitioners did not file a timely appeal of DNR's denial of its general wetland permit request. (DNR Nov. 9, 2023 Letter Granting Contested Case Hearing)
10. On March 24, 2023, the Petitioners filed an application for an after-the-fact individual wetland permit for the project. (Ex. 101-109) As part of the application, the Petitioners included a copy of the 2017 delineation (Ex. 107), a map identifying areas of wetland disturbance (Ex. 108), and an explanation that because of changes to the original site plan the project had resulted in 19,785 square feet of wetland fill. (Ex. 101, p. 12; Ex. 102) The Petitioners requested approval for the existing fill and proposed to offset any wetland impacts through onsite mitigation on the east side of the property. The permit application

asserted that removal of the wetland fill and existing structures was not a practicable alternative because of the cost of removal and because removal would cause additional impacts to the wetlands. (Ex. 101, pp. 14-18) (██████ Hearing Testimony)

11. On September 11, 2023, DNR denied the Petitioners' after-the-fact permit application, concluding that the project had resulted in 19,785 square feet of wetland impacts, including the temporary placement of 15,500 square feet of fill into wetlands and the placement of 4,285 square feet of permanent fill into wetlands. The DNR denied the permit application on the grounds that the project did not meet any of the three statutory permitting criteria because one or more practicable alternatives exist which will not adversely impact wetlands nor result in other significant adverse environmental impacts, and the project will result in significant adverse impacts to wetland functional values and water quality. (Ex. 110, Findings of Fact ¶¶ 16-17, Conclusions of Law ¶ 2).
12. On October 10, 2023, the Petitioners filed the instant request for a contested case hearing pursuant to Wis. Stat. §§ 227.42 and 281.36, and Wis. Admin. Code ch. NR 2, for review of DNR's denial of its after-the-fact permit application. The petition asserted three claims for relief. (Contested Case Hearing Petition, p. 9)
13. On November 9, 2023, DNR granted a contested case hearing on the first two of the Petitioner's claims and denied a hearing on the third claim. On February 15, 2024, DNR issued a supplemental letter, clarifying that the Petitioner's third claim was denied, as the DNR determined that the third claim presented questions of law that are already granted in the first and second claim. The Petitioners did not appeal the DNR's contested case hearing grant decision as outlined in either letter.
14. On February 27, 2024, DNR referred the matter to the Division of Hearings and Appeals for a hearing.
15. On November 15, 2024, assured wetland delineator ████████ completed a new wetland delineation of the subject property at the Petitioners' request based upon a delineation site visit in August 2024 ("2024 delineation"). (Ex. 29) ████████ concluded that two wetlands are present on the site, totaling approximately 2.09 acres. The location of these two wetlands largely overlapped with the location of the three wetlands identified in the 2017 delineation, with the most notable differences in the area near the detached garage. ████████ also determined, based on historical maps and photos of the site as well as his own observations and testing, that a significant amount of clay fill had been placed into the wetlands on the property at various times since at least the 1950s, and as a result the site contained a significant amount of historic wetland fill. (Ex. 29, p. 171-181, 191) (██████ Hearing Testimony)
16. ████████ concluded that the Petitioners' project permanently impacted 1,668.76 square feet (0.038 acre) of wetlands. (Ex. 29, p. 167) He did not identify any temporary fill into wetlands, explaining that it was difficult to identify any temporary impacts from the Petitioners' project because of the presence of historic fill. He noted that during his

August 2024 site visit, he observed historic fill piles that he believed to be unrelated to the Petitioners' project. (██████████ Hearing Testimony)

17. ██████████ also concluded that, based on the characteristics of the wetlands as a result of the historic fill, both wetlands on the property are recently developed wetlands that meet the criteria to be considered "artificial wetlands" for purposes of the artificial wetland permit exemption. (Ex. 29, p. 171-181) (██████████ Hearing Testimony)
18. The Petitioners presented ██████████ findings and the 2024 delineation to DNR. DNR wetland exemption specialist ██████████ disagreed that the wetlands on site meet the definition of artificial wetlands, and DNR declined to recognize an artificial wetland permit exemption. (██████████ and ██████████ Hearing Testimony)
19. The Petitioners did not request a wetland permit exemption prior to initiating construction in 2020, as they only learned of the possibility that an exemption may apply when consulting with ██████████ during the course of the DNR enforcement action in this case. (██████████ ██████████ ██████████ Hearing Testimony)

DISCUSSION

Claim 1: Application of Wis. Stat. § 281.36(3b) and (3m) to the Petitioners' Project

The first issue for hearing is whether DNR properly applied the requirements under Wis. Stat. § 281.36(3b) and (3m) to the Petitioners' after-the-fact permit application. This includes the question of whether the permit decision erroneously applied DNR's authority under Wis. Stat. § 281.36(3b) and (3m) by asserting jurisdiction over an area the Petitioners allege they have not filled or impacted. (DNR Nov. 9, 2023 and Feb. 15, 2024 Letters Granting Contested Case Hearing)

The Petitioners argue that DNR misapplied the statute because it failed to properly consider the impact of historic wetland fill on the property, relied upon an outdated wetland delineation and, as a result, overestimated the size and scale of the project's impact and improperly held the Petitioners responsible for fill they did not place. The Petitioners also assert that DNR erred by requiring an individual wetland permit for the project because the site qualifies for the artificial wetland permit exemption under Wis. Stat. § 281.36(4n).

Nothing in the record establishes that DNR erred in its application of the requirements of Wis. Stat. § 281.36(3b) and (3m). Subsection (3b) sets forth the circumstances under which a wetland general or individual permit is required, and subsection (3m) sets forth requirements related to the submission and review of wetland individual permit applications. Here, DNR properly required an individual permit for the project, the artificial wetland exemption does not apply, and the Petitioners have not established any other error with regard to the procedural or substantive requirements of (3b) or (3m) of the statute. Therefore, the Petitioners have not met their burden of proof with regard to Claim 1.

DNR's Application of Individual Wetland Permitting Requirements (Wis. Stat. § 281.36(3b) and (3m)(a))

The DNR correctly applied the requirements of Wis. Stat. § 281.36(3b) and (3m)(a) to determine that an individual wetland permit was required for the Petitioner's project. The wetland permitting requirement is set forth pursuant to Wis. Stat. § 281.36(3b)(b), which states:

No person may discharge dredged material or fill material into a wetland unless the discharge is authorized by a wetland general permit or individual permit issued by the department under this section or the discharge is exempt under sub. (4), (4m) (a), (4n), or (4r). No person may violate any condition contained in a wetland general or individual permit issued by the department under this section. The department may not issue a wetland general or individual permit under this section unless it determines that the discharge authorized pursuant to the wetland general or individual permit will comply with all applicable water quality standards.

This same standard is restated in Wis. Stat. § 281.36(3m)(a):

Any person wishing to proceed with a discharge into any wetland shall submit an application for a wetland individual permit under this subsection unless the discharge has been authorized under a wetland general permit as provided in sub. (3g) or is exempt under sub. (4), (4m) (a), (4n), or (4r).

While the parties dispute how much fill the Petitioners placed into wetlands on their property, there is no question that the Petitioners' project included the discharge and placement of some amount of fill material into wetlands. This is true under both the 2017 and 2024 wetland delineations as well as the conclusions of the Petitioners' expert witness [REDACTED] and DNR's witnesses [REDACTED] and [REDACTED]. The statute also does not distinguish between temporary and permanent fill, both of which are considered discharges requiring a permit. Here, an individual wetland permit was required unless the discharge was authorized by a wetland general permit or a permit exemption applies. Neither of those circumstances have been met.

First, the DNR already determined prior to this hearing that the Petitioners do not qualify for a wetland general permit. The Petitioners did not timely appeal that determination, and thus DNR's contested case hearing grant letter explicitly states that a hearing is denied on the question of whether the project qualifies for a wetland general permit. (DNR's Nov. 9, 2023 Letter Granting Contested Case Hearing) Pursuant to Wis. Stat. § 281.36(3g)(a)6., DNR may issue a wetland general permit (in lieu of an individual permit) for discharges into a wetland that are part of a development for residential purposes, if the discharge does not affect more than 10,000 square feet of wetland. The Petitioners continue to argue that DNR improperly asserted its jurisdiction over the project based upon the area of wetland impacted by their project, which they assert is actually only 1,668.76 square feet of permanent impact (and possibly an indeterminate amount of temporary fill). (Ex. 29, p. 167; [REDACTED] Hearing Testimony) However, because the Petitioners failed to timely appeal the general permit denial and also chose not to

appeal the DNR's contested case hearing grant decision, it is too late for them to now argue that they should be excluded from individual permitting standards, or that DNR erred in its application of Wis. Stat. § 281.36(3b)(b) and (3m)(a), based upon the size of the area impacted by the Petitioners' project.

Therefore, the only remaining question is whether the project qualifies for a permit exemption. The statute specifies several exemptions to wetland permitting requirements, enacted as part of 2018 Wisconsin Act 183. Specifically, the Petitioners argue that their project qualifies for an "artificial wetland" exemption due to the impact of the historic fill on the character and quality of the wetlands on the site, as determined by their expert witness [REDACTED] As defined in Wis. Stat. § 281.36(4n)(a)1.:

"Artificial wetland" means a landscape feature where hydrophytic vegetation may be present as a result of human modification to the landscape or hydrology and for which the department has no definitive evidence showing a prior wetland or stream history that existed before August 1, 1991, but does not include any of the following: a. A wetland that serves as a fish spawning area or a passage to a fish spawning area. b. A wetland created as a result of a mitigation requirement under sub. (3r).

The permit exemption for artificial wetlands is set forth in Wis. Stat. § 281.36(4n)(d), which states:

Subject to par. (e), the permitting requirement under sub. (3b) does not apply to any discharge into an artificial wetland.

Paragraph (e) sets forth the process for applying for an artificial wetland exemption. Of particular relevance, that process includes a requirement that an exemption must be obtained prior to initiation of the project. As stated in Wis. Stat. § 281.36(4n)(e)1.:

A person who proposes a project that may affect a wetland or landscape feature under par. (b), (c), or (d) shall notify the department no fewer than 15 working days before initiating the project. The notice shall include one of the following to show that the wetland or landscape feature is eligible for the relevant exemption: a. A statement issued by a professional who has investigated the wetland and who is qualified to give such an opinion. b. A wetland delineation prepared by a qualified professional showing the exact location and boundaries of the wetland.

Once the required notice is provided, the project may proceed without a permit unless DNR notifies otherwise within 15 working days. Wis. Stat. § 281.36(4n)(e)2.-4.

DNR's rules further confirm the requirement that an artificial wetland exemption must be requested prior to project initiation. Wisconsin Admin. Code § NR 300.05(4) states:

MANDATORY EXEMPTION REVIEWS. A project proponent shall notify the department no fewer than 15 working days prior to initiating a project that may affect a wetland or landscape feature under s. 281.36 (4n), Stats. The notification shall contain all information specified in sub. (6) and shall be submitted through the department electronic permitting system or through other department-approved systems.¹

DNR has issued program guidance applicable to artificial wetland exemptions, which again states that artificial wetland exemption requests must be submitted to DNR 15 days prior to project initiation. (Ex. 158, p. 2, explaining “[t]he purpose of the submittal process is two-fold: 1. Confirm that the project is eligible and meets the requirements for the permitting exemption; and 2. Provide the stakeholder with regulatory certainty before initiating a project.”)

Here, the Petitioners acknowledge that they did not request a permit exemption prior to initiating their project, as they only learned of the possibility that an exemption may apply when consulting with specialists during the course of the DNR enforcement action in this case.

(██████████ and ██████████ Hearing Testimony) DNR wetland exemption specialist ██████████ testified that in practice DNR generally expects applicants to request an exemption review 15 days prior to initiation of the project. (██████████ Hearing Testimony Dec. 11, 2024; hearing recordings part 2 of 4 at 51:00 and part 3 of 4 at 31:00) ██████████ acknowledged, however, that DNR has on occasion considered and approved artificial wetland exemption requests that were not timely submitted. Three examples of such after-the-fact exemption approvals were provided by the Petitioners as Exhibits 31 through 33.

However, the fact that DNR may have previously deviated from the mandatory timelines set forth in the statute has no bearing here. *See, e.g., Schoolway Transp. Co., Inc. v. Division of Motor Vehicles, Dept. of Transp.*, 72 Wis. 2d 223, 229, 240 N.W.2d 403, 406 (1976) (articulating the basic principle that an agency is duty bound to adhere its practice to clear statutory requirements); *see also Wehr Steel Co. v. DILHR* (App. 1981) 307 N.W.2d 302, 102 Wis.2d 480, modified 315 N.W.2d 357, 106 Wis.2d 111 (holding that an agency action must be set aside if that agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action). The statutes and rules (as well as publicly available DNR guidance) plainly and unambiguously state that an individual is only eligible for an artificial wetland exemption if the exemption is requested 15 days prior to initiation of the project. Because the Petitioners did not timely request an artificial wetland exemption determination 15 days prior to initiating their project as required by Wis. Stat. § 281.36(4n)(d)-(e) and Wis. Admin. Code § NR 300.05(4), they have not met the criteria to qualify for the exemption, and the exemption cannot be granted regardless of the characteristics of the wetlands on the site.

Therefore, the DNR was correct in requiring the Petitioners to obtain an individual permit for their project because the Petitioners placed fill into wetlands, that fill was not authorized by a

¹ In contrast, Wis. Admin. Code § NR 300.05(3), characterizes exemption reviews for the other categories of wetland exemptions as “voluntary,” and states that with regard to those other exemptions “[a] person may submit an exemption determination request to the department if a stakeholder would like to ensure that the proposed activity and site are eligible for an exemption.” No similar mandatory timeline applies.

general permit, and the Petitioners are not entitled to an exemption from permitting. With regard to Claim 1, the DNR properly applied the requirements of Wis. Stat. § 281.36(3b) and (3m)(a) to the Petitioners' project.

Other Requirements under Wis. Stat. § 281.36(3b) and (3m)

The record does not establish any other error in DNR's application of the requirements of Wis. Stat. § 281.36(3b) or (3m). The remainder of subsection (3m) outlines the process for submission and review of individual wetland permit applications. It includes, for example, a requirement that the applicant submit an analysis of practicable alternatives as part of its application. It also sets forth mandatory timelines for DNR's application review, parameters for DNR to request additional information from an applicant, and requirements related to public notice and comment. None of those requirements are implicated in the instant appeal or related to the arguments raised by the Petitioners.

The requirement of Wis. Stat. § 281.36(3m)(i) was also met. That paragraph states that if DNR denies an individual wetland permit "the department shall include in the decision the specific grounds and reasons as to how the applicable provisions of this section were not met." DNR's denial decision, which is six pages long and includes 22 findings of fact and several conclusions of law, provides a comprehensive description of the project, DNR's findings related to the project, and the reasons why DNR determined that the permitting criteria were not met.

Finally, contrary to the Petitioners' assertion, DNR did not misapply the statute by basing its permit denial on the 2017 delineation. That delineation, which the Petitioners themselves provided to DNR as part of their permit application materials, had been confirmed by DNR on November 21, 2017. Pursuant to Wis. Stat. § 23.321(5)(a), DNR's wetland confirmation remained in effect for five years, or until November 21, 2022, meaning that the confirmation was still in effect when the Petitioners completed construction on the property. When the confirmation expired, DNR was no longer required to defer to or concur with those wetland boundaries – but it was not prohibited from considering or continuing to agree with them. DNR staff [REDACTED] further testified that she found the wetland boundaries in the 2017 delineation to be reliable based upon site visits in both October 2017 (for purposes of the wetland confirmation) as well as another visit after the Petitioners' construction was completed for purposes of the permit application review. The 2017 delineation was also the most recent delineation performed on the property at the time the DNR reviewed the Petitioners' permit application. While the Petitioners may disagree factually with the wetland boundaries as set forth in the 2017 delineation, DNR made no statutory error by relying on it.

Considering all of the above, the Petitioners have not met their burden with regard to Claim 1. The record establishes that DNR properly applied the requirements under Wis. Stat. § 281.36(3b) and (3m) to the Petitioners' after-the-fact permit application, and that the permit decision did not erroneously apply DNR's authority by asserting jurisdiction over an area the Petitioners allege they have not filled or impacted.

Claim 2: Practicable Alternatives Analysis under Wis. Stat. § 281.36(3n)(c)1. and 2.

The second issue for hearing is whether the proposed project represents the least environmentally damaging practicable alternative under Wis. Stat. § 281.36(3n)(c)1. and 2., taking into consideration practicable alternatives that avoid wetland impacts and whether all practicable measures to minimize the adverse impacts to wetland functional values will be taken. This also includes the question of whether DNR properly applied its authority under Wis. Stat. § 281.36(3n) in its practicable alternatives analysis. (DNR Nov. 9, 2023 and Feb. 15, 2024 Letters Granting Contested Case Hearing)

The permitting criteria for individual wetland permits is set forth in Wis. Stat. § 281.36(3n)(c), which states:

(c) *Standards for issuing permits.* The department shall make a finding that a proposed project causing a discharge is in compliance with water quality standards and that a wetland individual permit may be issued if the department determines that all of the following apply:

1. The proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts.
2. All practicable measures to minimize the adverse impacts to wetland functional values will be taken.
3. The proposed project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences.

As stated in DNR's contested case hearing grant letters, a hearing has only been granted with regard to the first two permit criteria. However, in its permit denial decision, DNR determined that all three permit criteria were not met, including that the project did not comply with paragraph 3. because the project will result in significant adverse impact to wetland functional values and water quality. (Ex. 110, p. 3-4) (DNR Denial Decision Finding of Fact ¶ 16 and Conclusion of Law ¶ 2) As a result, even if the Petitioners could prevail as to the permit criteria in paragraphs 1. and 2., they still do not qualify for the permit because DNR has not granted a hearing on the question of whether paragraph 3. was met. Claim 2 is therefore moot.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. Mootness is a doctrine of judicial restraint. Courts will decide an issue, even if moot, under limited circumstances such as when the issue will likely reoccur and should be resolved to avoid uncertainty. *State ex rel. La Crosse Tribune v. Circuit Court for La Crosse Cnty.*, 115 Wis.2d 220, 229, 340 N.W.2d 460 (1983). No such exception applies to this appeal, which involves the application of well-settled law to the particular facts of the case. Claim 2 is moot because the determination sought can have no practical effect on the underlying controversy, which is an appeal of DNR's permit denial decision. Regardless of the resolution of the issues stated in Claim 2, the permit cannot be granted.

Because the Petitioner has not met its burden with regard to Claim 1 and the issues raised in Claim 2 are moot, DNR's denial of the Petitioners' after-the-fact individual wetland permit application must be affirmed.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has the authority to hear this case and issue a final decision pursuant to Wis. Stat. §§ 281.36(3q) and 227.43(1)(b) and Wis. Admin. Code § NR 2.155(1).
2. Pursuant to Wis. Admin. Code §§ NR 2.13(3)(b) and HA 1.17(2), the Petitioners have the burden to prove both of their claims by a preponderance of the evidence.
3. The Petitioners did not meet their burden with regard to Claim 1.
 - a. DNR properly applied the requirements under Wis. Stat. § 281.36(3b) and (3m) to the Petitioners' after-the-fact permit individual wetland permit application.
 - b. An individual wetland permit was required for the Petitioners' project because the Petitioners placed fill into wetlands, that fill was not authorized by a general permit, and the Petitioners are not entitled to an exemption from permitting. Wis. Stat. § 281.36(3b)(b) and (3m)(a).
 - c. The Petitioners are not entitled to an artificial wetland permit exemption under Wis. Stat. § 281.36(4n) and Wis. Admin. Code § NR 300.05(4) because they failed to timely request the exemption 15 working days prior to commencing their project.
 - d. The Petitioners have not established any other error in DNR's application of the requirements of Wis. Stat. § 281.36(3b) and (3m).
4. Claim 2 is moot. Even if the Petitioners could prevail as to DNR's application of the permit criteria in Wis. Stat. § 281.36(3n)(c)1. and 2., they still do not qualify for an individual wetland permit because DNR has not granted a hearing on the question of the Petitioners' failure to satisfy the criteria in Wis. Stat. § 281.36(3n)(c)3. Regardless of the resolution of the issues stated in Claim 2, the permit cannot be granted.
5. Therefore, DNR's denial of the Petitioners' permit application was correct and must be affirmed.

ORDER

IT IS HEREBY ORDERED that the DNR's denial of the Petitioners' March 24, 2023 after-the-fact individual wetland permit application (Permit Application IP-NE-2023-71-0090) is AFFIRMED.

Dated at Madison, Wisconsin on February 18, 2025

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, Fifth Floor
Madison, Wisconsin 53705
Telephone: (414) 227-4027
FAX: (608) 264-9885
EMAIL: Andrea.Brauer@wisconsin.gov

By: _____
Andrea Brauer
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 ensure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wis. Admin. Code § NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law

Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to ensure strict compliance with all its requirements.