



STATE OF WISCONSIN
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December 23, 2011

The Honorable J. Mac Davis
Waukesha County Circuit Court, Branch 7
Waukesha County Courthouse
515 W. Moreland Boulevard
Waukesha, WI 53188-2428

Re: *State ex rel. Reddelien Road Neighborhood Association, Inc., et al. v.
Wisconsin Department of Natural Resources*
Waukesha County Case No. 10-CV-5341

Dear Judge Davis:

I have received Attorney Gleisner's draft order dated December 22, 2011, and write to object to the form of the draft pursuant to Local Rule 2.7. While there are some minor editorial errors (there were no arguments on December 12; the reference to the O'Reilly affidavit does not clarify which affidavit; there are some extra colons), my primary concerns relate to the substance of the draft order.

The Court ordered the matter remanded for a contested case hearing on the decision that is the subject of this judicial review proceeding. The Court ordered that the hearing be conducted in accordance with the procedures set forth in Wis. Stat. §§ 227.42-227.50, and it "decline[d] the invitation of the petitioner to try to be any more specific about discovery or procedures to be used." Tr. at 5:4-6.

Contrary to this directive, the draft order includes a "Supplement" by which RRNA attempts to dictate the scope of the hearing. While some of the issues raised in RRNA's petition for judicial review may be appropriate considerations in a contested case hearing on whether or not DNR should have issued general permit coverage for its boat launch construction site, others may not be. These issues were not addressed at the hearing, and they were not addressed by the Court. The scope of a contested case hearing and the procedures for conducting such a hearing are set forth in Wis. Admin. Code ch. NR 2, a copy of which is provided with this letter. Sections 2.12 and 2.13 of this chapter set forth the procedures employed by the administrative law judge to clarify issues, set the scope of discovery, etc. The prehearing process provides RRNA with the proper forum for vetting the issues it identifies in its petition for judicial review. A Supplement to the Court's order is not the proper forum.

The Honorable J. Mac Davis
December 23, 2011
Page 2

In addition, while the Court stated that it would retain jurisdiction over the matter "in case either side is dissatisfied with the outcome of such a hearing, or if there is any reason along the way that it needs to be referred back here" (Tr. 4:24-5:2), RRNA's draft order references issues that may arise "during the period of remand." This language could imply some kind of supervisory authority over the administrative law judge that would be inconsistent with the rules and statutes that apply to contested case hearings.

Enclosed please find a revised draft order that resolves the concerns identified here in a manner that is consistent with the Court's oral ruling. I ask that the Court please sign this order instead if it receives no objection from RRNA under the Court's five-day rule.

Sincerely,



Diane L. Milligan
Assistant Attorney General

DLM:kmr

Enclosures

c w/enc.: Attorney William C. Gleisner, III
Attorney William Harbeck