STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

Petitioners,

vs. Case No. 10CV5341

The Department of Natural Resources ("DNR"),
Respondent.

RRNA REPLY BRIEF IN SUPPORT OF MOTIONS PURSUANT TO WIS. STATS. §227.57(1) AND §227.57(7)

INTRODUCTION

The DNR's principal argument concerning the pending motions is both incorrect and breathtaking. The DNR argues that the RRNA's Motions under Wis. Stats. § 227.57(1) and § 227.57(7) must fail because the RRNA failed to file a Request for a Contested Case Hearing under § 227.42. DNR 9-15-11 Brief, p. 2. That is simply not the case.[1]

On December 20, 2010, on the very same day that the RRNA filed its Petition for Judicial Review in this case (the "Petition"), the RRNA simultaneously filed a lengthy § 227.42 Request for a Contested Case Hearing ("Request"). In other words, the RRNA's Request for a Contested Case Hearing

[1] There is one troubling aspect to the DNR's 9-15-11 Brief, which the RRNA hopes is simply the result of the DNR's failure to recall that the RRNA did in fact file a Request for a Contested Case Hearing in this matter. The DNR asserts that the time for filing a Contested Case Hearing has long passed. 9-15-11 DNR Brief, p. 4. Surely, the DNR is not thereby attempting to reassert by the "back door" the arguments which it made in favor of its Motion to Dismiss the Petition now before this Court, which arguments were resolved against the DNR by this Court's August 11, 2011 Order.

was as timely as the Petition now before this Court. As discussed below, under the peculiar facts of this case the Request is actually part of the Petition.

For the Court's convenience, a complete copy of the December 20, 2011 Request is contained in attached Appendix 1, together with the acknowledgement by the Secretary of the DNR that it was received on that date. That very same Request is also attached to and incorporated into the RRNA's Petition for Judicial Review, which is pending before this Court and which was the subject of this Court's August 11, 2011 Order. Much more will be said *infra* about the significance of the fact that the Request is attached to and incorporated in the Petition.

On January 10, 2011 the DNR attempted to deny the RRNA's Request for a Contested Case Hearing **for the exact same reason that the DNR moved to dismiss the Petition at issue here**. In that attempted denial (*see* attached Appendix 2) the DNR stated: "Your December 20, 2010 petition was not timely because it was served 46 days after the Department's action." App. 2, p. 1. That is the basis on which the DNR moved to dismiss the Petition in this case, which motion was denied by Order of this Court on August 11, 2011. In its attempted denial, the DNR acknowledged, somewhat more candidly than it did in this Court, that the "November 4, 2010 storm water permit decision was not served upon (or mailed to) the Petitioners, so there is no dispute of fact on this issue. App. 2, p. 2, par. 1.

In addition, even had the RRNA not filed a Request for a Contested Case Hearing, DNR is simply wrong in stating that such a request is a prerequisite to

granting the relief that the RRNA seeks through §§ 227.57(1) and (7). The statutes don't say this nor do the cases that DNR cites.

Finally, DNR appears to argue that there cannot be a remand under Wis. Stats. § 227.57(7) until there has first been judicial review. DNR Brief at 6. This is nonsensical and would waste judicial resources because it would lead to the Court undertaking judicial review twice. The purpose of remanding now would be so that at long last a record can be fully and fairly developed that will permit a judicial review process which is meaningful. *R.W. Docks &Slips v. DNR*, 145 Wis. 2d 854, 429 N.W.2d 80 (Ct. App. 1988) (discussed further *infra*) holds that § 227.57(7) authorizes the Court to remand whenever "the agency's action depends upon facts determined without a hearing." *Id.* at p. 860. That is exactly the situation here.

As is clear from the RRNA's initial August 25, 2011 Brief in Support of its Motions pursuant to §§ 227.57(1) and (7) (at pp. 11 to 15), there are many disputed facts relevant to DNR's self-serving decision to grant a storm water permit to itself. DNR applied to itself for such coverage, didn't advise the Hansons it was doing so in spite of their co-ownership of a portion of the property at issue, issued its decision a mere three days later without seeking nor considering submissions by other interested parties (including the Hansons) or experts that might call into question the propriety of granting itself a permit, and then told no one but itself that it had issued a decision granting itself a storm water permit until a number of days after the time for appealing that decision had passed. If the remedies afforded under Wis. Stats. § 227.57(1) or § 227.57(7) do

not come into play here it is hard to imagine a circumstance when they would. RRNA's motion for remand should be granted.

ARGUMENT

I. THE DNR HAS COMPLETELY OVERLOOKED BOTH THE CONTENT AND THE PRAYER FOR RELIEF IN THE RRNA's PETITION FOR JUDICIAL REVIEW.

In moving for a remand pursuant to Wis. Stats. § 227.57(1) and § 227.57(7), the RRNA was and is simply seeking to enforce the Petition for Judicial Review in this case **according to its terms**. The Prayer for Relief in the RRNA's Petition, pending before this Court since December 20, 2010, specifically seeks as follows:

> "3. FOR AN ORDER that the Hartsook Decision ***be remanded*** so that a factual determination can be made that there is full compliance with Wis. Admin. Code NR § 151.12(5)(a) in that a factual determination is made that the access road on the Kraus Site should be considered a new "development" rather than a "redevelopment" under Wis. Admin. Code NR §§151.002(39) and151.12(5)(a) and a factual determination is made that there will be full compliance with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2.
>
> "4. FOR AN ORDER that the Hartsook Decision ***be remanded*** so that a factual determination can be made that there will be full compliance with Wis. Admin. Code NR §151.12(5)(b) in that:
>
> a) the culverts proposed in the project plans are adequate to handle the volume of water that will flow out of the wetland complex on and adjacent to the Kraus Site and
> b) that the proposed parking lot will not act as a stopper, preventing water from the wetland complex on and adjacent to the Kraus Site from draining into North Lake via the Kraus Site and instead divert it onto neighbors to the south of the Kraus Site.
>
> "5. FOR AN ORDER that the Hartsook Decision ***be remanded*** so that a factual determination be made that the

surcharge of septic systems on Reddelien Road will not cause flooding in the Reddelien Road Neighborhood or pollution of North Lake.

"6. FOR AN ORDER that the Hartsook Decision ***be remanded*** so that a factual determination can be made that there is full compliance with Wis. Stat. §281.15 and Wis. Admin. Code NR §299.04(1)(b) in that:

a) A factual determination will be made that the storm water treatment system for the roadway will remove oils, grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff.
b) A factual determination will be made that the storm water treatment system will not in fact increase pollution in the Reddelien Road. Neighborhood and North Lake.

"7. FOR AN ORDER that the Hartsook Decision ***be remanded*** so that it is clear from the face of the Hartsook Decision that the required water quality certification under Wis. Stat. §281.15, Wis. Admin. Code NR Ch. 103 and Ch. 299, as well as the Federal Clean Water Act, 33 USC §1341? [Emphasis in ¶¶ 3-7 supplied]"

The RRNA was fully aware when seeking the relief in ¶¶3 to 7 above that the requested "evidentiary hearing" would have to occur within the context of a contested case hearing. The RRNA proceeded in this manner when drafting its Petition for Judicial Review because of the unusual and troubling manner in which the RRNA discovered the existence of the November 4, 2010 Hartsook storm water decision.

When the RRNA finally received a copy of the Hartsook Decision many days after the time for appeal had passed, it recognized that there were irregularities in that decision and that a number of factual determinations had not been made prior to the issuance of that decision. Thus, the express purpose of the Petition for Judicial Review (which is before this Court) was to seek remand in

order to insure that a full and balanced administrative record could be developed for use by this Court.

The purpose of citing *R.W. Docks & Slips v. DNR,* 145 Wis. 2d 854, 429 N.W.2d 86 (1988), was not to correct a deficient factual record. It was cited because there never had been any meaningful administrative record created in this matter other than DNR's bare-boned decision itself (consisting of a mere three pages) and two expert reports which have little meaning standing alone and which have never been subject to scrutiny.

It is truly ironic that the DNR now seeks to strike a portion of Dr. O'Reilly's affidavit (which is dealt with in a separate response being filed today) on the grounds that Dr. O'Reilly's affidavit falls short of the new *Daubert* standard incorporated into Wis. Stats. § 907.02(1) without addressing the possibility that the Gestra and Kapur Reports may similarly fall short of the *Daubert* standard.

And at this point there is absolutely no evidence that those reports meet that standard. No testimony was taken from the authors of the Kapur and Gestra Reports and no opportunity to cross-examine them was afforded to anyone. Nor was there ever any opportunity to submit countervailing information or reports.

Docks applies and remand should occur because, in the words of Wis. Stats. § 227.57(7), at present "the agency's action [in granting the storm water permit] depends on facts determined without a hearing…." There presently is no meaningful record to review because none has ever been created. That is the gravamen of the RRNA's Petition for Judicial Review and the Motions under §§

227.57(1) and (7) which are now before this Court and which simply seek to implement the Prayer for Relief in the pending Petition.

Like the *Docks* case, in the case at bar there is **no record** "as that term is commonly understood" (*Docks, id.* at 860-861) which this Court can review in any meaningful manner. None was created, other than two unexamined reports and a very short decision issued with no input from those affected by the decision and no practical opportunity for any meaningful deliberation. In fact, one of the irregularities noted in the RRNA's August 25, 2011 initial Brief is the following: "[A]t a minimum, there is an appearance of impropriety when an Agency … applies to itself one day and issues a permit virtually the next day." 8-25-11 RRNA Brief, p. 15. To insure that there is an appearance of justice, especially when the DNR has presided as the Judge over its own application, at a minimum a full administrative record should be developed before this Court is called upon to review the storm water permit which is the subject of this action.

II. THE REQUEST FOR A CONTESTED CASE HEARING IS PART OF THE PETITION IN THIS CASE.

As noted at the start of this Brief, the DNR's claim in its 9-15-11 Responsive Brief that the RRNA never filed a timely § 227.42 Request for a Contested Case Hearing is incomprehensible and breathtaking. The RRNA filed its Request at the earliest moment it possibly could, which was the exact same day that it filed and served the Petition now before this Court. The DNR had to know about that Request, since a copy was attached to the RRNA's Petition for Judicial Review (which has been on file with this Court since December 20,

2010) as an appendix. Because it is so important, the RRNA wishes to repeat that even had the RRNA not originally requested a contested case hearing it would not be an obstacle to a remand here. As the *Docks* court noted: "[T]he fact that *Docks* did not request a hearing the first time around does not limit the court's power to order DNR action within the range of its responsibilities." *Docks, Id*. at 862 to 863.

When the RRNA discovered the existence of the November 4, 2011 Hartsook Decision on December 16, 2011 for the first time it was already a number days beyond the due date for seeking **Judicial Review or a Contested Case Hearing under either Wis. Stats. § 227.42 or § 227.52**. As the hearings before this Court on June 17, 2011 and again on July 29, 2011 made clear, this is because the DNR decided not to serve the Hartsook's storm water permit decision upon anyone other than itself.

A. The Request for a Contested Case Hearing is Now Properly Before This Court.

After it finally obtained a copy of the November 4, 2010 Hartsook Decision, the RRNA acted with great alacrity to file the pending Petition for Judicial Review and a Request for a Contested Hearing, serving both on the DNR on December 20, 2011. Because of the unusual and troubling circumstances it confronted, the RRNA both served the Request for a Requested Case Hearing on the DNR **and incorporated** the Request for a Contested Case Hearing directly into its Petition for Judicial Review. This is of both procedural and substantive significance.

B. A Contested Case Hearing is also in fact Part of the Prayer for Relief in the Petition for Judicial Review.

The Request for a Contested Case hearing was incorporated directly into the Petition for Judicial Review which specifically referred to the Request a number of times. In fact, in Section II, of the Petition, the RRNA specifically asked for a declaration of rights under Wis. Stats. § 227.57(9) and stated: "This date the Petitioners also will file a Petition for a Contested Hearing with the DNR pursuant to Wis. Stats. §227.42. A copy of that Petition for a Contested Hearing is set forth in attached Appendix 2." When the RRNA filed its Petition for Judicial Review with this Court it was already very concerned about what it perceived to be irregularities in the practice and procedure of the DNR. Therefore, as noted above, the Prayer for Relief in the Petition asks the Court to remand this matter for a Contested Case Hearing designed to investigate those alleged irregularities and to develop a complete record.

In addition, paragraphs 8 to 10 of the RRNA's Prayer for Relief in its Petition (pp. 22-23), pending before this Court since December 20, 2010, make it abundantly clear that the RRNA was and is asking this Court to utilize the Contested Case process to achieve the following relief:

> "8. FOR AN ORDER, pursuant to Wis. Stats. §227.57(1) and to the extent evidence is adduced ***at the Contested Hearing pursuant to the Petition in Appendix 2*** of DNR irregularities in procedure before the Agency, allowing for further testimony before this Court and also for discovery in the form of depositions or interrogatories.
>
> "9. FOR AN ORDER, pursuant to Wis. Stats. §227.57(4) and based [on] evidence adduced ***at the Contested Hearing pursuant to the Petition in Appendix 2***, remanding this case to the

> DNR for further action because the fairness of the proceedings and the correctness of the DNR's actions have been impaired by a material error in procedure or a failure to follow prescribed Agency Procedures.
>
> "10. FOR AN ORDER, pursuant to Wis. Stats. §227.57(8) and based on evidence adduced ***at the Contested Hearing pursuant to the Petition in Appendix [2]***, remanding the case to the DNR because the DNR has
>
> a) Acted outside its area of discretion; or
> b) Acted inconsistently with a DNR rule, stated DNR policy or a prior DNR practice [Emphasis ¶¶ 8-10 supplied]."

In other words, because of perceived irregularities the RRNA was treating the Petition for Judicial Review and the Request for a Contested Case Hearing as complimentary vehicles for ascertaining the truth concerning certain perceived irregularities before the Agency and to allow someone other than the DNR to judge the propriety of its grant of coverage to itself. As long as a § 227.42 Request for a Contested Case Hearing is timely filed on the DNR, there is nothing in Chapter 227 which forbids simultaneously asking a Circuit Court to utilize that Contested Case mechanism in order to insure that full and complete justice is achieved pursuant to a Petition for Judicial Review under § 227.52.

Further, the Petition for Judicial Review now before this Court (at p. 6) specifically seeks relief under Wis. Stats. § 227.57(9), which states: "The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action."

III. THE *BARNES* DECISION IS IRRELEVANT.

Unfortunately, the DNR started with a faulty premise. For some reason, it assumed that the RRNA had not sought a Contested Case Hearing. Not only did the RRNA in fact seek a Contested Case Hearing, but it incorporated that Request directly into its Petition for Judicial Review in this Court. Clearly, until this Court ruled that it had jurisdiction on August 11, 2011, nothing could be done pursuant to either the RRNA's Petition or its Request for a Contested Hearing

Now that the Court has ruled that it has jurisdiction, the RRNA's Petition and its prayer for relief, including the prayer for a remand for a Contested Case Hearing, are properly before this Court. *Barnes v. DNR*, 178 Wis. 2d 290, 506 N.W.2d 155 (1993), cited by the DNR, correctly recognizes that Wis. Stats. § 227.52(2) states that "unless the court finds a ground for setting aside, modifying, remanding or ordering agency action" the reviewing court must affirm an agency's action. But, the RRNA is not seeking to set aside or modify the DNR's storm water decision; it is only seeking a remand of that decision for the purpose of holding a Contested Case Hearing, which the DNR is at pains to point out in its 9-15-11 Brief is the only place that a hearing on the facts can occur.

The RRNA respectfully submits that there is more than enough in the record to justify such a remand. The RRNA has set forth what it submits are irregularities that raise questions about the circumstances of the DNR's storm water decision in this case. *See* RRNA 8-25-11 Brief at 11-15. This Court

specifically found an irregularity in the service of the storm water decision following a lengthy hearing. A remand is the only way to provide this Court with a proper record upon which it can then conduct a full and fair judicial review based on the results of the hearing.

IV. THE DNR MISUNDERSTANDS THE REASON FOR THE REQUEST FOR DISCOVERY.

In a related case which is now before Administrative Law Judge Jeffry Boldt for a contested case hearing, the DNR has stressed repeatedly that such a proceeding is nothing more than a Class I dispute and that discovery is not necessarily allowed.

The point of Section II of the RRNA's August 25th brief is that discovery is necessary in order to get to the bottom of a number of perceived irregularities involving the DNR's conduct concerning the storm water permit coverage decision issued by the DNR on November 4, 2010, and to allow questioning of not only of Mr. Hartsook (who issued the decision) but of the authors of the Kapur and Gestra reports so that their conclusions can be at the very least scrutinized by a party (unlike the DNR) who does not have a self-serving interest in rubber-stamping them. Wis. Stats. § 227.57(9) does allow the court to provide "whatever relief is appropriate…."

Allowing limited discovery is certainly within this court's latitude and that is all that the RRNA is in fact requesting. How else can the RRNA learn the relevance and significance of the Kapur Report and the Gestra Report, which supposedly are the basis for Engineer Hartsook's grant of a storm water permit?

CONCLUSION

For the foregoing reasons, the RRNA asks this Court to remand DNR's storm water permit coverage decision for a Contested Case Hearing and to allow some limited discovery in connection with that Hearing.

Dated at Hartland, Wisconsin this 10th day of September, 2011.

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APPENDIX 1

State ex rel. Reddelien Road Neighborhood Association, Inc. ("RRNA"), 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,

Petitioners,

vs.

Case Code: 30607
Administrative Agency Review

The Department of Natural Resources ("DNR"), an agency of the State of Wisconsin,

Respondent.

PETITION FOR JUDICIAL REVIEW
OF NOVEMBER 4, 2010 STORM WATER PERMIT

Petitioners, by counsel, hereby petition for Judicial Review pursuant to Wis. Stats. §227.52 of a Storm Water Permit Decision (under WPDES General Permit No. WI-S067831-3) for a North Lake Boat Launch, which was issued by Bryan Hartsook on November 4, 2010. A copy of that decision (hereafter referred to as the "Hartsook Decision") is attached as Appendix 1. In this Petition for Judicial Review, the Petitioners (named *infra*) ask first that this Court enter a declaration pursuant to Wis. Stats. §227.57(9) that the thirty (30) day limitation on an appeal of the Hartsook

Decision did not begin to run until December 16, 2010 for the reasons set forth in the first section of this Petition. Thereafter, Petitioners ask that this Court reverse the Hartsook Decision for the reasons set forth in the rest of this Petition.

I. THE PARTIES

A. The Respondent.

1. The Respondent is the Wisconsin Department of Natural Resources ("DNR").

B. The Petitioners.

2. The Petitioners in this Petition are the same Petitioners who are seeking administrative review of the Hartsook Decision pursuant to their Petition for a Contested Hearing in attached Appendix 2, consisting of the following:

    i. Reddelien Road Neighborhood Association, Inc., ("RRNA") W322 N7516 Reddelien Road (the boundaries of the Reddelien Road Neighborhood are marked with a solid red line in Exhibit A of attached Appendix B).

    ii. F. Robert Moebius, RRNA President, citizen and owner of property at W322 N7492 Reddelien Road.

    iii. David Draeger, RRNA Board Member, citizen and owner of property at W322 N7448 Reddelien Road.

    iv. William C. Gleisner, III, RRNA Board Member, citizen and owner of property at W322 N7574 Reddelien Road.

v. Frederick A. Hanson, RRNA Board Member, citizen and owner of property at W322 N7574 Reddelien Road.

vi. Doris Lattos, RRNA Board Member, citizen and owner of property at W322 N7516 Reddelien Road.

vii. James Wozniak, RRNA Board Member, citizen and owner of property at W322 N7548 Reddelien Road.

viii. Donna Anderson, citizen and owner of property at N73 W32375 River Road.

ix. Brad Barke, citizen and owner of property at W322 N7458 Reddelien Road.

x. Carol Barke, citizen and owner of property at W322 N7458 Reddelien Road.

xi. James Baumgartner, citizen and owner of property at N73 W32275 Reddelien Road.

xii. Hilda Baumgartner, citizen and owner of property at N73 W32275 Reddelien Road.

xiii. Douglas Bruch, citizen and owner of property at W322 N7508 Reddelien Road.

xiv. Charlene Cary, citizen and owner of property at N73 W32365 River Road.

xv. Annabelle M. Dorn, citizen and owner of property at W322 N7356 Reddelien Road.

xvi. Linda Bruch, citizen and owner of property at W322 N7508 Reddelien Road.

xvii. Paulette Draeger, citizen and owner of property at W322 N7448 Reddelien Road.

xviii. Margo Hanson, citizen and owner of property at W322 N7574 Reddelien Road.

xix. Christine Janssen, citizen and resident of property at W322 N7288 Reddelien Road.

xx. Frank Janssen, citizen and resident of property at W322 N7288 Reddelien Road.

xxi. Mitchell Kohls, citizen and owner of property at N73 W32435 River Road.

xxii. Brian Kennedy, citizen and owner of property at N73 W32295 Reddelien Road.

xxiii. Mary Lou Kennedy, citizen and owner of property at N73 W32295 Reddelien Road.

xxiv. Joseph G. Krakora, citizen and owner of property at W322 N7478 Reddelien Road.

xxv. Marie Krakora, citizen and owner of property at W322 N7478 Reddelien Road.

xxvi. Charles Luebke, citizen and owner of property at N72 W32225 Reddelien Road.

xxvii. Patricia Luebke, citizen and owner of property at N72 W32225 Reddelien Road.

xxviii. Mary Mitchell, citizen and owner of property at N73 W32435 River Road.

xxix. David Mirsberger, citizen and owner of property at N72 W32455 River Road.

xxx. Patti Mirsberger, citizen and owner of property at N72 W32455 River Road.

xxxi. Jill Moebius, citizen and owner of property at W322 N7492 Reddelien Road.

xxxii. Gerhard Palmer, citizen and owner of property at W322 N7288 Reddelien Road.

xxxiii. Betty Palmer, citizen and owner of property at W322 N7288 Reddelien Road.

xxxiv. Aletta Ruesch, citizen and owner of property at W322 N7536 Reddelien Road.

xxxv. Thomas Schwartzburg, citizen and owner of property at W322 N7574 Reddelien Road.

xxxvi. Stephanie Smith, citizen and owner of property at N73 W32305 Reddelien Road.

xxxvii. William Timmer, citizen and owner of property at N72 W32455 Reddelien Road.

xxxviii. Suzanne Timmer, citizen and owner of property at N72 W32455 Reddelien Road.

xxxix. Deborah Wozniak, citizen and owner of property at W322 N7548 Reddelien Road.

xl. Daniel Yuhas, citizen and owner of property at W322 N7392 Reddelien Road.

xli. Jennifer Yuhas, citizen and owner of property at W322 N7392 Reddelien Road.

II. PETITIONERS OBJECT TO THE DNR'S FAILURE TO PROPERLY MAIL OR SERVE THE HARTSOOK DECISION AND REQUEST A DECLARATION OF RIGHTS UNDER §227.57(9).

This date the Petitioners also will file a Petition for a Contested Hearing with the DNR pursuant to Wis. Stats. §227.42. A copy of that Petition for a Contested Hearing is set forth in attached Appendix 2.

On November 4, 2010 the DNR issued a Permit for a boat launch on North Lake, which Permit is contained in attached Appendix 2 (hereafter, "App. 2"), Exhibit A. On November 22, 2010 Petitioners filed a Petition for a Contested Hearing regarding that Permit. On December 13, 2010 the Wisconsin Department of Natural Resources ("DNR") issued a decision denying that Petition for a Contested Hearing, which Decision is contained in attached App. 2, Exhibit B.

In the fourth paragraph of that December 13th Decision, the DNR cites to a November 4, 2010 Storm Water Permit authored by one Bryan Hartsook. According to the December 13, 2010 Decision in App. 2, Exhibit B:

> Any disputes of fact or questions of law in [Petitioners'] 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-SO67831-3: Construction Site Storm Water Runoff. However, the decision to grant Storm Water Permit coverage was not authorized by [the November 4, 2010 Permit], **but by a decision issued November 4, 2010 by Water Resources Engineer Bryan Hartsook. That decision was not appealed by you or any other person and is now final** [Emphasis supplied].

The mention of the November 4, 2010 Hartsook Decision in the December 13th Decision of the DNR is the very first time the Petitioners or their counsel had ever heard of the Hartsook Decision.

The Petitioners allege and assert that the Hartsook Decision was never mailed to them or their counsel, and was never served in any manner upon them. THEREFORE PETITIONERS OBJECT to the finality or propriety of the Hartsook Decision on the grounds set forth below. Because the Petitioners do not wish to delay the filing of this Petition for Judicial Review, they have not sought affidavits to verify the following. However, the Petitioners are prepared to present testimony confirming the following factual assertions:

1. After the December 13, 2010 Decision of the DNR was received by the Petitioners' counsel on December 15, 2010, counsel immediately sought to locate the decision by doing the following:

    A. Attorney Surridge, one of the counsel for Petitioners, emailed the DNR to learn where one might find a copy of the Hartsook Decision. As can be seen from the attached email exchange in App. 2, Exhibit C, Attorney Surridge first emailed Mr. James McNelly on December 15, 2010 at 1:41 p.m. asking where that decision might

be found. Mr. McNelly then emailed Mr. Hartsook on December 15, 2010 at 4:57 p.m. asking if Mr. Hartsook would email a copy of his decision to Mr. Surridge. On December 16, 2010, at 11:24 a.m., Mr. Hartsook emailed a copy of his November 4, 2010 decision (the "Hartsook Decision") to Mr. Surridge. A copy of the Hartsook Decision is contained in attached App. 2, Exhibit D.

B. Neither Attorney Gleisner nor Attorney Surridge had ever seen the Hartsook Decision before and so they attempted to locate the decision online at the DNR website. After extensive searching, neither Messrs. Gleisner nor Surridge could locate the Hartsook Decision. Attorney Gleisner then checked with Attorneys at Quarles & Brady and they had never seen the decision either.

2. On the morning of December 17, 2010, Attorneys William Gleisner and William Harbeck, a lawyer with Quarles & Brady, had a conference call with Assistant Attorney General Milligan. During that call, Attorney Gleisner stated to Ms. Milligan that neither the Petitioners nor their counsel had received a copy of the Hartsook Decision by mail or by service.

3. As can be seen from attached App. 2, Exhibit E, Ms. Milligan subsequently sent an email to Attorneys Gleisner and Harbeck on December 17, 2010, at 12:11 p.m., wherein she stated as follows: "Regarding the storm water permit, I learned that DNR promptly noted its issuance on its website, as it does with all storm water permits." The Petitioners wish to point out that in

her foregoing email Ms. Milligan did not assert that the Hartsook Decision had been posted online, but only that it had been "noted" online.

4. Attorney Gleisner then conferred with one his experts, Dr. Neal O'Reilly, to learn his opinion as to whether notice had been given of the Hartsook Decision only. Dr. O'Reilly worked for the DNR for sixteen years and presumably would know about DNR procedures concerning the posting of storm water permits. Dr. O'Reilly wrote the following in a December 18, 2010 email: "I disagree with Ms. Milligan's claim that the storm water permit issuance was listed on WDNR's website."
5. Counsel for the Petitioners then examined the four corners of the November 4, 2010 Hartsook Decision, contained in attached App. 2, Exhibit D, and made the following discoveries.
    A. The November 4, 2010 Hartsook Decision was addressed to just Lynette Check of the DNR. It was not copied to anyone else. In contrast, the November 4, 2010 Permit in App. 2, Exhibit A was copied to ten different entities. In addition, the December 13, 2010 Decision of the DNR in attached App. 2, Exhibit B was received from the DNR by Petitioners' counsel via mail on December 15, 2010.
    B. At the conclusion of the November 4, 2010 Hartsook Decision, it is clear that appeal rights are noted. According to the conclusion of the Hartsook Decision in App. 2, Exhibit D, a person disagreeing with the decision: "[has] 30 days after the decision is mailed, or

otherwise served by the Department, to serve a petition … on the Secretary." Thus, the very terms of the Hartsook Decision, posting on a website would not have started the appeal clock running under either Wis. Stats. §227.42 or §227.52. In addition:

i. According to Black's Law Dictionary (6th Ed. 1990), p. 952: "A letter, package, or other mailable matter is 'mailed' when it is properly addressed, stamped with the proper postage, and deposited in a proper place for the receipt of mail."

ii. According to Black's Law Dictionary, p. 1368: "The service of writs, complaints, summonses, etc. signifies the delivering to or leaving them with the party to whom or with whom they ought be delivered or left; and, when they are so delivered, they are then said to have been served."

iii. The November 4, 2010 Hartsook Decision was never mailed to or served upon the Petitioners or their counsel as required within the four corners of the Decision itself.

C. When Attorney Gleisner confronted Ms. Milligan with the assertion that neither the Petitioners nor their counsel had received a copy of the Hartsook Decision by mail or service, her response was the email in attached App. 2, Exhibit E which did not contradict the assertion that the Hartsook Decision had not been mailed or served but instead merely claimed that the DNR had "noted [the Decision's] issuance on its website."

6. At a minimum, the DNR had to know that the Petitioners and their counsel would be keenly interested in receiving notice of a decision such as the Hartsook Decision from the lawsuit which Petitioners previously commenced in Waukesha County Circuit Court on September 3, 2010 as Case No. 10CV3792.

7. In addition, the DNR knew or should have known that the Petitioners and their counsel were unaware of a water quality permit or a storm water permit from the discussion at pages 14 to 15 of their November 22, 2010 Petition for a Contested Case Hearing in the case of *North Lake Boat Launch Manual Code 3565.1 Approval Re: IP-SE-2009-68-05745-05750, Issued November 4, 2010.* It is clear from the foregoing referenced discussion that the Petitioners and their counsel did not know about the existence of the Hartsook Decision at the time of the filing of their November 22, 2010 Petition for a Contested Hearing of the November 4, 2010 Permit in App. 2, Exhibit A. The Petitioners even include an example of what a water quality permit should have looked like in Exhibit I to the aforesaid November 22, 2010 Petition. At that point, the DNR should have referred the Petitioners to the Hartsook Decision, and there can be no doubt from Petitioners' November 22, 2010 Petition for a Contested Hearing that they would have sought review of the Hartsook Decision if they had known of it.

8. Further, the DNR knew or should have known that the Petitioners and their counsel were unaware of a water quality permit or a storm water permit

from the discussion at pages 16 to 18 of their December 3, 2010 Petition for Judicial Review in the case of *State ex rel. Reddelien Road Neighborhood Association v. DNR*, Waukesha Circuit Court Case No. 10CV5096. It is clear from the foregoing referenced discussion that the Petitioners and their counsel did not know about the existence of the Hartsook Decision at the time of the filing of the December 3, 2010 Petition for Judicial Review. At that point, the DNR should have referred the Petitioners to the Hartsook Decision, and again there can be no doubt from Petitioners' December 3, 2010 Petition for Judicial Review that the Petitioners would have sought review of the Hartsook Decision if they had known about it..

9. In addition to all of the foregoing, there is absolutely no reference of any kind in the November 4, 2010 Permit contained in attached App. 2, Exhibit A to the Hartsook Decision in attached App. 2, Exhibit D, although since the Hartsook Decision in App. 2, Exhibit D was issued on the exact same day as the DNR's Permit in App. 2, Exhibit A it would have been logical for there to have been cross-references between those documents.

10. The Hartsook Decision in attached App. 2, Exhibit D notes in its first paragraph that Mr. Hartsook had received the application from the DNR for a "Construction Project Permit" on November 1, 2010, and the Hartsook Decision is dated just four days later, on November 4, 2010. The Hartsook Decision makes it clear that it is being issued under Wis. Stats. Ch. 283. Permit applications subject to Chapter 283 must be issued so that

the public has at least 30 days to provide comments on the permit application. Wis. Stats. §283.39(2). Clearly, the four days from the application to the issuance of the Hartsook Decision is less than 30 days.

WHEREFORE, pursuant to §227.57(9) and under the superintending powers of this Court, Petitioners respectfully request that this Court declare that the thirty (30) day limitation on an appeal of the Hartsook Decision did not begin to run until December 16, 2010.

III. WITHIN THE MEANING OF WIS. STATS. §227.53(1)(b), PETITIONERS ARE AGGRIEVED PARTIES WHOSE SUBSTANTIAL INTERESTS WILL BE AFFECTED BY THE HARTSOOK DECISION.

1. The Petitioners are aggrieved by the DNR's issuance of the Hartsook Decision, and the development of the boat launch that decision makes possible affects Petitioners' substantial interests. The Petitioners are also residents of the Reddelien Road Neighborhood, which is immediately adjacent to the proposed boat launch on the Kraus Site which is the subject of the Hartsook Decision.
2. The Petitioners have a substantial interest in using and enjoying their property in the Reddelien Road Neighborhood adjacent to the Site. Based on reports from Petitioners' experts, the construction of the access road, parking lot, and boat launch authorized in part by the November 4, 2010 Hartsook Decision will result in increased flooding and pollution as well as the surcharging of septic systems on Petitioners' property. <u>This will impair Petitioners' use and enjoyment of their property, reduce the value of that property and damage their interest as riparian owners in North Lake.</u>

3. The Hartsook Decision was issued in violation of the public notice and comment requirements of Wisconsin Law, as detailed *supra*. The DNR held a public informational hearing on September 30, 2010, pursuant to Wis. Admin. Code Chapter NR 310. The DNR's comment period ended on October 12, 2010, at 4:30 p.m. As set forth more fully *infra*, the Petitioners' statutory and due process rights were violated when Petitioners were prevented from responding to the Hartsook Decision.

4. In point of fact, as is clear from the items in attached App. 2, Exhibit D, the NLMD and the RRNA were denied reasonable access to the Kraus Site during the growing season and during the period of time when threatened and endangered species would be present so that they could conduct tests and make appropriate observations in order to address properly storm water issues now raised by the Hartsook Decision. Without the ability to meaningfully access the Kraus Site, the NLMD and the Petitioners were obstructed from formulating comprehensive or meaningful responses to the Hartsook Decision.

IV: THE HARTSOOK DECISION IS DEFICIENT IN A NUMBER OF DIFFERENT RESPECTS.

5. The Hartsook Decision in attached App. 2, Exhibit D makes reference to DNR General Permit No. WI-S067831-3, which provides at Section 3.1.6.1 that an erosion control plan for a development should contain a description of the "expected level of sentiment control on the construction

site that achieves compliance with Wis. Admin. Code NR §151.11 or §151.23."

A. The Hartsook Decision does not address the Factual Issue of whether the DNR's Proposed Work is "Development" or "Redevelopment."

6. The Hartsook decision does not contain such a description and is otherwise deficient when compared with the requirements of Wis. Admin. NR Ch. 151. Most troubling of all, the Hartsook Decision completely overlooks the fact that the DNR has decided to characterize the work to be performed on the Kraus Site as "redevelopment." As a consequence, the DNR insists that it only has to reduce pollutants by 40%. As Petitioners' expert, Dr. O'Reilly makes clear in the Affidavit contained in App. 2, Exhibit F, ¶4, it is entirely incorrect to characterize the work to be performed as "redevelopment." In fact, the work to be performed is "new development" and pollutants must be reduced by 80%. *Id.* The failure of the Hartsook Decision to address this issue in any way ignores the facts of the Kraus Site and must be addressed in a contested hearing before an ALJ.

7. As part of the proposed development, the DNR plans to construct a 1,500 foot long, 24 foot wide paved access road with a surface area of approximately 36,000 square feet. This is to be built over the existing 6 to 9 foot wide gravel access road with a surface area of approximately 9,000 square feet. See App. 2, Exhibit F, ¶4.

8. For purposes of Wis. Admin. Code NR §151.12(5)(a) the DNR considers this construction of the paved road to be "redevelopment," thus requiring a

design that meets only a 40% total suspended solids ("TSS") removal standard under NR 151.12(5)(a)2. *Id.* Since the proposed construction of the road actually represents a 300% increase in the development footprint, its construction should be considered a new "development" [as defined in Wis. Admin. Code NR §151.002(39)] requiring a design that meets an 80% TSS removal standard under NR §151.12(5)(a)1. *Id.*

9. According to the DNR, the design achieves only a 39.9% TSS removal. *Id.* Thus the DNR's proposed work at the Kraus Site does not comply with Wis. Admin. Code NR 151.12(5)(a) *Id.* and the Hartsook Decision is invalid for failing to address this issue in any way.

B. The Hartsook Decision does not Comply with the Requirements of Wis. Admin. Code NR §151.12(5)(b).

10. Wis. Admin. Code NR §151.12(5)(b) requires the institution of Best Management Practices ("BMPs") to maintain or reduce peak runoff discharge rates to the maximum extent practicable, as compared to pre-development conditions for the 2-year, 24 hour design storm applicable to the post-construction site.

11. In the September 22, 2009 memo prepared by Kapur & Associates, Inc. for the DNR titled "Storm Water Evaluation for North Lake Boat Launch, Waukesha County" the issue of peak flood discharges is not addressed (O'Reilly Affidavit, App. 2, Ex. F, ¶5). The Hartsook Decision does not address this factual issue or the requirements of Wis. Admin. Code NR §151.12(5)(b), and this also requires a contested hearing.

12. According to Petitioners' expert, the construction of the proposed parking lot for the boat launch will interfere with drainage for the residents along Reddelien Road (O'Reilly Affidavit, App. 2, Ex. F, ¶6). The 4-inch PVC pipe to be used for drainage according to the DNR plans will be totally inadequate to handle the amount of water that will flow out of the wetland complex. *Id.* Again, the Hartsook Decision does not even address this factual issue.

13. The fill for the proposed parking lot has the potential to raise flood water stages on neighboring properties by several feet and shift the current overland flow route onto the neighbors to the south of the Kraus Site. *Id*.

14. The foregoing will increase flooding and surcharge septic tanks in the Reddelien Road Neighborhood. Once again the Hartsook Decision does not address this factual issue.

C. The Hartsook Decision does not Comply with Wis. Stat. § 281.15 or Wis. Admin. Code NR §299.04(1)(b).

15. The storm water treatment system for the roadway is not designed to remove oils and grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff. See O'Reilly Affidavit, App. 2, Ex. F, ¶4. These effects are not accounted for by the DNR or the Hartsook Decision and violate Wis. Stats. §281.15 and Wis. Admin. Code NR § 299.04(1)(b). The Hartsook Decision is thus invalid.

D. The Hartsook Decision was issued without permitting Petitioners and the NLMD Reasonable Access to Kraus.

16. The DNR prevented Petitioners from providing meaningful comments on the DNR's issuance of permits to itself because it failed to accord Due Process to the public – specifically to Petitioners themselves and the North Lake Management District ("NLMD"), members of which include the Petitioners – when it refused to allow Petitioners and the NLMD access to the Kraus Site during the growing season and/or during the period of time when threatened/endangered species would be present at the Kraus Site.

17. By denying meaningful access the Kraus Site during seasons which would allow Petitioners and the NLMD (via experts) to conduct the necessary studies, the DNR obstructed Petitioners' and the NLMD's ability to formulate a comprehensive or meaningful comment to the proposed development, or to otherwise protect their property interests from the DNR's actions at the Kraus Site. Quite simply, it is impossible to know whether or not the DNR has complied with the mandate of Wis. Admin. Code NR §103.03 or Wis. Stats. §281.36, and in addition Wis. Admin. Ch. 151. The DNR's denial of meaningful access to publically owned property is fundamentally unfair given the DNR's self-dealing on its own project. Therefore, Petitioners' statutory and Due Process rights were violated by the DNR's actions. DNR's denial of reasonable access to the Kraus Site is also contrary to Wis. Admin. Code NR §150.01(5) which provides that

DNR is to "provide an opportunity for public input to the decision-making process."

E. The Hartsook Decision was issued without affording Petitioners a Reasonable Opportunity to Comment.

18. The Hartsook Decision in attached App. 2, Exhibit D notes in the first paragraph that Mr. Hartsook had received the application from the DNR for a "Construction Project Permit" on November 1, 2010, and the Hartsook Decision is dated just four days later, on November 4, 2010. The Hartsook Decision makes it clear that it is being issued under Wis. Stats. Ch. 283. Permit applications subject to Chapter 283 must be issued so that the public has at least 30 days to provide comments on the permit application. Wis. Stats. §283.39(2). Clearly, the four days from the application to the issuance of the Hartsook Decision is considerably less than 30 days.

F. The Hartsook Decision does not contain a Proper Water Quality Certification as Required by Law.

19. The November 4, 2010 DNR Permit contains the following statement: "The [DNR] 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 …" (App. 2, Exhibit A, FOF #13). This statement falls well short of the standards normally employed and the methodology normally adopted by the DNR when assessing water quality.

20. One has only to compare the extremely terse statement in App. 2, Exhibit A, FOF #13 with the lengthy and very specific water quality certification

attached as App. 2, Exhibit G that is customarily issued by the DNR in other cases. The Hartsook Decision does not in any way clarify the lack of clarity in the November 4, 2010 Permit in App. 2, Exhibit A and makes it impossible for the Petitioners to ascertain whether water quality standards have been met.

21. Indeed, the absence of a meaningful water quality certification such as that contained in App. 2, Exhibit G in and of itself deprives the Petitioners of their Due Process rights because they have no way of knowing, let alone assessing, the accuracy of the claims in App. 2, Exhibit A, FOF #13.

22. In addition, the single statement in the Permit's (App. 2, Ex. A, FOF # 13), does not satisfy in any way the requirements of the DNR to act as an agent for the Environmental Protection Agency in conducting a full water quality certification under Section 401 of the Federal Clean Water Act (33 USC §1341). Nowhere is there any evidence in the Permit that the DNR conducted the type of investigation and certification process customary for such a project.

WHEREFORE, Petitioners pray for the following relief:

1. FOR AN ORDER that the thirty (30) day limitation on an appeal of the Hartsook Decision did not begin to run until December 16, 2010.

2. FOR AN ORDER that the November 4, 2010 Hartsook Decision, which was issued based on a November 1, 2010 was not timely prepared and issued within the meaning of Wis. Stats. §283.39(2), and thus should be set aside.

3. FOR AN ORDER that the Hartsook Decision be remanded so that a factual determination can be made that there is full compliance with Wis. Admin. Code NR § 151.12(5)(a) in that a factual determination is made that the access road on the Kraus Site should be considered a new “development” rather than a “redevelopment” under Wis. Admin. Code NR §§151.002(39) and151.12(5)(a) and a factual determination is made that there will be full compliance with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2.

4. FOR AN ORDER that the Hartsook Decision be remanded so that a factual determination can be made that there will be full compliance with Wis. Admin. Code NR §151.12(5)(b) in that:

a) the culverts proposed in the project plans are adequate to handle the volume of water that will flow out of the wetland complex on and adjacent to the Kraus Site and

b) that the proposed parking lot will not act as a stopper, preventing water from the wetland complex on and adjacent to the Kraus Site from draining into North Lake via the Kraus Site and instead divert it onto neighbors to the south of the Kraus Site.

5. FOR AN ORDER that the Hartsook Decision be remanded so that a factual determination be made that the surcharge of septic systems on Reddelien Road will not cause flooding in the Reddelien Road Neighborhood or pollution of North Lake.

6. FOR AN ORDER that the Hartsook Decision be remanded so that a factual determination can be made that there is full compliance with Wis. Stat. §281.15 and Wis. Admin. Code NR §299.04(1)(b) in that:

a) A factual determination will be made that the storm water treatment system for the roadway will remove oils, grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff.

b) A factual determination will be made that the storm water treatment system will not in fact increase pollution in the Reddelien Road. Neighborhood and North Lake.

7. FOR AN ORDER that the Hartsook Decision be remanded so that it is clear from the face of the Hartsook Decision that the required water quality certification under Wis. Stat. §281.15, Wis. Admin. Code NR Ch. 103 and Ch. 299, as well as the Federal Clean Water Act, 33 USC §1341?

8. FOR AN ORDER pursuant to Wis. Stats. §227.57(1) and to the extent evidence is adduced at the Contested Hearing pursuant to the Petition in Appendix 2 of DNR irregularities in procedure before the Agency, allowing for further testimony before this Court and also for discovery in the form of depositions or interrogatories.

9. FOR AN ORDER pursuant to Wis. Stats. §227.57(4) and based evidence adduced at the Contested Hearing pursuant to the Petition in Appendix 2, remanding this case to the DNR for further action because the fairness of the proceedings and the correctness of the DNR's actions have been impaired by a material error in procedure or a failure to follow prescribe Agency Procedures.

10. FOR AN ORDER pursuant to Wis. Stats. §227.57(8) and based on evidence adduced at the Contested Hearing pursuant to the Petition in Appendix B, remanding the case to the DNR because the DNR has

a) Acted outside its area of discretion; or

b) Acted inconsistently with a DNR rule, stated DNR policy or a prior DNR practice.

Dated at Hartland, Wisconsin this 20th day of December, 2010.

LAW OFFICES OF WILLIAM C. GLEISNER, III
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APPENDIX 2

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
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Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Cathy Stepp, Secretary
Telephone 608-266-2621
FAX 608-267-3579
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January 10, 2011

William C. Gleisner, III, Esq.
Law Offices of William C. Gleisner, III
300 Cottonwood Ave., Suite No. 3
Hartland WI 53029

Subject: Petition for contested-case hearing – North Lake boat launch November 4, 2010, storm water general permit decision

Dear Mr. Gleisner:

On December 20, 2010, the Department received your 64- page petition on behalf of Reddelien Road Neighborhood Association, Inc., and several individuals. The petition requested a contested-case hearing under s. 227.42, Stats. The agency action or inaction complained of was the Department's November 4, 2010, decision to convey WPDES general permit coverage for storm water discharges from land disturbing construction activity associated with a proposed public boat launch project. For the reasons stated below, your petition is denied.

Section 227.42, Stats., affords any person the right to a contested-case hearing if: (a) A substantial interest of the person is injured in fact or threatened with injury; (b) There is no evidence of legislative intent that the interest is not to be protected; (c) Injury to the person requesting a hearing is different in kind or degree from injury to the general public; and (d) There is a dispute of material fact. Under s. NR 2.05 (intro.) and (5), Wis. Adm. Code, petitions for contested-case hearings under s. 227.42, Stats., must be served upon the Secretary within 30 days after the complained-of Department action or inaction.

Your December 20, 2010, petition was not timely because it was served 46 days after the Department's action. As was explained in Secretary Matt Frank's December 13, 2010, letter granting, in part, your previous petition for a contested-case hearing regarding the proposed public boat launch project, the Department's decision to grant coverage under the storm water general permit ". . . was issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook and is now final."

In your petition you set out several reasons that you believe justify your failure to serve the petition by the required deadline, including alleged errors of law by the Department. However, these allegations appear to be based either on misunderstandings of the streamlined procedures under ch. NR 216, Wis. Adm. Code, that govern the construction site storm water discharge general permit process, or are a collateral attack on those streamlined permitting rules. Statutes and rules governing the issuance and administration of WPDES permits recognize important substantive and procedural differences between storm water discharge permits issued under s. 283.33, Stats., and other WPDES discharge permits. They further recognize differences between individual permits and general permits. In particular, s. 283.37 (1) and (6), Stats., provide that Department rules may specify different requirements for applications for storm water permits issued under s. 283.33, Stats., and that owners or operators eligible for coverage under general permits are not subject to the "normal" application requirement of s. 283.37 (1) to (5), Stats. Rules relating to coverage under storm water general permits are codified in ch. NR 216, Wis. Adm. Code. For projects involving land disturbing construction activity, the expedited permit process rules are set out in subchapter III of ch. NR 216, Wis. Adm. Code, and have been in effect since August 1, 2004.

The November 4, 2010, agency action complained of in your petition was not the issuance of a new, individual WPDES permit, but rather was a grant of coverage under existing WPDES general permit No. WI-S067831-3 for storm water discharges from land disturbing construction activities. That general permit was issued by the Department on September 29, 2006, under s. 283.33, Stats., following public notice and hearing.

Under s. NR 216.44 (1), Wis. Adm. Code, a landowner proposing land-disturbing construction activity may obtain coverage under that WPDES general permit simply by submitting a Notice of Intent (i.e., a permit application) to the Department at least 14 working days prior to the commencement of any land disturbing construction activities. Unless notified by the Department to the contrary, a landowner who submits a complete Notice of Intent is automatically permitted and is authorized to discharge storm water from a construction site under the terms and conditions of the construction site storm water discharge general permit 14 working days after the date that the Department received the notice of intent, or upon receipt of notification from the Department that the construction site is covered under the general permit, whichever occurs first.

Since public participation due process requirements for prior notice and comment were satisfied when the construction site storm water discharge general permit was issued in 2006, there are no statutory or code requirements for prior notice and opportunity to comment regarding Department decisions to grant coverage to a specific site under the general permit, nor are there requirements for after-the-fact notice of such decisions. Nevertheless, the Department informally welcomes public input regarding both proposed and permitted projects and, to that end, lists pending Notices of Intent on its website along with construction sites where general permit coverage has been granted.

Because your petition was not timely, the request for a contested-case hearing must be denied. Even if the petition had been timely served, it must be denied because none of the 6 issues sought to be reviewed meets all of the requirements of s. 227.42, Stats.

Issues sought to be reviewed

1. *Were the Petitioners properly served?* The Department agrees that its November 4, 2010, storm water permit decision was not served upon (or mailed to) the Petitioners, so there is no dispute of fact on this issue. However, it is the Department's position that as a matter of law, service or mailing to the Petitioners was not required and that the timeframe to petition for a contested-case hearing was governed by s. NR 2.05 (intro.) and (5), Wis. Adm. Code.

2. *Was the Department's November 4, 2010, storm water permit decision made and issued in compliance with s. 283.39 (2), Stats.?* Section 283.39 (2), Stats., requires public notice and a 30-day written comment period on tentative decisions regarding applications required under s. 283.37, Stats., for WPDES permits. The Department agrees that its November 4, 2010, storm water permit decision was not issued in compliance with s. 283.39 (2), Stats., so again there is no material dispute of fact. Rather, the Department maintains as a matter of law that under s. 283.37 (1) and (6), Stats., the streamlined storm water discharge general permit process followed in this case is not subject to s. 283.39 (2), Stats., and that the procedures of subchapter III of ch. NR 216, Wis. Adm. Code, govern instead. To the extent that Petitioners dispute this, the petition improperly seeks the review of an administrative rule in a s. 227.42, Stats., contested-case hearing.

3. *Does the proposed public boat launch project comply with s. NR 151.12 (5) (a), Wis. Adm. Code?* The Petitioners dispute the Department's legal determination and assert that proposed project is a "new development," making it subject to a more stringent post-construction storm water management performance standard for the reduction or control of total suspended solids (TSS) than would apply if it were "redevelopment." "New development" and "redevelopment" are defined in s. NR 151.002 (28) and (39), Wis. Adm. Code, respectively. "New development" means development resulting from conversion of previously undeveloped land or agricultural land uses, while "redevelopment" means where development is replacing older development.

The facts regarding the nature of the existing site and the scope of the proposed project aren't in material dispute, although the petition incorrectly described the Department's November 4, 2010, decision as characterizing the work to be performed at the site as "redevelopment" instead of as "new development." In fact, it did neither, and there is no legal requirement that decisions conferring general permit coverage do so. But, because permit coverage was granted after the Department reviewed the site's post-construction storm water management plan, it can be argued that the November 4, 2010 decision implicitly determined that the plan complied with applicable standards in ch. NR 151, Wis. Adm. Code.

The Department interprets ch. NR 151, Wis. Adm. Code, to require the proration of new development and redevelopment at construction sites based on the respective areas involved. In this case, a supplement to the post-construction storm water management plan prepared for the project explained that the project involved both new development and redevelopment, and that it would meet both performance standards overall:

> "The proposed roadway is considered redevelopment according to the definition in NR 151.002(39), Wis. Adm. Code. The proposed parking lot is considered new development according to the definition in NR 151.002(28), Wis. Adm. Code. Based on the acreage of each, a weighted average TSS removal rate of 54.10% is required for the development as shown on page 4 of the Kapur evaluation.
>
> The SLAMM model was utilized to determine pollutant loading for the proposed development. The total suspended solids load from the proposed development with no controls [is]1,102.64 pounds. The required removal of TSS of 54.10% is 596.5 pounds. TSS removal with the proposed development is achieved through four pipe storage units under the roadway that treats roadway runoff, and a biofilter that treats parking lot runoff. The treatment systems will remove 634.27 pounds, or 57.5% of the TSS load."

(Even without proration, the 40% redevelopment and 80% new development TSS reduction standards are met. The storm water management practices employed for the redevelopment of the road achieve 39.9 % TSS reduction and the practices for the parking lot and approach to the boat ramp achieve 90 % TSS reduction.)

Accordingly, Petitioners' issue of whether all or part of the project is "new development" or "redevelopment" under s. NR 151.12 (5), Wis. Adm. Code, only calls into question the Department's interpretation of its own rules, and Petitioners have not alleged that this issue involves a material dispute of fact.

4. *Does the proposed project meet s. NR 151.12 (5) (b), Wis. Adm. Code?* Petitioners claim the Department's November 4, 2010, decision improperly failed to address the post-construction storm water performance standard regarding 2-year, 24-hour peak flood flow. In particular, they raise concerns about the adequacy of proposed culverts, potential changes in surface water drainage through and from the site, and potential impacts of the project on septic system and local flooding. While these are all important questions, they indicate that Petitioners misunderstand the legal purpose and scope of the WPDES construction site storm water discharge general permit program. Its primary focus is on erosion control and limiting the total movement of total suspended solids in storm events of a two-year intensity or less. Beyond this, its authority does not extend to the regulation of flooding, changes in surface water drainage patterns or the malfunctioning of septic systems, all of which fall under the common law surface water reasonable use doctrine.

Nevertheless, the Department maintains that as a matter of law, the peak discharge performance standard of s. NR 151.12 (5) (b), Wis. Adm. Code, is not applicable to the proposed public boat launch project. Under s. NR 151.12 (5) (b) 2. b., Wis. Adm. Code, the standard does not apply to redevelopment construction such as the access road, and s. NR 151.12 (5) (b) 2. a.., Wis. Adm. Code, exempts new development construction such as the parking lot, where the change in hydrology due to development would not increase the surface water elevation at any point within the downstream receiving water by more than 0.01 of a foot for the 2-year, 24-hour storm event. (Assuming 100% of the rain that falls on the parking lot becomes runoff, the parking lot would generate a total

runoff volume of 2.7 acre-inches or 0.225 acre-feet. Projecting the maximum runoff volume of 0.225 acre-feet over the surface of North Lake (437 acres) would result in a maximum surface water elevation increase of only 0.0005 feet due to the parking lot.) Thus, like Petitioners' Issue No. 3, this issue only calls into question the Department's interpretation of its own rules, and Petitioners have not alleged that this issue involves a material dispute of fact.

5. *Does the Department's November 4, 2010, decision granting coverage to the proposed project under the WPDES construction site storm water discharge general permit meet s. 281.15, Stats., and s. NR 299.04 (1) (b), Wis. Adm. Code?* On its face, this Issue presents only a potential question of law, not a dispute of material fact. Section 281.15, Stats., primarily requires rule-making, so Petitioners' purpose in citing it is not apparent. Section NR 299.04 (1) (b), Wis. Adm. Code, sets standards that must be applied by the Department when reviewing applications for water quality certification of proposed activities. The Department contends, however, that s. NR 299.01 (2) (c), Wis. Adm. Code, waives certification for any wastewater discharge associated with an activity which will be regulated by the Department under ch. 283, Stats. Because the discharge of storm water from land-disturbing construction activity associated with the proposed public boat launch project will be regulated under ch. 283, Stats., (and by a permit and rules adopted under ch. 283, Stats.), s. NR 299.04 (1) (b), Wis. Adm. Code, does not apply. If Petitioners disagree, only a dispute of law exists.

6. *Did the Department fail to conduct the required water quality certification under s. 281.15, Stats., and the federal Clean Water Act?* This Issue appears to be a restatement of Petitioners' Issue No. 5, but in any case, there is no dispute of fact as to whether or not a water quality certification was conducted in connection with the Department's Nov. 4, 2010, decision to grant coverage under the WPDES construction site storm water discharge general permit. It was not. Based on s. NR 299.01 (2) (c), Wis. Adm. Code, the Department does dispute Petitioners' claim that certification was required under either state or federal law, however. If Petitioners disagree, only a dispute of law exists, and by implication, their petition also constitutes an impermissible attempt to challenge, in a s. 227.42, Stats., contested-case hearing, either the reasonableness of a term or condition of the storm water general permit itself (issued September 29, 2006) or the validity of s. NR 299.01 (2) (c), Wis. Adm. Code.

For the foregoing reasons, the petition for a contested-case hearing is denied. If you have questions regarding this determination, please contact either Pete Flaherty or Dan Graff of the Department's Bureau of Legal Services at (608) 266-8254 or (609) 264-8527, respectively.

Sincerely,

Matt Moroney
Deputy Secretary

cc: Pete Flaherty – LS/8
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Mike Lutz – LS/8
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Jim McNelly – SER
Bryan Hartsook – SER
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