



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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December 13, 2010

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

Dear Attorney Gleisner:

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

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

PETITION UNDER S. 227.42, STATS.

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

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

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

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

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

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

PETITION UNDER S. 30.209, STATS.

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

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

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

...

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

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

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

(emphasis added)

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

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

(emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

and/or:

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

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

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

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

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

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

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

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

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

Even if you had properly alleged a specific reason why the actions authorized by the Water Quality Certification violated the standards under s. NR 299.04, the delineation of the wetlands on the DNR site is not an issue that would be properly before a Wisconsin administrative law judge in any hearing granted under s. NR 299.05(5). The determination regarding the presence, area, and federal vs. nonfederal character of the wetlands on the DNR site is a decision of the U.S. Army Corps of Engineers. The Corps rendered 2 jurisdictional

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

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

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

Sincerely,



Matthew J. Frank
Secretary

cc: Edwina Kavanaugh – LS/8

NOTICE OF APPEAL RIGHTS

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