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September 15, 2011

VIA UPS OVERNIGHT

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

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

Dear Clerk:

Enclosed for filing please find the following:

- (1) Motion to Strike Portions of and Exhibits to the August 23, 2011, Affidavit of Neal O'Reilly, PhD; and
- (2) DNR's Response to RRNA's "Motions Pursuant to Wis. Stats. §§ 227.57(1) and 227.57(7)."

Copies are being sent today to opposing counsel. Thank you for your assistance in this matter.

Sincerely,

Diane L. Milligan
Assistant Attorney General

DLM:kmr

Enclosures

c w/encs.: ✓ Attorney William C. Gleisner, III (via email and U.S. first-class Mail)
Attorney Edwina Kavanaugh, DNR (via email)

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

WAUKESHA COUNTY

REDELLEN ROAD NEIGHBORHOOD
ASSOCIATION, INC. ("RRNA"), et al.,

Petitioners,

Case No. 10-CV-5341

v.

Administrative Agency Review: 30607

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

MOTION TO STRIKE PORTIONS OF AND EXHIBITS TO
THE AUGUST 23, 2011, AFFIDAVIT OF NEAL O'REILLY, PHD

The Respondent Wisconsin Department of Natural Resources (DNR), by its attorneys J.B. Van Hollen, Attorney General, and Diane L. Milligan, Assistant Attorney General, moves the Court to strike specific sentences, paragraphs and the exhibits from the August 23, 2011, Affidavit of Neal O'Reilly, PhD, which the petitioners have filed in support of their motion seeking an expansion of the record in this case.

As grounds for this motion the DNR states:

1. Wisconsin Stat. § 906.02 provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."
2. Regarding opinion testimony, Wis. Stat. § 907.01 provides: "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences

is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue" and Wis. Stat. § 907.02 provides that a "witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise," if the testimony is based on the application of reliable principles and methods to the facts of the case.

3. The following statements in Dr. O'Reilly's affidavit should be stricken because the affidavit fails to establish any foundation that the affiant has personal knowledge of the evidence he is seeking to present, because the affidavit fails to establish that any lay opinions are rationally based on Dr. O'Reilly's personal perceptions, or because the affidavit has not adequately established that Dr. O'Reilly is qualified by knowledge, skill, experience, training or education to provide expert opinion:

a) Paragraph 2 and Exhibits 2-4. In this paragraph, Dr. O'Reilly states that DNR proposes to construct a boat launch on land it "purchased from a Mr. Kraus," and references Exhibit 2. Dr. O'Reilly does not provide the foundation for his knowledge regarding DNR's proposal, regarding who DNR purchased the property from, and he does not establish any foundation for Exhibit 2 (who created this, based on what).

This paragraph goes on to discuss the drainage area that includes DNR's property, and references another exhibit (Exhibit 3), but does not establish his personal knowledge of the drainage pattern, and it does not provide adequate foundation for Exhibit 3.

This paragraph states that DNR's property is in the 100-year floodplain, but does not establish the basis for his personal knowledge of this fact. It does not provide foundation for Exhibit 4.

The remainder of the paragraph discusses a channel on the north side of DNR's property, and states that the channel carries enough water to float a boat during storm events. There is no foundation establishing Dr. O'Reilly's personal knowledge regarding this channel.

The closest Dr. O'Reilly's affidavit gets to establishing his personal knowledge of the DNR property is in Paragraph 1, where he says he is "very familiar with the lake, its watershed, and the proposed WDNR public boat launch on the former Kraus Property." This is inadequate because he does not explain the basis for his familiarity. Did he visit the site and perform field work? Did he conduct a literature review? He does not say.

His CV does not fill the gap. It just says he has served as RRNA's expert witness "in their battle to stop a public boat launch from being built in a wetland on the west side of North Lake" (Exhibit 1, p. 10) by providing expert reports on potential damage, reviewing unidentified permits and documents, testifying, and preparing affidavits. In other words, he is experienced providing documents and testimony in support of RRNA's arguments. This does not make him a fact or expert witness regarding DNR's property.

Since Paragraph 2 and Exhibits 2-4 lack proper foundation, they should be stricken.

b) Paragraph 3. In this paragraph, Dr. O'Reilly presents details of DNR's development plans, quotes and paraphrases Wis. Admin. Code chs. NR 216 and 151, and quotes DNR's contractor, all without providing the basis for his personal knowledge. He describes the "existing site condition" on DNR's property without establishing his personal knowledge of this alleged condition. He states that DNR's driveway will be 36,000 square feet in size, without providing foundation for his calculations. Then he makes an argument about what "redevelopment" has "traditionally meant" without establishing the foundation for his personal knowledge regarding redevelopment. Has meant to whom?

Dr. O'Reilly's employment at DNR predates the storm water management program (*see* Bertolacini Aff., ¶ 6 and Exhibit 1, p. 1 (O'Reilly left DNR two years before DNR adopted its storm water discharge permit regulations)), so he cannot attest to DNR's interpretations of the code. Nor has he provided a foundation establishing the bases for or methods used to generate the opinions he purports to make with a "reasonable degree of scientific certainty."

RRNA can make arguments about the record and the law in its brief; it does not need Dr. O'Reilly's affidavit to paraphrase the record or the law. Since there is no basis for the remaining facts or opinions in Paragraph 3 of Dr. O'Reilly's affidavit, it should be stricken.

c) Paragraph 4. Paragraph 4 is unnecessary because the record and the law speak for themselves. Dr. O'Reilly does not add any facts that he has personal knowledge of, or establish any expert opinions in this paragraph. It should be stricken.

d) Paragraph 5 and Exhibit 6. The first five sentences in Paragraph 5 lack foundation and should be stricken. Sentences 7 through 12 should also be stricken for lack of foundation, because some statements assume facts without foundation (what DNR allegedly has not done or not addressed), and because some statements are based on hearsay (sentences 10 and 11).

Sentences 6 and 7 provide Dr. O'Reilly's hydrologic analysis. Although this affidavit does establish personal knowledge, it falls short of the standard in the expert opinion statute, Wis. Stat. § 907.02(1), effective January 31, 2011. This section now provides that expert testimony must be based upon sufficient facts or data, that it must be the product of reliable principles and methods, and that the witness must have applied the principles and methods reliably to the facts of the case. Dr. O'Reilly does not provide his calculations, his methods or his analysis. These sentences must therefore be disregarded.

Exhibit 6, which Dr. O'Reilly states is an undated letter from Bruce Klien [sic] to the Town of Merton, should also be stricken for lack of foundation and because it seeks to present unsubstantiated inadmissible hearsay (what Klien thinks about flooding) and double hearsay (what Klien and Kraus discussed about flooding).

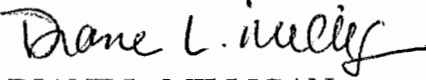
e) Paragraphs 6, 7 and 8. These paragraphs should be stricken for lack of foundation. In Paragraph 6, O'Reilly presents his opinion regarding the application of a geotechnical engineering company's soil boring findings to the storm water analysis. He does not establish his qualifications for opining about geotechnical engineering concepts. In Paragraph 7, O'Reilly opines that Gestra's soil borings "show that there are serious problems with the soil" without explaining what those problems are and how he is qualified to opine about "problematic" soil. He states that the plan does not discuss how the storm water treatment tank will be supported, and speculates that if the tank sunk or tilted, it might not function well. Nowhere does he explain how he is qualified to judge tank placement in soil, or why he thinks this tank, as designed, might tilt or sink.

Paragraph 8 continues this speculation about the tank, using the passive voice: "Concerns exist that settlement in the parking lot due to the '*very soft/very loose soil*' may impact drainage patterns" Whose concerns are these? How soft or loose is too soft or loose? Too soft or too loose for what? Based on what? Dr. O'Reilly or RRNA is clearly worried that "soft" soil may be problematic, and it or they turn this worry into speculation. But such speculation must be supported by facts and evidence of knowledge and expertise. Since the proper factual basis and expert foundation are lacking from Paragraphs 6 through 8, they should be stricken.

4. For the reasons set forth above, Respondent DNR respectfully requests that this Court strike all of the statements, paragraphs and exhibits identified here.

Dated this 15th day of September, 2011.

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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

WAUKESHA COUNTY

REDELLEN ROAD NEIGHBORHOOD
ASSOCIATION, INC. ("RRNA"), et al.,

Petitioners,

Case No. 10-CV-5341

v.

Administrative Agency Review: 30607

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

DNR'S RESPONSE TO RRNA'S
"MOTIONS PURSUANT TO WIS. STATS. §§ 227.57(1) AND 227.57(7)"

INTRODUCTION

Petitioners Reddellen Road Neighborhood Association, Inc., et al. (RRNA) seek a Court order "remanding" DNR's November 4, 2010, decision granting Construction Site Storm Water Runoff Coverage under WPDES General Permit No. WI-S067831-3 for the North Lake Public Access construction site (permit coverage decision) to DNR under Wis. Stat. § 227.57(7) with directions that the Department of Administration Division of Hearings and Appeals (DHA) permit RRNA to depose individuals whose reports are included in the record of the permit coverage decision. RRNA also seeks an order under Wis. Stat. § 225.57(1) allowing the same remand and discovery, as well as an evidentiary hearing if the Court desires to hold one.

RRNA's motion and brief are supported by an Affidavit of Dr. Neal O'Reilly dated August 23, 2011.

As explained below, RRNA's motion must be denied because it reflects a misunderstanding and misapplication of Wis. Stat. §§ 227.57(7) and 227.57(1). The first section provides that the Court *may* remand a matter to the agency as a form of relief if the petitioner satisfies its burden during the judicial review proceeding. The second section provides that the Court *may* hold an evidentiary hearing regarding alleged procedural irregularities before the agency if a *prima facie* showing is made. Neither section provides a vehicle that would allow the Court to order the agency to hold a contested case hearing before the Court conducts its review.

The exclusive means under Wis. Stat. ch. 227 by which RRNA could have obtained a contested case hearing was through a Wis. Stat. § 227.42 petition. RRNA did not file such a petition, and it is now too late to do so.¹ RRNA cannot use Wis. Stat. §§ 227.57(7) or 227.57(1) as a back door into a Wis. Stat. § 227.42 hearing.

RRNA has provided the O'Reilly affidavit to show what it would argue about if it were granted a contested case hearing. It also uses this affidavit to make arguments about

¹ While RRNA raised storm water issues in its petition for a contested case hearing on DNR's Manual Code Approval (RRNA Br. at 3), a hearing was denied on those issues because the Manual Code Approval did not authorize storm water permit coverage (RRNA Ex. A). RRNA never filed a petition for a contested case hearing on DNR's storm water permit coverage decision. In other words, RRNA raised storm water issues in the wrong petition and it never filed the right petition to obtain a hearing on those issues. It also did not file a petition for judicial review of the Manual Code Approval contested case hearing denial decision, instead filing a "supplemental" pleading in the judicial review proceeding on the merits of the Manual Code Approval. That supplemental pleading was dismissed by the circuit court, and the court of appeals denied RRNA's petition for an interlocutory appeal, with costs. Waukesha County Circuit Court Case No. 10-CV-5096, CCAP Dkt. ## 29, 37.

the application of the law to the record, showing that Dr. O'Reilly would have drawn different conclusions than DNR. By motion filed herewith, DNR has moved to strike the majority of this affidavit for lack of foundation, because it does not establish Dr. O'Reilly is qualified to provide the expert opinion(s) he gives, and because it contains inadmissible hearsay.

ARGUMENT

I. RRNA SHOULD HAVE SOUGHT A CONTESTED CASE HEARING UNDER WIS. STAT. § 227.42 BY TIMELY FILING THE PROPER PETITION.

- A. A petition for a contested case hearing under Wis. Stat. § 227.42 must be filed within thirty days of the agency decision or action being challenged.

The right to request a contested case hearing under Wisconsin's Administrative Procedures Act is set forth in Wis. Stat. § 227.42(1), which provides:

In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting the hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

A petition for hearing must be filed with DNR "within 30 days of the date of the order or decision to be reviewed." Wis. Admin. Code §§ NR 2.05; NR 2.03.

B. RRNA did not file a timely petition under Wis. Stat. § 227.42, and it is now too late for it to do so.

This Court has determined that the clock started ticking for RRNA to seek judicial review the day it received a copy of the decision being challenged in this case. The thirty-day clock for seeking a contested case hearing under Wis. Admin. Code § NR 2.05 began the same day, so it ran out more than eight months ago.

RRNA seeks to sidestep its failure to timely seek a hearing by asserting, without citing any law, that "RRNA was powerless to proceed with any challenge to the record underlying the storm water permit issued" until after this Court disposed of DNR's motion to dismiss. RRNA Br. at 1. This argument should be disregarded. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (courts decline to consider arguments unsupported by citation to authority).

If RRNA wanted to obtain a contested case hearing, it should have filed a timely petition under Wis. Stat. § 227.42. It failed to do so, and now it is too late to do so.

II. RRNA CANNOT OBTAIN A PRE-REVIEW HEARING UNDER WIS. STAT. § 227.57(7).

RRNA asserts that since DNR did not hold a hearing on the storm water general permit coverage application for its North Lake boat launch, "this necessitates a § 227.57(7) remand." RRNA Br. at 5. In support of its argument, RRNA cites just one case, *R.W. Docks & Slips v. DNR*, 145 Wis. 2d 854, 429 N.W.2d 86 (Ct. App. 1988), for the proposition that a court has open-ended authority to remand any case decided without a hearing so that the facts may be ascertained and developed. RRNA Br. at 5-6

(selectively quoting and citing *R.W. Docks* at 859, 860 and 861). RRNA misunderstands Wis. Stat. § 227.57(7), and it ignores *Barnes v. DNR*, 178 Wis. 2d 290, 506 N.W.2d 155 (Ct. App. 1993), a case that directs parties not to misread *R.W. Docks* as RRNA has.

Wisconsin Stat. § 227.57(4)-(8) set forth the types of relief a court may order, after conducting its review, if the petitioner has met the requisite burden associated with each. As the *Barnes* court explains, a court "must affirm the agency's action unless [it finds] a ground exists for setting aside, modifying, remanding or ordering agency action under sec. 227.57(4)-(8)." *Barnes*, 178 Wis. 2d at 304 (citing Wis. Stat. § 227.57(2)). When the agency has made its decision without first holding a hearing, and if the petitioner has met his or her burden, the court has two remedies available to it, with one being mandatory and the other permissive:

- (1) if the facts compel a particular action as a matter of law, the court *must* set it aside, modify it, or order the agency to take some specific action; or
- (2) if the facts do not compel a particular action as a matter of law, the court *may* remand the case to the agency for further examination and action within the scope of the agency's responsibility.

Barnes, 178 Wis. 2d at 305 (citing *R.W. Docks*, 145 Wis. 2d at 860, and quoting Wis. Stat. § 227.57(7)) (emphasis added and internal quotation marks omitted). The *Barnes* court went on to caution:

Our decision in *R.W. Docks* . . . should not be read to *require* the reviewing court to set aside or modify the agency decision, order the agency to take some specific action or remand to the agency for further examination all appeals of an agency's decision made without a hearing. *Docks* was not asked to consider, nor was it required to consider, the possibility of an affirmance under sec. 227.57(2), Stats.

Id. at 306, n.5 (emphasis in original).

RRNA misses or ignores the three points made by the *Barnes* court. First, the options in Wis. Stat. §§ 227.57(4)-(8) are remedies or relief following judicial review; they are not pre-review procedures. Second, a remand is not required if there has not been a hearing; it is only one option. Last, affirmance under Wis. Stat. § 227.57(2) is the default if a petitioner does not meet its burden of showing grounds for other relief under Wis. Stat. § 227.57. *Barnes*, at 306.

In this case, the Court has not begun its review, and RRNA has not met its burden on review. It is therefore premature for RRNA to make an argument for remand pursuant to Wis. Stat. § 227.57(7). It is also inappropriate for RRNA to seek orders bypassing the discovery procedures for administrative hearings set forth in Wis. Admin. Code ch. NR 2.

III. RRNA CANNOT OBTAIN THE DISCOVERY IT SEEKS THROUGH WIS. STAT. § 227.57(1).

- A. Wisconsin Stat. § 227.57(1) provides for a court hearing on alleged procedural irregularities if a *prima facie* showing is made.

As its last argument, RRNA asks this Court to "fashion a remand for a hearing which includes the right to take depositional discovery," pursuant to Wis. Stat. § 225.57(1), based on alleged irregularities in procedure. RRNA Br. at 11-12. As discovery, RRNA seeks to depose the authors of the engineering reports DNR considered when it made its permit coverage decision. *Id.* at 4, 10, 14. Wisconsin Stat. § 227.57(1) does not provide the relief RRNA seeks.

Wisconsin Stat. § 227.57(1) sets forth the trial court's scope of review of an agency decision. It provides that the trial court's review is generally confined to the record established before the agency, but it also contains an exception:

in cases of alleged irregularities in procedure before the agency, *testimony thereon* may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing . . . if proper cause is shown therefor.

Wis. Stat. § 227.57(1) (emphasis added). In other words, when a party alleging procedural irregularities occurred makes a *prima facie* showing of those irregularities (see *State ex rel. Madison Airport Co. v. Wrabetz*, 231 Wis. 147, 155, 285 N.W. 504 (1939)), then "the circuit court may take testimony probative of the alleged irregularities." *Guthrie v. Wis. Employment Relations Comm.*, 107 Wis. 2d 306, 315, 320 N.W.2d 213 (Ct. App. 1982).

B. RRNA has not made a *prima facie* showing of procedural irregularities, and it cannot obtain the relief it seeks through Wis. Stat. § 227.57(1).

1. RRNA has not made the requisite showing for a Wis. Stat. § 227.57(1) hearing.

RRNA declares that procedural irregularities have already been established, but it invites the Court to "probe the irregularities in this case further before remanding under § 227.57(1)" if it "wishes." RRNA Br. at 12. It also invites the Court to hold a hearing "if this Court requires further evidence of the alleged irregularities." *Id.* at 15.

In support of its allegations of "irregularities," RRNA insinuates that there is something wrong with DNR applying for permit coverage as an easement holder, even though easement holders are defined as landowners under Wis. Admin. Code § NR 216.002(15). It also suggests it might be "interesting to explore" whether DNR treats itself differently than it treats others. RRNA Br. at 13. These suggestions and insinuations fall short of establishing a *prima facie* showing of procedural irregularities.

2. RRNA cannot be granted a contested case hearing allowing specific discovery through Wis. Stat. § 227.57(1).

Even if RRNA had made an adequate showing of procedural irregularities before DNR, it cannot obtain the relief it seeks through Wis. Stat. § 227.57(1). RRNA says it would like to carefully study the Kapur and Gestra Engineering Reports and depose their authors. RRNA Br. at 13-14. It wants to visit DNR's property. *Id.* at 13. It also wants to evaluate DNR's permit coverage decision in light of the requirements in DNR General Permit WPDES WI-S067831-3. *Id.* at 14. This type of relief is not available in conjunction with a trial court hearing limited to issues of alleged irregularities in procedure before the agency.

RRNA can present arguments regarding DNR's compliance with the requirements in DNR General Permit WPDES WI-S067831-3 when it provides its brief on the merits during this Court's judicial review proceeding. It could have sought discovery and could have provided countervailing expert testimony if it had petitioned and been granted a contested case hearing under Wis. Stat. § 227.42. It is well-settled that where a particular

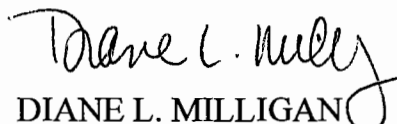
method of review provides a "plain, speedy and adequate" statutory remedy, "it will generally be deemed exclusive." *Sewerage Commission of Milwaukee v. DNR*, 102 Wis.2d 613, 630, 307 N.W.2d 189 (1981) (citation omitted). The method for obtaining a pre-review contested case hearing set forth in Wis. Stat. § 227.42 is plain, speedy, adequate, and exclusive. RRNA cannot now ask the Court to order the hearing RRNA failed to timely request.

CONCLUSION

For all of the reasons set forth here, DNR respectfully requests that this Court deny RRNA's Wis. Stat. §§ 227.57(1) and 227.57(7) motions.

Dated this 15th day of September, 2011.

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