

North Lake Management District ("NLMD"),
a Public Inland Lake Protection and
Rehabilitation District,

Petitioner,

vs.

Case No. _____

Case Code: 30607

Administrative Agency Review

12CV01751

J. M. DAVIS

The Wisconsin Department of Natural Resources,
an Agency of the State of Wisconsin,
101 S. Webster Street
Madison, Wisconsin 53707

Respondent.

COPY

Reddelien Road Neighborhood Association, Inc. ("RRNA"), et al.

(The Petitioners include: F. Robert Moebius, David Draeger, Frederick A. Hanson, Doris Lattos, James Wozniak, Donna Anderson, Brad Barke, Carol Barke, James Baumgartner, Hilda Baumgartner, Douglas Bruch, Linda Bruch, Charlene Cary, Annabelle M. Dorn, Paulette Draeger, William C. Gleisner, III, Margo Hanson, Christine Janssen, Frank Janssen, Brian Kennedy, Mary Lou Kennedy, Mitchell Kohls, Joseph G. Krakora, Marie Krakora, Charles Luebke, Patricia Luebke, Mary Mitchell, David Mirsberger, Patti Mirsberger, Jill Moebius, Gerhard Palmer, Betty Palmer, Aletta Ruesch, Thomas Schwartzburg, Stephanie Smith, William Timmer, Suzanne Timmer, Deborah Wozniak, Daniel Yuhas, and Jennifer Yuhas),

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CLERK OF COURTS

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JOINT PETITION OF THE NLMD
AND THE RRNA FOR JUDICIAL REVIEW

INTRODUCTION

The North Lake Management District ("NLMD") and the Reddelien Road Neighborhood Association, et al. ("RRNA"), by their attorneys, Donald P. Gallo of

Reinhart, Boerner Van Deuren, S.C. (for the NLMD), and William Gleisner of the Law Offices of William Gleisner and William Harbeck of Quarles & Brady LLP (for the RRNA), hereby petition the Circuit Court for Waukesha County, pursuant to Wis. Stats. §§ 227.52, 227.53 and 227.57, for judicial review of portions of a decision issued May 4, 2012 (the "Decision") by the Wisconsin Division Hearings & Appeals ("DHA"), Administrative Law Judge Boldt presiding, which rejected challenges by the NLMD and RRNA and upheld a Manual Code Approval which the Wisconsin Department of Natural Resources ("DNR") issued to itself on November 4, 2012. A copy of that Decision is attached to this Petition as Appendix A.

THE PARTIES

1. The NLMD is a special purpose unit of government, a public inland lake protection and rehabilitation district organized under Wis. Stats. Ch. 33, with an address of W326 N7050 North Lake Drive, Hartland, WI 53029.

2. The RRNA is a neighborhood association whose members include the 100 citizens who own property on or reside on Reddelien Road and River Road in the Town of Merton in Waukesha County. Its principal offices are located at W322 N7516 Reddelien Road, Hartland, WI 53029. Their neighborhood is directly adjacent to North Lake on the East and a large wetland complex to the North and West of their neighborhood. Forty members of the RRNA are named petitioners in this matter.¹

¹ The forty RRNA members include: F. Robert Moebius, David Draeger, Frederick A. Hanson, Doris Lattos, James Wozniak, Donna Anderson, Brad Barke, Carol Barke, James Baumgartner, Hilda Baumgartner, Douglas Bruch, Linda Bruch, Charlene Cary, Annabelle M. Dorn, Paulette Draeger, William C. Gleisner, III, Margo Hanson, Christine Janssen, Frank Janssen, Brian Kennedy, Mary Lou Kennedy, Mitchell Kohls, Joseph G. Krakora, Marie Krakora, Charles Luebke, Patricia Luebke, Mary Mitchell, David Mirsberger, Patti Mirsberger, Jill Moebius, Gerhard Palmer, Betty Palmer, Aletta Ruesch, Thomas Schwartzburg, Stephanie Smith, William Timmer, Suzanne Timmer, Deborah Wozniak, Daniel Yuhas, and Jennifer Yuhas.

3. Respondent DNR is an executive agency of the State of Wisconsin created by Section 15.34, Stats. DNR has authority under Chapter 285 to process and issue permits under Wis. Stats. §30.12 and related statutes and administrative code provisions. DNR is an “agency” as defined in § 227.01(1), Stats., with its principal offices located at 101 South Webster Street, Madison, Wisconsin, 53703.

4. The DNR is the owner of a certain parcel of property located in the aforementioned wetlands which are adjacent to Reddelien Road and River Road, sometimes referred to as the Kraus Site. The DNR seeks to build a public boat launch on the Kraus Site which will include a 1500 foot long access road and a football field sized parking lot and has issued a permit to itself under its Manual Code Approval process as described below.

THE PERMIT AT ISSUE

5. On November 4, 2010, the DNR issued to itself a Manual Code Approval 3565.1 (hereafter, “MC Approval”), authorizing it to grade more than 10,000 square feet on the bank of North Lake, install a boat ramp structure, and fill 0.16 acres of wetland. The specific Manual Code 3565.1 Approval was issued on that date in DNR File Ref: IP-SE-2009-68-05745-05750 whereby DNR issued a permit to itself which authorized it to construct a public boat launch on North Lake located on property owned by the DNR at SE ¼, S17, T8N, R18E, Town of Merton, Waukesha County (otherwise known as the “Kraus Site”). A copy of this MC Approval is attached as Appendix B.

6. The NLMD and the RRNA filed timely Petitions for Contested Case Hearings regarding the MC Approval in 2010 and also filed timely Petitions for Judicial Review in 2010. The 2010 Petitions for Judicial Review are still pending in Waukesha Circuit

Court as Case Nos. 10CV5085 and 10CV5096, but are at this time subject to a stay in Circuit Court.

7. On December 13, 2010 the DNR issued a written decision denying the RRNA's petition for a contested case hearing in part and granting it in part. A copy of that decision is attached as Appendix C.

8. On December 23, 2010 the DNR also issued a written decision denying the NLMD's petition for a contested case hearing in part and granting it in part. A copy of that decision is attached as Appendix D.

CONTESTED CASE HEARING

9. The ALJ consolidated the petitions of the RRNA and the NLMD and a combined hearing was held on both. The hearing was conducted on September 19-21, 2011 and on October 31 - November 1, 2011. A transcript of that hearing has been prepared. With exhibits and the transcripts, the record of the contested case hearing is several thousand pages in length. The hearing primarily focused on two issues: (1) the RRNA's contention that the construction of the proposed parking lot would impact navigable waters in an area sometimes referred to as the "Grove of Trees" and thus needed to comply with the Chapter 30 permitting requirements; and (2) the RRNA and NLMD's contention that the construction of the proposed access road, which would result in the placement of fill in navigable waters located in the wetland complex, was subject to the requirements of Chapter 30.

THE DECISION

10. On May 4, 2012, Administrative Law Judge Jeffrey Boldt ("ALJ") issued the Decision (Appendix A) including his findings of fact and conclusions of law. The

NLMD and the RRNA are seeking review of that portion of the Decision relating to the proposed access road construction and the ALJ's conclusion that the DNR was not required to separately evaluate whether the fill to be placed in navigable waters adjacent to the access road met the standards under Wis. Stat. Sec. 30.12(3m)(c) for placing fill on the bed of a navigable water, nor was DNR required to make specific findings in the MC Approval in regard to Wis. Stat. Sec. 30.12(3m)(c) for that fill. In addition, the Decision did not address the uncontroverted evidence regarding the existence of a stream which is proposed to be filled by WDNR in the construction of the east-west access road. This stream fill area is below the ordinary high water mark, has a defined bed and bank as testified to by engineer Don Reinbold and surveyor Mark Powers in the hearing record and was located by survey performed by Lake Country Engineering surveyor Mark Powers. This uncontroverted evidence of the proposed placement of fill into a stream triggers the Chapter 30.12(3m)(c)1 requirement of conducting a flood flow capacity analysis which WDNR admitted was not performed. The facts relevant to these issues are not disputed, and the issues are ones purely of law.

THE NLMD AND THE RRNA ARE AGGRIEVED PARTIES

11. The NLMD and its citizens, and the RRNA and its members, will be directly impacted by the Decision upholding the MC Approval and the work that will be performed pursuant to that approval. The members of the RRNA are also directly affected because they are riparian owners who own property adjacent to North Lake and the wetlands where the DNR launch will be built. They will suffer adverse consequences because of the proposed project, including flooding and pollution. The NLMD and its citizens and the RRNA and its members will also be affected as citizens

because the proposed project will destroy navigable waters and cause pollution to North Lake. The increased neighborhood flooding and pollution will affect the NLMD member's recreational enjoyment and scenic beauty of this public waterway and violates the protection of the Lake Management District's statutory purpose.

GROUNDNS FOR REVIEW

12. This case involves the issuance by the DNR of a MC Approval to itself authorizing it to place fill into navigable waters located on a site owned by the DNR.

13. In the Decision, the ALJ found that under the Manual Code Approval process, which the DNR uses when it is reviewing projects where it (as opposed to a private citizen) is the applicant, “the DNR binds itself to the standards (but not procedures) applicable to the appropriate statutes and administrative rules that would apply to similar privately sponsored projects.” *See* Decision, Finding of Fact (“FOF”) 6. During the hearing, the DNR acknowledged that it was subject to the substantive provisions of Chapter 30 when it was the project applicant.

14. The evidence was undisputed, and the ALJ found, that the construction of the proposed access road (which would widen the existing path from approximately twelve feet to twenty-four feet) would result in the placement of fill into navigable waters in the wetland complex alongside the existing access road. *Id.*, FOF 10. The evidence also demonstrated that in connection with the construction of the proposed access road, fill would be placed into a defined stream.

15. It also was undisputed that in issuing the MC Approval, the DNR did not conduct a Chapter 30 evaluation of the proposed access road fill placement nor did it issue a Chapter 30 permit equivalent (or MC Approval) for the proposed access road fill.

Instead, the DNR claimed that it was only required to subject the proposed access road construction to the wetlands water quality standards which are contained in Wis. Admin. Code NR 103.

16. The ALJ concluded that the DNR did not need to evaluate the placement of the proposed access road fill into navigable waters under Chapter 30 because the DNR had evaluated it under Wis. Admin. Code NR 103. *Id.*, FOF 11. The ALJ found, citing to the testimony of the DNR Water Management Specialist who had issued the MC Approval, that the application did not need to undergo a Chapter 30 review because the NR 103 wetland standards in NR 103 are “stricter than and also encompass the standards in Wis. Stat. § 30.12 (3m)(c). *Id.*, FOF 11.” The ALJ supported this conclusion by stating that the DNR had consistently only applied NR 103 (and not Chapter 30) when a proposed activity involved placement of fill in a wetland, navigable or not. *Id.*

17. The DNR claims that NR 103 is all that applies when navigable waters are located within a wetland. However, none of the DNR’s witnesses below could supply authority for this proposition, and the DNR did not supply that authority in its brief. What the undisputed evidence did show is that there are very large areas of “navigable wetlands” to the north and south of the proposed east-west access road, including a defined stream within the north navigable wetlands, which will be impacted by the roadway fill in construction of the access road. There is no evidence that NR 103 lessens or trumps the application of Wis. Stats. §30.12 in such a case, and the explicit requirements of Wis. Stats. § 30.12 (3m)(c) are clearly different than the NR 103 practical alternatives analysis.

18. In addition to the foregoing, despite DNR's assertions that NR 103 was the proper way to assess any impact on navigable waters located within a wetland, the DNR failed to produce any evidence that an NR 103 analysis had ever been performed on the Kraus Site.

19. Wisconsin Statutes Chapter 30 requires that *all* persons obtain a permit before depositing materials on the beds of navigable waters:

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.

Wis. Stat. § 30.12(3m)(c) [Emphasis Supplied]. *See also* Wis. Admin. Code NR § 329.02.

20. The ALJ's conclusions that the MC Approval for the placement of fill into navigable wetlands need not separately be evaluated under and comply with the requirements of Chapter 30 are erroneous, as a matter of law.

21. Wis. Stats. §30.12(3m)(c) specifies that before issuing a permit for placing a structure or deposit in navigable waters the DNR must make the three findings set forth in that subsection (as set forth in paragraph 19).

22. No such findings were made by the DNR in its MC Approval because the DNR did not subject the application, as it relates to the proposed access road, to the Chapter 30 review and approval process. For instance, the DNR acknowledged that no

flood flow analysis on the fill impact to the defined stream had ever been done. *See* TR1, p. 214 and TR2, pp. 48-49.²

23. If MC Approval here does not comply with Wis. Stats. §30.12(3m)(c) it is not saved by the rubric that it is long established agency practice. As a matter of law, a specific statute always trumps agency discretion. If the DNR's MC Approval process violates state law then it must be set aside by a reviewing court under Ch. 227. As Wis. Stats. §227.57(5) makes clear: "The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action...."

24. Similarly, agency action cannot trump or disregard decisions of the Wisconsin Supreme Court. The undisputed evidence was that the proposed access road would result in the placement of fill into the lakebed of North Lake. Thus, the placement of fill will not only impact waters that the DNR has acknowledged are navigable under Wis. Stats. §30.10(2), they are navigable under §30.10(1). A Chapter 30 permit is thus required. *See State v. Trudeau*, 139 Wis. 2d 91, 408 N.W.2d 337 (1987).

25. The ALJ states (at FOF 16) that the elevations of the navigable portions of the wetlands adjacent to the access road where the project plans identify impacts to wetlands is located at elevation 898.34, higher than the OHWM of North Lake (which the ALJ correctly references as 897.76). The exhibits cited by the ALJ in support of FOF 16 (Exhibits 104, 209, 221, 222) do not support this finding. In addition, the

² There are five volumes of testimony from the hearing below. Each volume of the hearing before Judge Boldt has been previously identified as follows: "TR1" standing for the September 19, 2011 transcript, "TR2" for the September 20, 2011 transcript, "TR3" for the September 21, 2011 transcript, "TR4" for the October 31, 2011 transcript and "TR5" for the November 1, 2011 transcript. The TR reference will be followed by a page reference (e.g., TR1, pp. 15-16).

testimony referred to by the ALJ reflects that the ALJ evidently is referring to a different area, an area in the Grove of Trees, not the area adjacent to the proposed access road. In fact, the elevations of the navigable wetlands adjacent to the access road range from 897.32 to 897.68 (*see* Ex. 129), which is below North Lake's OHWM of 897.76. Thus, the ALJ's FOF 16 is erroneous and not supported by substantial evidence in the record and should be set aside pursuant to Wis. Stats. §227.57(6).

26. Based on the foregoing, the ALJ's Decision is:

- (a) Arbitrary and capricious;
- (b) Based on an erroneous interpretation of law; and
- (c) Otherwise not supported by the facts, evidence in the record, and applicable law.

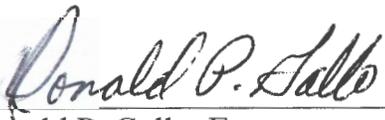
RELIEF REQUESTED

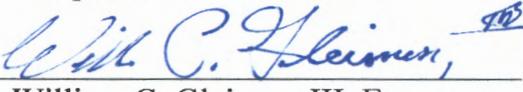
Wherefore, the RRNA respectfully requests the following relief:

1. That the Decision upholding the MC Approval be set aside and/or invalidated due to DNR's failure to specifically subject its application concerning the proposed construction of the access road to the substantive requirements of Chapter 30, including the provisions of Wis. Stats. §30.12(3m)(c).
2. That the Decision upholding the MC Approval be set aside and/or invalidated due to the DNR's failure to specifically issue a Chapter 30 permit for the placement of fill or a structure in the lakebed of North Lake.
3. That the Decision upholding the MC Approval be set aside because it is based on an erroneous interpretation of the law contrary to Wis. Stats. §227.57(5).

4. That the Decision upholding the MC Approval be set aside and or invalidated because it is not supported by substantial evidence in the record contrary to Wis. Stats. §227.57(6)
5. For a determination that no NR 103 analysis was ever done at any time in connection with the project and thus the assertion by the DNR that it must only comply with NR 103 is of no consequence.
6. For such other relief as may be just and proper under the circumstances.

Respectfully submitted this 1st day of June, 2012.

By: 
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APPENDIX A



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 Wetland 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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Waukesha, Wisconsin on September 19-21, and October 31-November 1, 2011, in Madison, Jeffrey D. Boldt, administrative law judge presiding. The parties requested the opportunity to submit written briefs and the last brief received on March 30, 2012.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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Attorney Edwina Kavanaugh
Department of Natural Resources
P. O. Box 7921
Madison, WI 53707-7921

North Lake Management District, by

Attorney Donald P. Gallo
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Reinhart, Boerner, Van Deuren, S.C.
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Reddelien Road Neighborhood Association, Inc., by

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Milwaukee, WI 53202-4426

Wisconsin Wildlife Federation, by

George Meyer, Executive Director
Wisconsin Wildlife Federation
W7303 County Highway CS
Poynette, WI 53955

FINDINGS OF FACT

1. The Department of Natural Resources (the Department), prepared a project application for approval under Department Manual Code 3565.1. The proposed project is located on North Lake in Waukesha County in Section 17, Township 8 North, Range 18 East, in the Town of Merton. The proposed project would include grading in excess of 10,000 square feet on the bank of North Lake, construction and placement of a boat ramp on the bed of North Lake, installation of two outfalls below the ordinary high water mark of North Lake, and the discharge of fill in 0.16 acres of wetland to construct an access road and parking facility. The purpose of the proposed project would be to provide adequate public access to North Lake.

2. On September 9, 2010, the Department issued a Notice of Public Informational Hearing for the Proposed North Lake Public Access and held a public informational hearing. The Department approved the activities noted above for the North Lake Boat Launch project by a Manual Code 3565.1 Approval issued on November 4, 2010.

3. On November 22, 2010, the Department received a petition for a contested case hearing and request for a stay from Attorneys William C. Gleisner, III and William H. Harbeck on behalf of the Reddelien Road Neighborhood Association, Inc. and 40 citizens and property owners who reside on Reddelien Road.

4. On December 3, 2010, the Department received a petition for a contested case hearing and request for a stay from Attorney Donald P. Gallo on behalf of the North Lake Management District.

5. By letter dated December 13, 2010, the Department partially granted and partially denied the petition for hearing from Reddelien Road Neighborhood Association, Inc. and 40 citizens and property owners who reside on Reddelien Road. By letter dated December 23, 2010, the Department partially granted and partially denied the petition for hearing from North Lake Management District.

6. The Department has routinely used the Manual Code procedure for its own projects impacting public waterways since August 27, 1970. (Ex. 203, p.12) The Manual Code procedure has been periodically updated over those years, most recently in October, 1993. (Ex.203) Under the Manual Code procedure the DNR binds itself to the standards (but not the procedures) applicable to "the appropriate statutes and administrative rules that would apply to similar privately sponsored projects." (Ex. 202 and 3)

7. The instant case represents the first known legal challenge to the DNR's use and application of the Manual code approval process, according to longtime DNR employee, Mr. Robert Wakeman, who was the southeast Wisconsin aquatic habitat coordinator for a decade. Wakeman testified as follows:

Q Okay. In your 20 years of experience has the Manual Code process been the approval process for DNR projects impacting waterways or wetlands?

A Yes...

Q To the extent of your personal knowledge, has there ever been a challenge to a DNR Manual Code 3565.1 approval?

A Not to my knowledge. We have received public comments on projects and worked to accommodate those public comments.

Q So there's been no legal challenge in your 20 years of experience?

A Not to my knowledge.

The issues of whether the DNR improperly exempted itself from the Chapter 30 process by using the Manual Code, as the petitioners claim, or is exempt from even this contested case review as the Wisconsin Wildlife Federation has argued, was not referred to the Division of Hearings and Appeals for hearing.

8. Both hearing requests were granted only on limited issues relating to whether an area of the property constitutes navigable waters or is a navigable waterway under Wisconsin law. Further, the Department denied both requests for a stay of the permit pursuant to Wis. Stat. §§ 30.209, because the Department was not subject to the provisions of that statute.

Specifically, the hearing requests were granted only as follows:

The Reddelien Road Neighborhood Association, Inc.'s petition was denied except that the "petition for hearing under s. 227.42, Stats., DNR **GRANTS** a s. 227.42 hearing on Issue # 2 and **DENIES** a s. 227.42 on Issues # 1 and 3 through 8."

Issue #2 related to whether the DNR properly assessed the impact to navigable waters including: whether it failed to identify a navigable water with sufficient specificity. (Petition, p. 32);

The North Lake Management District was denied except that the . . . "petition for hearing under s. 227.42, Stats., DNR **GRANTS** a s. 227.42 hearing on the only dispute that is a mix of a disputed material fact and an issue of law—whether DNR erroneously failed to identify navigable waters at the DNR site (Pet. Pp. 8-9 par. 12.c, p. 24 par. 16.b, and pp. 28-29 par. 18.e and 18.1), and **DENIES** a s. 227.42, Stats., hearing on all remaining issues."

9. On March 8, 2011, the Division of Hearings and Appeals received the Request for Hearing from the Department of Natural Resources.

10. Consistent with its longstanding usual practice, the DNR did not separately evaluate whether the fill to be placed in the navigable wetland adjacent to the access road met the standards under Wis. Stat. § 30.12(3m)(c) for placing fill on the bed of a navigable water, nor did it make specific findings in the MC Approval in regard to Wis. Stat. § 30.12(3m)(c) for that fill. (Wakeman, TR 4, pp. 17-18; 40)

11. The DNR had already evaluated placement of that fill for compliance with the wetland standards in Wis. Admin. Code ch. NR 103, which are stricter than and also encompass the standards in Wis. Stat. § 30.12(3m)(c). (Hudak, Tr. 1, p. 239 lns. 18-25, p. 240 lns. 1-5) For an activity that involves placement of fill in a wetland, navigable or not, DNR has consistently applied the wetland substantive standards and issues of a wetland water quality certification under its CWA § 401 wetland program. (Wakeman, Tr. 4, p. 10 lns. 6-19, p. 12 lns. 16-18) This is as true of individual permits as it is in this manual code case. The specific terms and conditions of the NR 103 wetland fill water quality certification were not an issue referred to the Division of Hearings and Appeals for Hearing. (See: Finding 6 above)

12. There was no significant environmental review that was missing from the NR 103 analysis. (Hudak; Wakeman) Rather, a preponderance of the credible evidence makes it clear that the DNR had already evaluated all environmental impacts to the site and adjacent wetlands and navigable waters. (Hudak, Tr. 4, p 150 lns. 7-10, p. 152 lns. 9-

25, p. 153 lns. 1-11) Further, as part of the practicable alternatives analysis the Department considered “past, present and future” attempts to obtain other suitable public access sites for North Lake.

13. Dr. O’Reilly testified that the DNR failed to identify a stream in the grove of trees area represented by the blue line on the north side of Ex. 2-002. (Tr. 2, p. 49) O’Reilly later clarified his opinion that *portions* of the area of the grove of trees were a stream. (O’Reilly, Tr. 2, p. 140 lns. 10-20, Ex. 2-007 (green marking) O’Reilly failed to testify to facts that would establish that the grove of trees contained a waterway with a distinct bed with aquatic substrate, an upland bank, and an OHWM between the two that had been created by the persistent presence of water in the area. Rather, he testified that in his opinion an OHWM was not needed for a stream whereas it was necessary for a lake. (O’Reilly, Tr. 2, p. 126 lns. 12-19, p. 163 lns. 12-25, p. 164 ln. 24 – p. 165 lns. 1-4) O’Reilly identified that in his opinion the stream was located within a depressional area depicted by DNR stormwater expert Wood that contained only about 10% of the Grove of Trees area. (O’Reilly, Tr. 2, p. 70 lns. 4-6, p. 143 ln. 1- p. 144 and 10 Ex. 215 (pink/red area); see also Ex. 2-007 (green line) O’Reilly testified toward the end of the hearing that the “navigable water” that allegedly existed in the “Grove of Trees” was both a wetland and stream, and that the “stream” he had identified had an OHWM but he just had “not determined exactly where it is.” (O’Reilly, Tr. 5, p. 84 lns. 9-22, p. 98 ln. 25, p. 100 lns. 10-20)

14. No witnesses for the Petitioners testified to any physical or biological indicators such as a lack of vegetation, changes in vegetation or substrate, adventitious roots, or permanent water stains on trees that would indicate that the “Grove of Trees” or any other area was frequently and regularly inundated by water. The only support O’Reilly identified for his alleged “bed and bank” was a slight change in elevation, a depression in the contour line of up to one foot, most of it less, on the landscape in that area. (O’Reilly, Tr. 2, p. 142) However, a slight change in elevation does not create a bed, banks, or an identifiable OHWM.

The next best effort by the petitioners to identify the area as a stream was present in the testimony of Mr. Reinbold. (Tr. 3, pp. 30-32) As Reinbold credibly testified, there is no question that there has been regular flooding in the area and that water has flowed both away from and toward the lake along a line roughly consistent with that drawn by O’Reilly. But that does not make this area a stream. Significantly, no aerial photographs were presented that identified a navigable water that presented itself objectively over time nor was any evidence presented to establish a definite stream channel. Rather, historic aerial photos from 1941 to 2010 do not support the existence of a specific flowing stream channel in this area. (Exs. 206, p. 10)

Further, the day the kayak was paddled and filmed in the grove of trees, July 15, 2010 (ex. 17-F), followed a particularly wet month of June and the second highest rain events in July of that year. (O’Reilly, Tr. 2, p. 112 ln. 5 – p. 113 ln. 25 and Ex. 218) Ms.

Hanson testified that she had not previously navigated anywhere on the DNR property. (Hanson, Tr. 1, p. 152 lns. 19-25) Moreover, Ms. Hansen paddled the area on the specific day that she was directed to by O'Reilly. (O'Reilly, Tr. 2, p. 117 lns. 1-10) Overall, the minimal facts presented do not support a conclusion that a navigable water exists in the grove of trees. Rather, the area meets the legal definition of diffuse surface waters in a floodplain.

15. It is not at all uncommon for a wetland complex to be navigable at certain times of the year during periods of inundation such that you could float a skiff or small kayak. (Hudak, Tr. 1, p. 173 lns 8-15) Further, the testimony of all parties established that water would flow west during high water, high enough to flow over the ice berm at the edge of the lake, and east toward North Lake as it drained from the northern wetlands and that water would pool until it could go over the berm and return to the lake. A stream, in contrast to a wetland complex adjacent to a navigable lake, does not ebb and flow in both directions but rather has a distinct direction of flow. (Hudak, Tr.1, p.53) Diffused surface waters are those waters which are not confined to stream or lake beds and instead flow across or collect on land in a diffused manner. (Hudak, Tr. 4, pp. 190-191) This definition fits precisely with the area in the "grove of trees," which Ms. Hanson and Mr. Wood navigated on several occasions.

16. Mr. Wakeman established an ordinary high water mark (OHWM) for North Lake in 2009. (Tr. 4, pp.18-35) This was found at elevation 897.76. (Ex. 104) Dr. O'Reilly testified that all of the bed elevations of the swale or depression which he opined had a bed and bank were below the OHWM elevation for North Lake and were thus part of the lakebed of North Lake. (Tr.2. pp.86-87) It's hard to square this proposition with his testimony that the area is a stream flowing into North Lake. According to Dr. O' Reilly the putative stream is also a part of the lake proper. However, there is no legal authority cited for such a highly unusual and seemingly inconsistent opinion. Further, the elevations of the navigable portions of the wetlands adjacent to the access road where the project plans identify impacts to wetlands is located at elevation 898.34, higher than the OHWM of North Lake. (Exs. 104, 209, 221, 222)

Mr. Peter Wood, DNR water resources engineer, confirmed these elevations (with some rounding of elevation numbers) and testified at length about the pattern of the flow of water and the locations of the elevations, all above the OHWM of North Lake, of the wetland areas subject to the fill or causing impacts to wetlands in the area. (Tr. 5, pp. 256-319) Water settles ('just sits there') diffusely in low areas in both directions in this area, both toward and away from North Lake, until it reaches elevation 898.68, when a consistent flow occurs toward North Lake at the surface water discharge elevation. (Id., pp. 260-265)

The DNR witnesses all opined that parts of this area are navigable wetlands and parts are diffused surface waters that occur during times of high water flooding. Wakeman opined that it was not uncommon for water to exceed the OHWM, given the

area of the watershed draining into North Lake, the constriction of the outlet, and because “the lake doesn’t have a fast way of draining” it overflows its banks and floods wetland lobes such as those around the project site. (Tr.4, pp. 34-35)

17. The petitioners have not carried their burden of proof in demonstrating that there is an additional stream which should have been evaluated by the Department pursuant to the standards of Chapter 30 in conjunction with the Manual Code approval. Based upon the testimony above, there is also no basis for the conclusion that the swale depression area is part of the lakebed of North Lake. Rather, a clear preponderance of the credible evidence indicates that it is simply a lower swale area subject to occasional flooding which lacks the consistent pattern of flow characteristic of a stream or the hydrological connection to be considered as part of the lakebed of North Lake.

18. Kurt Farrenkopf is the Project Manager at Kapur & Associates, Inc. responsible for the design of the driveway and parking lot. Farrenkopf is a Wisconsin professional engineer who has been building roads for 24 years. (Farrenkopf, Tr. 5, p. 106 lns. 10-20; Ex. 223) He has considerable experience dealing with soils of poor load carrying quality because poor soils and roads built on such soils are common in Wisconsin, especially in the southeastern part of the state. (Giese, Tr. 2, p. 276 lns. 13-25, p. 277 lns. 1-11; Farrenkopf, Tr. 5, p. 115 lns. 1-25, p. 116 ln. 1; Reinbold, Tr. 3, p. 106 lns. 18-25, p. 107 lns. 1-10, p. 132 lns. 1-7) Conducting a partial depth excavation as opposed to a full depth excavation represents an accepted engineering practice recommended in past situations by petitioner’s geotechnical expert Mr. Giese and used in the past by Reinbold and Farrenkopf. (Giese, Tr. 2, p. 272 lns. 7-11; Reinbold, Tr. 3, p. 129 lns. 14-25, p. 130 ln. 1; Farrenkopf, Tr. 5, p. 146 lns. 4-17)

Farrenkopf provided credible and convincing engineering testimony regarding the steps that would be taken to provide a solid base for the access road. Further, an even more detailed description of project methods will be used in the final design phase. Bath included specific recommendations in the GESTRA report to address the presence of Houghton and Roland muck soils. (Ex. 7-007 at Section 3.3.1) In addition, Bath and Farrenkopf discuss methods to address the soils further following the issuance of the GESTRA report. (Farrenkopf, Tr. 5, p. 132 lns. 8-11, p. 145 lns. 10-25, p. 146 lns 1-3) As a result, final plans will incorporate the current recommendations. Specifically, the DNR consultants will follow the following steps recommended by the geotechnical experts: excavate down about three to four feet (beyond the peat material),

1. place a filter fabric/geotextile fabric to separate the marsh soil from the roadway bed and avoid contamination of the roadway bed by the marsh soils,
2. place a uniaxial grid on top which “acts as a snowshoe” to spread load and control vertical settlement, in addition to reducing the need to excavate close to the groundwater table,

3. place usable excavated material such as good granular fill or good excavated material,
4. place the gravel base for roadway, and
5. finally, after observing settlement, place the asphalt.

(Farrenkopf, Tr. 5, p. 138 lns. 4-25, p. 139 lns. 1-7, p. 376 lns. 14-25, p. 377 lns. 1-25, p. 378 ln. 1 and Ex. 7-006)

19. Further, these treatment steps go beyond the recommendations found in 3.3.1 of the GESTRA report. The GESTRA report provides in section 3.3.1 that “[u]niaxial geogrid could be used to reduce the required granular fill layer from 3-feet to 1-foot (does not include subbase gravel). (Ex. 7-006)

20. The greater weight of the credible evidence establishes that the proposed roadway and parking lot will be constructed in a manner that will meet or exceed long established engineering design standards for such projects. (Farrenkopf)

DISCUSSION

This case involves a simple public boat ramp which will provide public access to North Lake. To place the boat ramp, the DNR has to fill a small amount of wetland, just over a tenth of an acre, to construct an access road and parking facility. The Department received plans from an experienced engineering firm to undertake the project, and approved the plans after an extensive environmental review using its longstanding policy under its written manual code.

Two groups of petitioners, the nearby Neighborhood Association and the Lake District, have made a grand effort to raise issues in order to prevent the DNR from building this boat ramp for public access. Both hearing requests were granted only on limited issues relating to whether a small area of the property constitutes navigable waters or is a navigable waterway under Wisconsin law. The Department of Natural Resources granted the hearing requests pursuant to Wis. Stat. §§ 227.42. Accordingly, the petitioners have the burden of proof pursuant to Wis. Admin. Code § NR 2.13(3)(b). The petitioners have not come close to proving their case and carrying their burden of proof on any of the limited issues for which the hearing request was granted.

There is no question that the facts of this case are somewhat complicated and implicate numerous aspects of sometimes overlapping water law regulations. But the law and the Department’s approach to this type of fact situation are both well settled. As it has for many years in cases involving wetland fills placed in either navigable or non-

navigable wetlands, the DNR evaluated the project using the wetland standards under NR 103. For an activity that involves placement of fill in a wetland, navigable or not, DNR has consistently applied the wetland substantive standards and issues a wetland water quality certification under its CWA § 401 wetland program. (Wakeman, Tr. 4, p. 10 lns. 6-19, p. 12 lns. 16-18) This is as true of individual permits as it is in this manual code case. Further, there was no significant environmental review that was missing from the NR 103 analysis.

Mr. Robert Wakeman was the southeast Wisconsin aquatic habitat coordinator for nearly a decade before recently taking another job. Wakeman testified as follows on the two most decisive issues. First, with respect to how the DNR has handled overlapping jurisdictional issues in matters involving the placement of fill in a wetland.

1. Q So would it be fair to say that a lot of wetlands in this State are wet enough to have an ordinary high water mark?

A Yes.

Q So why doesn't the Department place ordinary high water marks on all those wetlands?

A Well, we may place ordinary high water marks on the wetlands for zoning issues, things of that nature, but when it comes to the placement of fill, our authority for fill placement in a wetland is a water quality cert.

Q So we already have jurisdiction?

A Yes

Q . . . Is the rationale of not placing an ordinary high water mark because we already have jurisdiction under water quality certification?

A Yes, we don't always have to do the water quality cert for – if you've got a navigable wetland. If you're placing fill it would be a water quality cert authority.

Q So DNR's consistent practice for those wetlands containing navigable waters would be to require a wetland water quality certification to place fill in those wetlands when no other Chapter 30 regulated activity is associated with the fill, is that correct?

A That's correct.

TR 4, pp. 17-18...

Q Going back to the jurisdictional issue, did you reach an opinion within a reasonable degree of professional certainty regarding what jurisdiction DNR should assert for the fill placed for the access road and impacts resulting from widening that road?

A For fill placed in wetlands it would be a water quality cert.

TR 4, p. 40

It is important to note, as well, that the Department has also routinely used the same procedures and jurisdictional determinations that were the source of so much overheated rhetoric by the petitioners, especially the RRNA.¹ Further, the Department's position appears completely consistent with the holding in *Houslet v. DNR*, 110 Wis. 2d 280, 329 N.W. 2d 219 (1982). In *Houslet*, the DNR rejected a Chapter 30.20 dredging contract solely on the basis of the project's impact upon wetlands. In affirming the Department's denial, the Wisconsin Supreme Court explicitly rejected the idea that the Department must put form over substance in determining what constitutes lake bed or wetlands and that the two are not necessarily mutually exclusive categories. Rather the Wisconsin Court concluded "that the department properly applied its wetland regulations (NR 1.95, the precursor to NR 103) in denying the dredging contract." Obviously, there are some factual differences, this case involves a manual code approval rather than a denial, but the point is the same. It is the substance of the review that matters, not the form. Department of Natural Resources staff personnel consider a great number of projects in any given year, and it makes practical as well as legal sense to use the more restrictive wetlands regulations when there are overlapping jurisdictional possibilities.

The petitioners' primary water regulation expert, Dr. Neal O'Reilly, expressed opinions that would dramatically expand the jurisdiction of the Department of Natural Resources in a way that would reach an absurd result that is inconsistent with longstanding principles of Wisconsin law. Dr. O'Reilly opined that under Wisconsin law a defined bed and banks/OHWM were not required for a stream, but were required for a lake. (O'Reilly, Tr. 2, p. 126 lns. 12-19, p. 163 lns. 12-25, p. 164 lns. 1-25, p. 165 lns. 1-4) He even went so far as to opine that the paved Reddelien Road or the backyards of nearby neighbors could be considered navigable waters under Wis. Stat. 30.10(2) (Tr. 2, p.127) However, paved roads, parking lots, backyards and public roadways are not public navigable waters simply because of occasional flooding. Nothing could ever be constructed anywhere near a waterway in this state if O'Reilly's extreme view were the law of Wisconsin. Fortunately, our appellate courts have long since rejected his expansive views, and they are not the law of the state.

Rather than being a navigable stream, several large areas of the property contain diffused surface waters that are subject to flooding. Much of the property, and nearby properties, is in a floodplain. However, the fact that they regularly flood sufficiently to float a small watercraft does not make them navigable waters of the state. It makes them

¹ The RRNA claimed in its brief that the DNIR had shown "contempt" for nearby residents. There is absolutely no basis in the record for such a poisonous conclusion and every reason to conclude that the DNR employees have behaved in a professional and courteous manner. Unfortunately, both sides engaged in overblown language. The DNR asserted that the petitioner's primary expert committed perjury in the course of his testimony. There is likewise no basis for this conclusion.

diffuse surface waters in a floodplain. (See: *Wisconsin Environmental Law Handbook*, 3rd Ed., Kent, p.41, Sec 3.1.6 *Diffused Surface Waters* and the cases cited *infra*.) “Diffused surface waters are those waters which are not confined to stream or lake beds and instead flow across or collect on land in a diffused manner.” *Id.* This definition fits precisely with the area in the “grove of trees,” which Ms. Hanson and Mr. Wood navigated on several occasions. (Hudak, Tr. 4, pp. 190-191) There is no defined bed and bank or other sufficient indicators of a stream for purposes of DNR jurisdiction as a navigable water of the state.

In *Hoyt v. Hudson*, the Wisconsin Supreme Court reasoned: “*It would be highly unreasonable and mischievous to attach the legal qualities of water-courses to ravines and hollows thus serving as conduits of mere occasional accumulations of surface water.*” 27 Wis. At 660-661 and 662 (emphasis added.) Accordingly, such navigation is not surprising or dispositive, especially given that some of the same area is a navigable wetland.

Wisconsin law has long defined a stream as a watercourse, and it requires a watercourse to have flow or current in a definite channel and a bed and sides or banks. *Hoyt v. Hudson*, 27 Wis. 656, 660-661 (1871). In order to constitute a watercourse, “the channel and banks must present to the eye, on a *casual glance*, the *unmistakable evidences* of the frequent action of running water.” *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390, 392 (1897), *citing* Gould, *Waters* § 41.264 (emphasis added). No such evidence was provided at hearing. Rather, as Mr. Hudak testified, a stream, in contrast to a wetland complex adjacent to a navigable lake, does not ebb and flow in both directions but rather has a distinct direction of flow. (Hudak, Tr.1, p.53)

Further, Wisconsin case law holds that the bed and bank of a navigable water are delineated by the OHWM, defined as the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. *Diane Shooting Club v. Husting*, 156 Wis. 262, 145 N.W. 816 (1914); *State v. McFarren*, 62 Wis. 2d 492, 498 215 N.W.2d 459 (1974).

After years in the field, water regulation experts have a good feel for knowing when a low area has a sufficient bed and bank and continuous water action to meet the Wisconsin definition of stream. The area described by O’Reilly at hearing and at the site inspection just does not have enough of these objective characteristics. Rather, it seems like a fictional construct of a group of nearby private riparian owners who are unhappy to be sharing this area of public waters with a public boat ramp. But the public waters of Wisconsin belong to the residents of the state and are held in trust for all of them, not just lake property owners. This public trust would have little meaning without affording reasonable public access.

Nor did the petitioners establish, despite being given considerable latitude to do so, that any single factor of a Chapter 30 analysis would not be met.

Similarly, the petitioners did not carry their burden of proof that the area outlined by Dr. O'Reilly meets the definition of a slough within the meaning of §30.10 (2). In Wisconsin, sloughs are often associated with large river systems, such as the Upper Mississippi River. (See: <http://dnr.wi.gov/org/gmu/mississippi/visit.htm>) Many of these sloughs have such a common flow pattern that they are named, such as Wyalusing Slough near the state park of the same name (See: http://dnr.wi.gov/org/gmu/mississippi/pdf%20files/Maps%20from%20fishing%20and%20boating%20the%20Miss/f_page33.pdf), or Broken Arrow Slough, near La Crosse. (http://dnr.wi.gov/org/gmu/mississippi/pdf%20files/Maps%20from%20fishing%20and%20boating%20the%20Miss/f_page26.pdf) The depression, navigable wetland and diffused surface waters near North Lake have very little in common with these and many similar well-defined and frequently named water bodies long identified and mapped as Wisconsin sloughs. No evidence was provided that the area meets any established definition of a slough.

Finally, by way of some perspective, it must be noted that if this case were reviewed under the Chapter 30 balancing test, there is strong likelihood that creating a public access would be given strong weight within any such balancing of rights and that the project would likely have been approved. (Hudak, Tr. 4, pp. 168-169)

A preponderance of the credible evidence makes it clear that the DNR had already evaluated all environmental impacts to the site and adjacent wetlands and navigable waters and that the area the petitioners assert is a navigable waterway is rather a slight depression lacking the objective characteristics of a stream that sometimes holds diffused (rather than clearly channelized and defined) surface water during flooding.

The Department's Manual Code approval must therefore be affirmed.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) to hear contested cases and issue necessary orders in cases referred to it by the Department of Natural Resources.
2. The Department of Natural Resources granted the hearing request pursuant to Wis. Stat. §§ 227.42. Accordingly, the petitioners have the burden of proof pursuant to Wis. Admin. Code § NR 2.13(3)(b).
3. The Division of Hearings and Appeals has jurisdiction over only those issues referred to it for hearing by the Department of Natural Resources pursuant to Wis.

Stat. §§ 227.43(1)(b). Many of the issues raised by the petitioners in their brief were not referred to the Division for hearing and accordingly the Division lacks jurisdiction to consider them as a matter of law. Both hearing requests were granted only on limited issues set forth above relating to whether an area of the property constitutes navigable waters or is a navigable waterway under Wisconsin law.

4. The DNR did not fail to account for a stream within the meaning of Wisconsin law. Wisconsin law has long defined a stream as a watercourse, and it requires a watercourse to have flow or current in a definite channel and a bed and sides or banks. *Hoyt v. Hudson*, 27 Wis. 656, 660-661 (1871). In order to constitute a watercourse, “the channel and banks must present to the eye, on a *casual glance*, the *unmistakable evidences* of the frequent action of running water.” *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390, 392 (1897), *citing* Gould, *Waters* § 41.264 (emphasis added). In *Hoyt v. Hudson*, the Wisconsin Supreme Court reasoned: “It would be highly unreasonable and mischievous to attach the legal qualities of water-courses to ravines and hollows thus serving as conduits of mere occasional accumulations of surface water.” 27 Wis. At 660-661 and 662 (emphasis added.) This logic and this holding govern the legal conclusion that the Department did not fail to identify a navigable stream near the project site. The area which the petitioners assert is a stream is rather a slight depression lacking the objective characteristics of a stream. Rather, the area sometimes holds diffused surface water during flooding rather than a clearly “defined channel” and banks with a specific pattern of “flow or current.”

5. The petitioners did not carry their burden of proof that the area outlined by Dr. O’Reilly meets the definition of a slough within the meaning of §30.10 (2). There was simply insufficient evidence that this area had ever been or could reasonably be considered a slough.

6. The proposed project will not detrimentally impact wetlands if the fill is undertaken pursuant to the project plans described in detail above. The project proponent has demonstrated that there are no practicable alternatives to the proposal and that all practicable measures to minimize adverse impacts to the functional values of the affected wetlands have been taken within the meaning of Wis. Admin. Code § NR 103.08(4)(a).

7. Pursuant to Wis. Admin. Code § NR 1.90, it is the goal of the state of Wisconsin to provide, maintain and improve access to the state's navigable lakes, rivers and streams for the public. Public access facilities shall allow for public rights of navigation, related incidental uses and other uses which are appropriate for the waterway. Waterway uses shall be equally available to all waterway users and include enjoyment of natural scenic beauty and serenity. These public rights and uses may be provided by any combination of publicly and privately owned access facilities which are available to the general public free or for a reasonable fee. The department, alone or in cooperation with local government, shall exercise its management and regulatory responsibilities to achieve this goal and to assure that levels and types of use of navigable waters are

consistent with protection of public health, safety and welfare, including protection of natural resources.

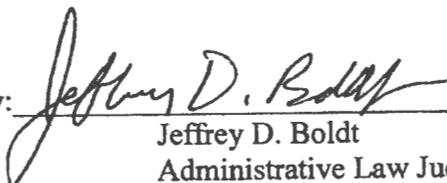
8. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. §§ 1.11 and Wis. Admin. Code Chapter § NR 150. Approval of a Department project involving public access to public waters is a Type III action pursuant to NR 150.03(05)(3). Type III actions normally do not require an EA or EIS and are exempt from the procedural requirements of § NR 150.22 to 150.24.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the Department's decision to issue the Manual Code approval be upheld and the petition for review be dismissed.

Dated at Madison, Wisconsin on May 4, 2012.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: 
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.

APPENDIX B

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: November 4, 2010

FILE REF: IP-SE-2009-68-05745-05750

TO: Lynette Check – Southeast Region Natural Resources Engineer - Milwaukee

FROM: Andrew Hudak – Water Management Specialist - Waukesha *AH*

SUBJECT: North Lake Boat Launch Manual Code 3565.1 Approval

Approval of Department project located in or adjacent to navigable waters

Project Name and Location: The Wisconsin Department of Natural Resources proposes to construct a public boat launch on North Lake. The overall purpose of the project is to provide year-round reasonable public access to North Lake for fishing, boating, and other recreational activities. The project is located in the SE ¼, S17, T8N, R18E, Town of Merton, Waukesha County

Sponsor: Wisconsin Department of Natural Resources

The project has been reviewed and found to be **consistent with the standards** of Chapters 30 and 281 Wisconsin Statutes and Chapters NR 102, 103, 150, 151, 216, 299, 320, 329, and 341 of the Wisconsin Administrative Code.

Conditions of Approval:

1. Conditions of this approval pertain to the application and plans received on October 15, 2009, and revised on September 16, 2010. Written approval of the final construction plans is required from Water Management Specialist Andrew Hudak prior to scheduling the pre-construction meeting.
2. A copy of this approval shall be posted on the project site and visible from the waterway, beginning at least five days prior to construction and remaining at least five days after construction.
3. The project shall be completed before November 15, 2013.
4. Items listed below shall be provided to Water Management Specialist Andrew Hudak by Kapur & Associates or the selected contractor:
 - A. Subsequent modifications and revisions to the construction sequence and erosion control plan.
 - B. Subsequent modifications and revisions to the dewatering plan to manage all water pumped from excavations for the installation of the access road stormwater pipe storage units, the bio-filter, the boat launch ramp and any other excavations requiring dewatering, including potential groundwater withdrawal.
 - C. A plan for removal and off-site disposal of any surplus excavated and dredged materials.
 - D. A construction note detailing the permanent site stabilization within 14 days of final grading. All disturbed areas shall be seeded and stabilized with mulch or erosion control blankets specified on the approved Product Acceptability List.
 - E. A cross section shoreline plan detail for the outlet of the French drain and bio-filter system. A deposit of natural river stone or fieldstone less than two cubic yards shall be used for bedding and protecting the outfall structure, provided the material is limited to the area beneath or within four feet of the structure. Dredging for the placement of the outfall structure may not exceed two cubic yards.
 - F. A construction detail for the screening fence along the southern property boundary indicating the location of support post installation in the wetland.



- G. Any revisions to the pavement detail and cross sections for the proposed road and parking lot areas.
 - H. The final landscape and buffer plan for the areas between the boat launch parking lot and the lake. The plan shall include the proposed species and density of native trees, shrubs, herbaceous plantings, and lakeshore emergent plantings.
3. A pre-construction meeting shall be scheduled four days prior to beginning construction. The meeting must include the project sponsor, the contractor, a Department of Administration representative, Water Management Specialist Andrew Hudak and Stormwater Engineer Bryan Hartschok.
 6. Silt fence, turbidity barrier, tracking pad and other best management practices identified on the approved erosion control plan shall be installed prior to the start of construction activities.
 7. The public boat launch ramp shall be constructed according to the draft final plan sheet C105 dated February 15, 2008, or by approved modifications. Launch ramp protection may consist of 24 inch diameter quarried limestone riprap submerged at the toe of the ramp. The side slopes of the ramp shall be protected with eight inch to 30 inch diameter natural fieldstone boulders.
 8. The construction of the public boat launch access road and parking lot may impact up to 7,011 square feet (0.16 acres) of wetland.
 9. This approval may be modified or revoked if the project is not completed according to the terms of this authorization and applicable Wisconsin Statutes and Administrative Codes.
 10. This manual code approval is conditioned upon compliance with the federal authorization under section 404 of the Clean Water Act issued by the U.S. Army Corps of Engineers on July 30, 2010.

Findings of Fact:

1. The Wisconsin Department of Natural Resources has submitted materials under its internal approval process (Manual Code 3565.1) to obtain approval to grade more than 10,000 square feet on the bank of North Lake, to install a boat ramp structure and two outfall structures on the bed of North Lake, to install four culverts crossings over the wetlands and to fill up to 0.16 acres of wetland for the construction of a public boat launch on North Lake.
2. North Lake is a 437 acre natural drainage lake with the Oconomowoc River as both its inlet and outlet. North Lake and portions of its wetland complex are navigable-in-fact at the project site and are impacted by the proposed project. North Lake is identified as an Area of Special Natural Resource Interest under Section NR 1.05(3), Wisconsin Administrative Code as waters that contain endangered or threatened species or aquatic elements identified in the Wisconsin Natural Heritage Inventory.
3. North Lake in Waukesha County does not meet Sections NR 1.90 to 1.91, Wisconsin Administrative Code standards for reasonable public boating access.
4. The Department proposes to construct a year-round public boat launch with 16 car-trailer stalls, which includes one designated disabled accessible car-trailer stall and two car only stalls, which includes one designated as a disabled car-only stall, and a launch ramp.
5. The Department proposes to fill up to 0.16 acres of wetland. The wetlands were delineated by the Southeastern Wisconsin Regional Planning Commission (Commission) on July 24, 2003, and the Commission and the Department on July 8, 2008, and August 14, 2008. This delineation was field verified and concurred with by the U.S. Army Corps of Engineers on June 30, 2010. The U.S. Army Corps of Engineers issued a Letter of Permission (2008-04314-DJP) authorizing the wetland fill on July 30, 2010.

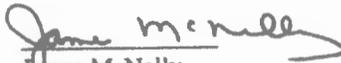
6. The Department completed field reviews on October 16 and October 24, 2009, and on September 1, 2010, and evaluated the project described in the application and plans submitted on October 15, 2009, and modifications provided on September 16, 2010.
7. The Department held a public informational hearing on September 30, 2010, pursuant to Chapter NR 310 of the Wisconsin Administrative Code.
8. The Department comment period ended on October 12, 2010, at 4:30 p.m. The Department received 197 comments for the record, including 103 opposed to the Department site, 93 favoring the Department site, and one neutral. The input received by the Department during the comment period was categorized as follows:
 - A. Public safety in the area will be impacted and emergency response time to the Department's public boat launch would be greater than at the Highway 83 site.
 - B. The Highway 83 site proposed by the North Lake Management District is a better alternative to construct a public boat launch.
 - C. The amount of wetland impact at the Department site was underestimated and an accurate estimate of wetland impact would result in significant adverse impacts to the functional values of the wetlands.
 - D. The Department site development will cause flooding and block natural drainage.
 - E. The Department development costs are underestimated. The development of a launch at the Highway 83 site would cost less.
 - F. Fish and wildlife resources will be impacted by the loss of wetland habitat and destruction of a unique sandbar.
 - G. Development of the Department site will reduce water quality of North Lake due to inundation of area septic systems, increase direct agricultural runoff due to the wetland fill and increase storm water runoff from the boat launch and parking area.
 - H. The Dual Site proposal for public access to North Lake should be the selected alternative.
 - I. The small community of North Lake will not benefit from the economic impact of development of an access on the Department site.
 - J. The Department should not consider any additional site alternatives but should build a public boat launch at its site to provide adequate public access.
 - K. Development of the Department site will impact the natural scenic beauty of the shoreline of North Lake.
 - L. Construction of a parking lot at the Department site will result in filling navigable waterways.
 - M. Development of the Department site will increase the potential for aquatic invasive species to enter North Lake.
9. Department resource managers concluded that:
 - A. No significant adverse wetland and environmental impacts would occur from construction of a public boat launch at the Department site.
 - B. Lakebed substrate at the launch ramp location is comprised of sand, gravel and cobble with no native aquatic plant beds. This area of the lake provides limited habitat to fish for feeding and spawning and no significant value to wildlife or water quality.
 - C. The wetland complex on and adjacent to the Department site is approximately 12 acres. The impacts to this wetland complex include 0.14 acres of fill to expand the existing access road and 0.02 acres of fill in a grassy area at the location of the proposed parking lot. The proposed wetland fill is not expected to cause significant impacts to the wetland's high functional values of providing flood storage capacity, water quality protection, groundwater recharge and discharge aesthetics, and wildlife habitat due to the size of the remaining wetland.
 1. The wetland complex contains:
 - High to exceptional functional values for wildlife habitat, flood protection, water quality protection, groundwater recharge and discharge, and aesthetics.
 - Moderate functional values for fisheries and floristic diversity.
 - Low functional value for shoreline protection.

10. The basic project purpose is to construct a public boat launch on North Lake. Construction of a public boat launch is a water dependant activity. Construction of a public boat launch is not a wetland dependant activity.
11. The Alternatives Analysis for the proposed project concluded:
 - A. The *do nothing* alternative does not provide year-round reasonable public access to North Lake for fishing, boating, and other recreational activities and does not meet the basic project purpose.
 - B. No existing platted access sites are suitable for developing reasonable public boating access to North Lake
 - C. Access at the North Lake Yacht Club is impracticable. That site is a privately owned club and its current use and configuration preclude development of a public boat launch.
 - D. Access development at the Cory Oil site is impracticable due to limited depth of the Oconomowoc River, the requirement for extensive dredging and the unavailability of winter access.
 - E. Access development at the Highway 83 site would result in significant adverse environmental impacts as identified in the findings of fact within the Department's decision dated March 1, 2010.
 - F. Alternatives to minimize wetland impacts were evaluated including the use of the existing access roadway, bridging the wetlands, developing a one-lane road with pullouts, and extending Reddelien or Silver Spring Roads to the Department site. These alternatives do not significantly reduce or eliminate adverse wetland or environmental impacts.
 - G. The Dual Site proposal was rejected because it would result in the greatest amount of wetland impact and significant adverse environmental consequences.
12. The Department public boat launch complies with the standards of Chapters 30 and 281 Wisconsin Statutes and Chapters NR 102, 103, 150, 151, 216, 299, 320, 329, and 341 of the Wisconsin Administrative Code.
13. The Department public boat launch will not adversely affect water quality or increase water pollution in the wetlands or in North Lake and will not cause environmental pollution as defined in subsection 283.01, Wisconsin Statutes.
14. The Department public boat launch meets Sections 1.90 and 1.91 of the Wisconsin Administrative Code public access standards and will provide reasonable year-round access to North Lake, a navigable water of the State. Meeting this standard will allow the Department to provide natural resources enhancement services including fish surveys, fish stocking, and eligibility for lake management grants.

Conclusions of Law:

1. The Department has authority under Manual Code 3565.1 to construct the project consistent with the above indicated Wisconsin Statutes and Administrative Codes

RECOMMENDED:


James McNelly
Southeast Region Water Leader

4 Nov 10
Date

APPROVED:


Gloria L. McCutcheon
Southeast Region Director

November 4, 2010
Date

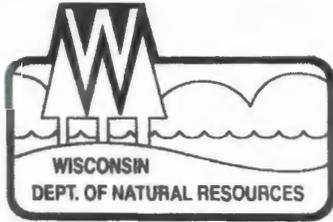
Notice of Appeal Rights:

If you believe that you have a right to challenge this decision, the Wisconsin Statutes and Administrative Rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision, a petition must be filed with the appropriate circuit court and be served on the Department. Such a petition for judicial review must name the Department of Natural Resources as the respondent.

To request a contested case hearing, if applicable, the Wisconsin Statutes and Administrative Rules establish time periods and procedural requirements for such requests. A petition for hearing must be served on the Secretary of the Department of Natural Resources. The filing of a request for a contested case hearing does not extend the time period for filing a petition for judicial review.

cc: Department of Natural Resources – Jim Morrissey
U.S. Army Corps of Engineers – Dale Pfeiffle
Waukesha County Parks and Land Use – Dale Shaver, Director
Town of Merton – Richard Morris, Chairman
North Lake Management District – Jerry Heine
Waukesha Environmental Action League – Russ Evans
North Lake Development Group
Reddelien Road Neighborhood Association
Fritz and Margo Hanson
Thomas and Edda Peters

APPENDIX C



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
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TTY Access via relay - 711

December 13, 2010

ATTORNEY WILLIAM C. GLEISNER III
LAW OFFICES OF WILLIAM C. GLEISNER III
300 COTTONWOOD AVE. SUITE NO. 3
HARTLAND WI 53029

SUBJECT: Petition for a Contested Case Hearing Pursuant to Wis. Stats. ss. 227.42, 30.209, and Wis. Admin. Code s. NR 299.05(5) In Re. North Lake Boat Launch Manual Code 3565.1 Approval dated November 4, 2010 (IP-SE-2009-68-05745-05750)

Dear Attorney Gleisner:

I am responding to your petition for a contested case hearing on behalf of your clients Reddelien Road Neighborhood Association ("RRNA") and 40 individuals who own property and/or reside on Reddelien Road. Your petition was received by Secretary Matthew Frank, Department of Natural Resources ("Department" or "DNR") on November 22, 2010. You seek a contested case hearing under the legal authorities cited above on an agency action – a DNR approval pursuant to Manual Code 3565.1 ("MC Approval").

The MC Approval at issue authorizes 4 activities needed to build the access road, parking lot, and boat launch: (1) grading more than 10,000 square feet on the bank of the lake; (2) installing a boat ramp and 2 outfall structures on the bed of the lake; (3) installing 4 culverts crossing over wetlands; and (4) placing fill in up to .16 acres of wetland. (MC Approval Finding of Fact No. 1)

PETITION UNDER S. 227.42, STATS.

To obtain a hearing under s. 227.42 there must be a dispute of material fact. A "material fact" is a fact of consequence to the merits of the litigation, i.e. a fact that has a bearing on the decision. A petition alleging only disputes of law and immaterial facts does not meet the criterion that requires a "dispute of material fact."

Storm Water Issues: To the extent that the issues for which you seek review (Pet. Sec. IV pp. 31-34) deal with storm water, the petition for hearing under s. 227.42, Stats., is **DENIED**. Issues # 3, 4, and 5 in your petition deal with storm water. (Pet. Sec. IV Issues # 3, 4, & 5, pp. 32-33) To the extent that Issues # 3, 4, and 5 may be disputes of fact rather than issues of law, they are irrelevant and immaterial to the activities authorized by the MC Approval. When a Storm Water Permit is required for a project, storm water pollutants are considered to be adequately managed and regulated under the Storm Water Permit issued for the project. Any disputes of fact or questions of law in Issues # 3, 4, and 5 may be relevant, material, or both to the issue of whether DNR should have granted coverage to the boat launch project under WPDES General Permit No. WI-S067831-3: Construction Site Storm Water Runoff. However, the decision to grant Storm Water Permit coverage was not authorized by this MC Approval, but by a decision issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook. That decision was not appealed by you or any other person and is now final.

Wetland Delineation Issues: To the extent that the petition deals with the wetland delineations, the petition is **DENIED** for the reasons outlined below for the denial of your petition for hearing under s. NR 299.05(5), Wis. Admin. Code, and because any disputed facts regarding the issue of wetland delineations for a federal water quality certification under s. 401 of the federal Clean Water Act are immaterial because the federal U.S. Army Corps of Engineers is the agency making the delineational and jurisdictional determinations. Issue # 1 a, c, d, e, & f in your petition deals with wetland delineations. To the extent that Issue # 8 may deal with wetland delineations, the petition is also denied. (Pet. Sec. IV Issues # 1 & 8, pp. 31-32 & 34)

Constitutional Issues: As an administrative agency the Division of Hearings & Appeals ("DHA") is not authorized to decide constitutional issues. Accordingly, to the extent that the petition deals with constitutional issues (e.g., due process), the petition is **DENIED**. Issues # 6 and 7 of your petition deal with constitutional issues. To the extent that Issue # 8 may deal with constitutional issues, the petition is also denied. (Pet. Sec. IV Issues # 6-8, pp 33-34)

Issues of Law: To the extent that the petition alleges that statutory due process rights were violated or that DNR failed to properly apply applicable law in its determination (including its practicable alternative analysis) that water quality certification should be granted for the activities authorized by the MC Approval, the petition is **DENIED** because those issues are purely issues of law rather than disputes of material facts. Issues # 1 b and 8 of your petition are purely issues of law.

In sum, in regard to your petition for hearing under s. 227.42, Stats., DNR **GRANTS** a s. 227.42 hearing on Issue # 2 and **DENIES** a s. 227.42 on Issues # 1 and 3 through 8.

PETITION UNDER S. 30.209, STATS.

You request (Pet. Sec. III, Ct. II, pp 25-28) a hearing and stay under s. 30.209(1m)(a) and(c), Stats. S. 30.209(1m), Stats., states:

30.209 Contracts and individual permits; administrative and judicial review... (1m) REQUEST FOR ADMINISTRATIVE REVIEW. (a) Any interested person may file a petition with the department for administrative review within 30 days after any of the following decisions given by the department:

1. The issuance . . . of any individual permit issued or contract entered into under this subchapter

...
(c) The activity shall be stayed pending an administrative hearing under this section, if the petition contains a request for the stay showing that a stay is necessary to prevent significant adverse impacts or irreversible harm to the environment

(emphasis added). S. NR 310.03, Wis. Admin. Code, states:

NR 310.03 Definitions In this chapter... (4) "Individual permit" means a permit issued by the department for a single project under specific applicable provisions of ch. 30, Stats., excluding s. 30.206, Stats. For purposes of this chapter, "individual permit" includes a contract issued under s. 30.20, Stats.

(emphasis added)

Authorizations issued under Manual Code 3565.1 are not "individual permits" issued under ch. 30, Stats., because the Department of Natural Resources is not subject to ch. 30, Stats., or rules promulgated thereunder. Statutes in general terms in which the state is not named, or which apply expressly to private rights, do not bind or affect rights of the state, since it must be presumed the Legislature does not intend to deprive the state of any prerogative, rights, or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible. *State v. City of Milwaukee*, 145 Wis. 131 (1911). See also *City of Milwaukee v. McGregor*, 140 Wis. 35 (1909); *Wisconsin Veterans Home v. Division of Nursing Home Forfeiture Appeals*, 104 Wis.2d 106 (Ct. App 1981). Manual Code 3565.1 makes this distinction clear when it states that:

All Department projects, where Chapters 30 and 31, Wis. Stats., and Chapters 103, 115, 116, 117 or 118, Wis. Adm. Code would apply if built by a private individual, must receive the approval of the District [now Regional] office prior to construction.

(emphasis added)

Though DNR is not bound by ch. 30, in 1970 it initiated the MC Approval process in Manual Code 3565.1, and for 40 years has voluntarily evaluated and authorized all DNR proposed projects that may affect waters of the State under the MC Approval process to ensure they are environmentally sound. Manual Code 3565.1 states:

Decisions [on DNR projects that may affect waters of the state] will be based on the standards in the appropriate statutes and administrative rules that would apply to similar privately sponsored projects. ...

(emphasis added) Though not bound by the procedural requirements of ch. 30, DNR solicits public input when authorizing by MC Approval any DNR project that may affect waters of the state by holding at its discretion informational hearings like those required by s. NR 310.16 Wis. Admin. Code. Manual Code 3565 1 states:

[The District (now Regional) Water Management Supervisor/Designee ...] shall determine if an informational hearing should be held for projects which may affect nondepartment lands or interests or may be considered controversial.

Indeed, the MC Approval decision that is the subject of your petition indicates that comments received on the boat launch project during the 13 day comment period included comments on many of the Issues that you raise in your petition. (MC Approval Finding of Fact No. 8, B, C, D, F, G, H, & L)

Because DNR is not subject to ch. 30 and the MC Approval is not an individual permit issued under ch. 30, your request for an administrative hearing and stay pending such hearing under s. 30.209, Stats. is **DENIED**.

PETITION UNDER S. NR 299.05(5), WIS. ADMIN. CODE

The MC Approval granted DNR a s. 401 Clean Water Act Water Quality Certification that authorizes DNR to place fill (including a road and 4 culvert structures) in up to .16 acres of wetland pursuant to the conditions in the MC Approval, which include compliance with the federal authorization under s. 404 of the Clean Water Act issued to DNR by the U.S. Army Corps of Engineers on July 30, 2010. (MC Approval Findings of Fact Nos. 1, 5, & 12 and Conditions Nos. 8 & 10)

You request a hearing under s. NR 299.05(5), Wis. Admin. Code, alleging that the "permit" violates s. 281.15, Stats., and s. NR 299.04, Wis. Admin. Code. (Pet. Sec. III, Ct. III, pp. 28-30) S. NR 299.05(5) states:

NR 299.05 Preliminary and final department action. ... (5) Any person whose substantial interests may be affected by the department's determination may, within 30 days after publication of the notice, request in writing a contested case hearing on the matter under ch. 227, Stats. A request for a contested case hearing shall include a written statement giving specific reasons why the proposed activity violates the standards under s. NR 299.04 (1) (b) and provide specific information explaining why the petitioner's interests are adversely affected by the department's determination. The request for hearing shall also include a written statement specifying that the petitioner will appear and present information supporting the petitioner's objections in a contested case hearing. The department may request additional information from the petitioner to support the allegations in the petition prior to granting or denying a hearing request. In any case where a class 1 notice on the application is otherwise required by law or where a contested case hearing on an application for water quality certification will be held under some other specific provision of law, the notice and hearings shall be combined.

(emphasis added) For your petition to be legally sufficient it must give specific reasons why the proposed activity violates the standards under s. NR 299.04(1)(b). In your petition the specific reason you give is that placing the fill and road in the wetland violates s. 281.15 because the storm water treatment system for the road is not designed to remove oils and grease, toxic organic compounds, nitrogen compounds, or deicing compounds such as salt that are found in roadway runoff, and that failing to do so will result in increased pollution to North Lake (Pet. Sec. II, Sec. C.iii, p. 12 & Sec. IV, No. 5 p. 33)

Since s. NR 299.04(1)(b)3 and 6 are the only standards under s. NR 299.04(1)(b) that refer to s. 281.15, Stats., you apparently are alleging that runoff from the road would violate those standards. It is unclear from your petition whether you are alleging that the runoff will not meet water quality standards for wetlands, surface waters, or both. Water quality standards promulgated by DNR pursuant to s. 281.15, Stats., for wetlands are listed as functional values in s. NR 103.03(1). Criteria used to assure maintenance of wetland functional values are listed at s. NR 103.03(2), and criteria for water quality standards promulgated by DNR pursuant to s. 281.15 for surface waters are listed at s. NR 102.04(1). The criteria you apparently allege will be violated are:

NR 103.03 Wetland water quality standards....(2)... (a) Liquids, fill or other solids or gas may not be present in amounts which may cause significant adverse impacts to wetlands;
(b) Floating or submerged debris, oil or other material may not be present in amounts which may interfere with public rights or interest or which may cause significant adverse impacts to wetlands;
(c) Materials producing color, odor, taste or unsightliness may not be present in amounts which may cause significant adverse impacts to wetlands;
(d) Concentrations or combinations of substances which are toxic or harmful to human, animal or plant life may not be present in amounts which individually or cumulatively may cause significant adverse impacts to wetlands;

and/or:

NR 102.04 Categories of surface water uses and criteria. (1) GENERAL. ... Practices attributable to ... land development or other activities shall be controlled so that all surface waters including the mixing zone meet the following conditions at all times and under all flow and water level conditions:
(a) Substances that will cause objectionable deposits on the shore or in the bed of a body of water, shall not be present in such amounts as to interfere with public rights in waters of the state.
(b) Floating or submerged debris, oil, scum or other material shall not be present in such amounts as to interfere with public rights in waters of the state.
(c) Materials producing color, odor, taste or unsightliness shall not be present in such amounts as to interfere with public rights in waters of the state.
(d) Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance, nor shall substances be present in amounts which are acutely harmful to animal, plant or aquatic life.

The standards in chs. NR 103 and 102 also applied to the decision as to whether DNR should grant coverage to the boat launch project under WPDES General Permit No. WI-S067831-3: Construction Site Storm Water Runoff:

NR 103.06 Applicability. ... (1) Activities subject to the requirements of this chapter include, but are not limited to:
...
(b) Permits and approvals under chs. 281, 283, 289 and 291, Stats.,
(c) Water quality certification under ch. NR 299;
(e) Department development and management projects....

NR 102.02 Applicability. The provisions of this chapter are applicable to surface waters of Wisconsin.

WPDES GENERAL PERMIT No. WI-S067831-3 provides:

In compliance with the provisions of ch. 283, Wis. Stats., and chs. NR 151 and 216, Wis. Adm. Code, landowners engaged in land disturbing construction activities including clearing, grading and excavating activities are permitted to discharge...

1.4.1 [Water Quality Standards.] This permit specifies the conditions under which storm water may be discharged to waters of the state for the purpose of achieving water quality standards contained in chs. NR 102 through 105 and NR 140, Wis. Adm. Code.

(emphasis added) The decision to grant coverage was issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook and is now final. The Storm Water General Permit coverage decision determined that the storm water system will meet all water quality standards promulgated under s. 281 15, so that issue may not be collaterally attacked in a contested case hearing on this MC Approval

On p. 33 of your petition you also apparently allege that placement of the fill and parking lot as proposed will alter the drainage patterns of the wetlands into North Lake so that the wetlands drain over your clients' properties rather than over the DNR property, but do not link such allegations to any of the standards of s. NR 299.04(1)(b) as required by s. NR 299.05(5).

Even if you had properly alleged a specific reason why the actions authorized by the Water Quality Certification violated the standards under s. NR 299 04, the delineation of the wetlands on the DNR site is not an issue that would be properly before a Wisconsin administrative law judge in any hearing granted under s. NR 299.05(5). The determination regarding the presence, area, and federal vs. nonfederal character of the wetlands on the DNR site is a decision of the U.S. Army Corps of Engineers. The Corps rendered 2 jurisdictional

determinations dated June 30, 2010 (Wetland 1) and July 30, 2010 (Wetland 2) determining the area and character of the wetlands on site, and in July 30, 2010 the Corps' issued DNR a Clean Water Act s. 404 permit (No. 2008-04314-DJP) authorizing the fill. The Corps' Decision Memorandum dated June 26, 2010, shows that it evaluated the area you are alleging is wetland and determined that it was not wetland and did not meet the criteria for wetlands used in the *Corps of Engineers Wetland Delineation Manual (1987 Manual)*. Since the Corps is the agency that made this determination, any dispute regarding the delineated area and federal vs. nonfederal character of the wetland is within the jurisdiction of the Corps, not DNR.

Because you have not properly alleged a specific reason why the actions authorized by the Water Quality Certification violated the standards under s. NR 299.04 as required by s. NR 299.05(5), your request for a contested case hearing under s. NR 299.05(5) is **DENIED**.

Please contact Department attorney Edwina Kavanaugh (608-264-8991) if you have any questions regarding this matter.

Sincerely,

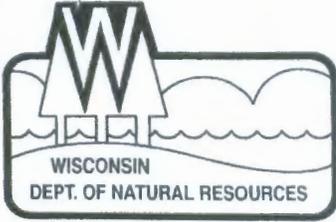

Matthew J. Frank
Secretary

cc: Edwina Kavanaugh – LS/8

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to ss. 227.52 and 227.53, Stats., you have thirty days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review should name the Department as the respondent.

APPENDIX D



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
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December 23, 2010

ATTORNEY DONALD P. GALLO
REINHART BOERNER VAN DEUREN S.C.
P.O. BOX 2265
WAUKESHA WI 53187-2265

SUBJECT: Petition for a Contested Case Hearing Pursuant to Wis. Stats. ss. 227.42, 30.209(1m), and Wis. Admin. Code s. NR 299.05(5) In Re. North Lake Boat Launch Manual Code 3565.1 Approval dated November 4, 2010 (IP-SE-2009-68-05745-05750)

Dear Attorney Gallo:

I am responding to your petition for a contested case hearing on behalf of your clients North Lake Management District ("NLMD"). Your petition was received by Secretary Matthew Frank, Department of Natural Resources ("Department" or "DNR") on December 3, 2010. You seek a contested case hearing under the legal authorities cited above on an agency action – a DNR approval pursuant to Manual Code 3565.1 ("MC Approval").

The MC Approval at issue authorizes 4 activities needed to build the access road, parking lot, and boat launch: (1) grading more than 10,000 square feet on the bank of the lake; (2) installing a boat ramp and 2 outfall structures on the bed of the lake; (3) installing 4 culverts crossing over wetlands; and (4) placing fill in up to .16 acres of wetland. (MC Approval Finding of Fact No. 1)

PETITION UNDER S. 227.42, STATS.

To obtain a hearing under s. 227.42 there must be a dispute of material fact. A "material fact" is a fact of consequence to the merits of the litigation, i.e. a fact that has a bearing on the decision. A petition alleging only disputes of law and immaterial facts does not meet the criterion that requires a "dispute of material fact."

Storm Water Issues: To the extent that the issues for which you seek review (Pet. pp. 9-10 par. 12.d, pp. 13-17 pars. 12.d, 12.h, and 12.j (including footnote 6), p. 22 par. 13, pp. 24-25 pars. 16c. and 16.f, and p. 29 pars. 18.f and 18.g) are issues regarding storm water (chs. 151 and 216, Wis. Admin. Code), the petition for hearing under s. 227.42, Stats., is DENIED. To the extent that any of the issues you raise in these paragraphs may be disputes of fact rather than issues of law, they are irrelevant and immaterial to the activities authorized by the MC Approval. When a Storm Water Permit is required for a project, storm water pollutants are considered to be adequately managed and regulated under the Storm Water Permit issued for the project. Any disputes of fact or questions of law in these paragraphs may be relevant, material, or both to the issue of whether DNR should have granted coverage to the boat launch project under WPDES General Permit No. WI-S067831-3: Construction Site Storm Water Runoff. However, the decision to grant Storm Water Permit coverage was not authorized by this MC Approval, but by a decision issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook. That decision was not appealed by you or any other person within the 30 days provided by law and is now final. That November 4, 2010, decision is the subject of 2 outstanding petitions (one for a contested case hearing and one for judicial review) served on the Department on December 20, 2010 by Reddelien Road Neighborhood Association, Inc., and several individuals.

Wetland Delineation Issues: To the extent that the issues for which you seek review (Pet. pp. 6-8 par. 12.b, pp. 10-11 par. 12.e, p. 13 par. 12.h (last sentence), p. 24 par. 16.a, pp. 28-29 pars. 18.a and 18.b) deal with the wetland delineations, the petition is DENIED for the reasons outlined below for the denial of your petition for hearing under s. NR 299.05(5), Wis. Admin. Code, and because any disputed facts regarding the issue of wetland

delineations for a federal water quality certification under s. 401 of the federal Clean Water Act are immaterial because the federal U.S. Army Corps of Engineers is the agency making the delineational and jurisdictional determinations. To the extent that p. 26 par. 28.a.iii deals with wetland delineations, the petition is also denied.

EA or EIS (ch. NR 150, Wis. Admin. Code) issues: To the extent that the issues for which you seek review deal with the Wisconsin Environmental Policy Act ("WEPA") and ch. NR 150, Wis. Admin. Code (Pet. pp. 19-21 pars. 12.o, 12.p, and 13, p. 30 par. 18.l), the petition is DENIED, because in a decision issued September 9, 2010 (Waukesha County Cir. Ct. Case No. 09-CV-4828) in which both DNR and NLMD were parties, the circuit court rejected NLMD arguments that an EIS was required for the boat launch project, that the DNR EA prepared for the project was inadequate, and that the court should:

... reverse, set aside, and remand the WDNR's decisions, required the WDNR to follow proper note and comment procedures, require the WDNR to properly analyze the proposal, require the WDNR to comply with WEPA, and order the WDNR to consider and analyze supplemental materials, subject to note and comment.

The circuit court found "NLMD's interpretation of the facts unreasonable and its application of the law incorrect" and denied the NLMD petition. The circuit court heard and rejected the arguments and issues that NLMD raises here. To the extent that the earlier decision may not address any issues regarding whether DNR complied with WEPA and ch. NR 150, those issues are questions of law, not disputes of material fact, and thus hearing on those issues of law is DENIED for the reasons noted below.

Constitutional Issues: As an administrative agency the Division of Hearings & Appeals ("DHA") is not authorized to decide constitutional issues. Accordingly, to the extent that the issues for which you seek review (Pet. pp.11-13, par. 12.f, 12.g, p. 17 par. 12.l, p. 22 par. 14, p. 26 par. 28a.ii (last sentence), p. 30 par. 18.j) are constitutional issues (due process, fundamental unfairness, deprivation of property rights, fair play, etc.), the petition is DENIED.

Issues of Law: To the extent that the petition alleges that statutory due process rights were violated or that DNR failed to properly apply applicable law in its determination (including its practicable alternative analysis) that water quality certification should be granted for the activities authorized by the MC Approval, the petition is DENIED because those issues are purely issues of law rather than disputes of material facts. The following alleged issues (Pet. p. 2) are also issues of law rather than disputes of material facts:

- whether there were any material errors in procedure or failure to follow prescribed procedures and if yes, whether such failure impaired the fairness of the proceedings (if there were "proceedings") or correctness of the decision to approve by Manual Code the 4 activities;
- whether DNR erroneously interpreted unspecified provisions of law;
- whether the facts compel an action different than the MC Approval as a matter of law;
- whether the MC Approval is an exercise of discretion beyond the range of discretion delegated DNR by law;
- whether the MC Approval is inconsistent with DNR rules and the inconsistencies are not explained; and
- whether the MC Approval violates statutes;
- whether DNR must comply with statutes and rules that apply to similar projects by a private individual.

The following issues that you raise are also issues of law rather than disputes of material fact:

- whether DNR erroneously determined that the activities authorized by this MC Approval are consistent with the standards of chs. 30 and 281, Stats., and chs. NR 102, 103, 150, 151, 216, 299, 320, 329, and 341, Wis. Admin. Code (Pet. pp. 6-7 par. 12.a);
- whether DNR is required by law to follow the same "legislative and regulatory required process" that any other applicant must follow to obtain ch. 30, wetland, and storm water permits rather than approving DNR projects that may affect navigable waters under its MC Approval process (Pet. p. 7 par. 12.a, p. 18 par. 12.n);
- if DNR erred in approving these activities by MC Approval, whether such error warrants the approval being reversed, set aside, and/or remanded (Pet. p. 7 par. 12.a);
- whether the proposed DNR boat launch (for which the 4 activities approved by this MC Approval are a part) complies with ss. NR 1.90 and 1.91, Wis. Admin. Code (Pet. pp. 9-10 par. 12.d);
- whether NLMD has a statutory right to access the DNR site at the times and in the manner it requested in order to perform the types of activities it desired;

- whether the DNR findings that the project complies with chs. NR 103 and 299, Wis. Admin. Code, specifically in regard to the practicable alternatives analysis and impact on wetland functional values, are supported by the record of the MC Approval.

In sum, in regard to your petition for hearing under s. 227.42, Stats., DNR GRANTS a s. 227.42 hearing on the only dispute that is a mix of a disputed material fact and an issue of law – whether DNR erroneously failed to identify navigable waters at the DNR site (Pet. pp. 8-9 par. 12.c, p. 24 par. 16.b, and pp. 28-29 par. 18.e and 18.l), and DENIES a s. 227.42, Stats., hearing on all remaining issues.

PETITION UNDER S. 30.209, STATS.

You request (Pet. p. 1 fn. 1, pp. 26-28 par. 28.b) a hearing and stay under s. 30.209(1m)(a) and (c), Stats. S. 30.209(1m), Stats., states:

30.209 Contracts and individual permits; administrative and judicial review... (1m) REQUEST FOR ADMINISTRATIVE REVIEW. (a) Any interested person may file a petition with the department for administrative review within 30 days after any of the following decisions given by the department:

1. The issuance ... of any individual permit issued or contract entered into under this subchapter.

...

(c) The activity shall be stayed pending an administrative hearing under this section, if the petition contains a request for the stay showing that a stay is necessary to prevent significant adverse impacts or irreversible harm to the environment.

(emphasis added). S. NR 310.03, Wis. Admin. Code, states:

NR 310.03 Definitions. In this chapter:... (4) "Individual permit" means a permit issued by the department for a single project under specific applicable provisions of ch. 30, Stats., excluding s. 30.206, Stats. For purposes of this chapter, "individual permit" includes a contract issued under s. 30.20, Stats.

(emphasis added)

Authorizations issued under Manual Code 3565.1 are not "individual permits" issued under ch. 30, Stats., because the Department of Natural Resources is not subject to ch. 30, Stats., or rules promulgated thereunder. Statutes in general terms in which the state is not named, or which apply expressly to private rights, do not bind or affect rights of the state, since it must be presumed the Legislature does not intend to deprive the state of any prerogative, rights, or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible. *State v. City of Milwaukee*, 145 Wis. 131 (1911). See also *City of Milwaukee v. McGregor*, 140 Wis. 35 (1909); *Wisconsin Veterans Home v. Division of Nursing Home Forfeiture Appeals*, 104 Wis.2d 106 (Ct. App. 1981). Manual Code 3565.1 makes this distinction clear when it states that:

All Department projects, where Chapters 30 and 31, Wis. Stats., and Chapters 103, 115, 116, 117 or 118, Wis. Adm. Code would apply if built by a private individual, must receive the approval of the District [now Regional] office prior to construction.

(emphasis added)

Though DNR is not bound by ch. 30, in 1970 it initiated the MC Approval process in Manual Code 3565.1, and for 40 years has voluntarily evaluated and authorized all DNR proposed projects that may affect waters of the State under the MC Approval process to ensure they are environmentally sound. Manual Code 3565.1 states:

Decisions [on DNR projects that may affect waters of the state] will be based on the standards in the appropriate statutes and administrative rules that would apply to similar privately sponsored projects. ...

(emphasis added) Though not bound by the procedural requirements of ch. 30, DNR solicits public input when authorizing by MC Approval any DNR project that may affect waters of the state by holding at its discretion informational hearings like those required by s. NR 310.16, Wis. Admin. Code. Manual Code 3565.1 states:

[The District [now Regional] Water Management Supervisor/Designee ...[shall d]etermine if an informational hearing should be held for projects which may affect nondepartment lands or interests or may be considered controversial.

Indeed, the MC Approval decision that is the subject of your petition indicates that comments received on the boat launch project during the 13 day comment period included comments on many of the Issues that you raise in your petition. (MC Approval Finding of Fact No. 8)

Because DNR is not subject to ch. 30 and the MC Approval is not an individual permit issued under ch. 30, your request for an administrative hearing and stay pending such hearing under s. 30.209, Stats. is **DENIED**.

PETITION UNDER S. NR 299.05(5), WIS. ADMIN. CODE

The MC Approval granted DNR a s. 401 Clean Water Act Water Quality Certification that authorizes DNR to place fill (including a road and 4 culvert structures) in up to .16 acres of wetland pursuant to the conditions in the MC Approval, which include compliance with the federal authorization under s. 404 of the Clean Water Act issued to DNR by the U.S. Army Corps of Engineers on July 30, 2010. (MC Approval Findings of Fact Nos. 1, 5, & 12 and Conditions Nos. 8 & 10)

You request a hearing under s. NR 299.05(5), Wis. Admin. Code, alleging that the "permit" violates s. 281.15, Stats., and s. NR 299.04, Wis. Admin. Code. (Pet. p. 1 fn. 1, pp. 25-26 par. 28.a, pp. 28-29 pars. 18.c, 18.d, and 18.h) S. NR 299.05(5) states:

NR 299.05 Preliminary and final department action. ... (5) Any person whose substantial interests may be affected by the department's determination may, within 30 days after publication of the notice, request in writing a contested case hearing on the matter under ch. 227, Stats. A request for a contested case hearing shall include a written statement giving specific reasons why the proposed activity violates the standards under s. NR 299.04 (1) (b) and provide specific information explaining why the petitioner's interests are adversely affected by the department's determination. The request for hearing shall also include a written statement specifying that the petitioner will appear and present information supporting the petitioner's objections in a contested case hearing. The department may request additional information from the petitioner to support the allegations in the petition prior to granting or denying a hearing request. In any case where a class 1 notice on the application is otherwise required by law or where a contested case hearing on an application for water quality certification will be held under some other specific provision of law, the notice and hearings shall be combined.

(emphasis added) For your petition to be legally sufficient it must give specific reasons why the proposed activity violates the standards under s. NR 299.04(1)(b). In your petition the specific reason you give (Pet. p. 25 par. 28a) as to why the proposed activities violate standards under s. NR 299.04(1)(b) is to refer to paragraphs 1 through 6 and 13 through 15. However, paragraphs 1 through 6 and 13 through 15 of the petition do not provide specific reasons as to what s. NR 299.04(1)(b) standards will be violated or why the proposed activities will violate them.

You state that the MC Approval decision "falls far short of the requirements set forth in NR ch. 299 [stat] and render it impossible for the public to evaluate the veracity of DNR's claims." (Pet. pp. 25-26 par. 28.a.ii) But the only clue as to what specific harm you allege the proposed activities may cause to the standards under s. NR 299.04(1)(b) is at pp. 13-14 pars. 12.h and 12.j of the petition, where you appear to be alleging that the proposed activities will adversely affect the wetland's functional value of providing storage and treatment for storm water by increasing the rate and volume of storm water runoff from the DNR property, blocking and diverting overland drainage, diverting surface water runoff to neighboring properties to their detriment, and failing to remove sufficient total suspended solids ("TSS") from the runoff. However, these issues are addressed by the separate DNR decision issuing storm water general permit coverage to this site, and are properly addressed in an appeal of that decision. The MC Approval did not authorize the storm water permit. (see below)

You also appear to be alleging that the proposed activities would violate water quality standards issued under s. 281.15, Stats. Since s. NR 299.04(1)(b)3. and 6. are the only standards under s. NR 299.04(1)(b) that refer to s. 281.15, Stats., (which you also reference) you may be alleging that runoff will violate those standards. It is unclear from your petition whether you are alleging the runoff will not meet water quality standards for

wetlands, surface waters, or both. Water quality standards promulgated by DNR pursuant to s. 281.15, Stats., for wetlands are listed as functional values in s. NR 103.03(1). Criteria used to assure maintenance of wetland functional values are listed at s. NR 103.03(2), and criteria for water quality standards promulgated by DNR pursuant to s. 281.15 for surface waters are listed at s. NR 102.04(1). The criteria you may be alleging will be violated are:

NR 103.03 Wetland water quality standards....(2)... (a) Liquids, fill or other solids or gas may not be present in amounts which may cause significant adverse impacts to wetlands;
(b) Floating or submerged debris, oil or other material may not be present in amounts which may interfere with public rights or interest or which may cause significant adverse impacts to wetlands;
(c) Materials producing color, odor, taste or unsightliness may not be present in amounts which may cause significant adverse impacts to wetlands;
(d) Concentrations or combinations of substances which are toxic or harmful to human, animal or plant life may not be present in amounts which individually or cumulatively may cause significant adverse impacts to wetlands;

and/or:

NR 102.04 Categories of surface water uses and criteria. (1) GENERAL. ... Practices attributable to ... land development or other activities shall be controlled so that all surface waters including the mixing zone meet the following conditions at all times and under all flow and water level conditions:
(a) Substances that will cause objectionable deposits on the shore or in the bed of a body of water, shall not be present in such amounts as to interfere with public rights in waters of the state.
(b) Floating or submerged debris, oil, scum or other material shall not be present in such amounts as to interfere with public rights in waters of the state.
(c) Materials producing color, odor, taste or unsightliness shall not be present in such amounts as to interfere with public rights in waters of the state.
(d) Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance, nor shall substances be present in amounts which are acutely harmful to animal, plant or aquatic life.

The standards in chs. NR 103 and 102 also applied to the decision as to whether DNR should grant coverage to the boat launch project under WPDES General Permit No. WI-S067831-3: Construction Site Storm Water Runoff:

NR 103.06 Applicability. ... (1) Activities subject to the requirements of this chapter include, but are not limited to:
...
(b) Permits and approvals under chs. 281, 283, 289 and 291, Stats.,
(c) Water quality certification under ch. NR 299;
(e) Department development and management projects....

NR 102.02 Applicability. The provisions of this chapter are applicable to surface waters of Wisconsin.

WPDES GENERAL PERMIT No. WI-S067831-3 provides:

In compliance with the provisions of ch. 283, Wis. Stats., and chs. NR 151 and 216, Wis. Adm. Code, landowners engaged in land disturbing construction activities including clearing, grading and excavating activities are permitted to discharge...

1.4.1 [Water Quality Standards.] This permit specifies the conditions under which storm water may be discharged to waters of the state for the purpose of achieving water quality standards contained in chs. NR 102 through 105 and NR 140, Wis. Adm. Code.

(emphasis added) The decision to grant coverage was issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook and is now final. The Storm Water General Permit coverage decision determined that the storm water system will meet all water quality standards promulgated under s. 281.15, so that issue may not be collaterally attacked in a contested case hearing on this MC Approval.

Even if you had properly alleged specific reasons why the actions authorized by the Water Quality Certification violated the standards under s. NR 299.04, the delineation of the wetlands on the DNR site is not an issue that would be properly before a Wisconsin administrative law judge in any hearing granted under s. NR 299.05(5). The determination regarding the presence, area, and federal vs. nonfederal character of the wetlands

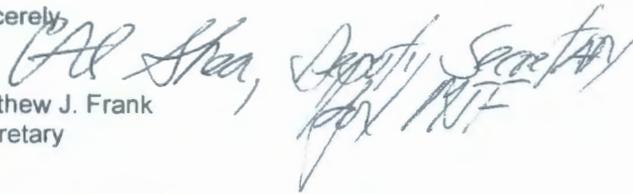
on the DNR site is a decision of the U.S. Army Corps of Engineers. The Corps rendered 2 jurisdictional determinations dated June 30, 2010 (Wetland 1) and July 30, 2010 (Wetland 2) determining the area and character of the wetlands on site, and in July 30, 2010 the Corps' issued DNR a Clean Water Act s. 404 permit (No. 2008-04314-DJP) authorizing the fill. The Corps' Decision Memorandum dated June 26, 2010, shows that it evaluated the area you are alleging is wetland and determined that it was not wetland and did not meet the criteria for wetlands used in the *Corps of Engineers Wetland Delineation Manual* (1987 Manual). Since the Corps is the agency that made this determination, any dispute regarding the delineated area and federal vs. nonfederal character of the wetland is within the jurisdiction of the Corps, not DNR.

Because you have not properly alleged a specific reason why the actions authorized by the Water Quality Certification violated the standards under s. NR 299.04 as required by s. NR 299.05(5), your request for a contested case hearing under s. NR 299.05(5) is **DENIED**.

Please contact Department attorney Edwina Kavanaugh (608-264-8991) if you have any questions regarding this matter.

Sincerely,

Matthew J. Frank
Secretary

A handwritten signature in black ink, appearing to read "Matt Frank, Deputy Secretary". The signature is written in a cursive, somewhat stylized script. Below the signature, the initials "M.F." are written in a similar style.

cc: Edwina Kavanaugh – LS/8

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin statutes establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to ss. 227.52 and 227.53, Stats., you have thirty days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review should name the Department as the respondent.