

**BEFORE THE WISCONSIN
DEPARTMENT OF NATURAL RESOURCES**

**In Re North Lake Boat Launch Manual Code 3565.1 Approval in
File Ref: IP-SE-2009-68-05745-05750, Issued November 4, 2010**

**To: Matthew J. Frank, Secretary
Department of Natural Resources
101 South Webster Street
Madison, Wisconsin 53707**

Pursuant to Wis. Stats. §227.42 and the rules of practice and procedure of the Wisconsin Department of Natural Resources (“DNR”) in Wis. Admin. Code NR §2.05, the Petitioners request a contested case hearing concerning the above referenced November 4, 2010 Permit Approval based on Wis. Stats. Chapter 227 (*see* Count I, *infra*). Petitioners also request a contested case hearing based on Wis. Stats. Chapter 30 (*see* Count II, *infra*) and Wis. Admin Code NR Chapter 299 (*see* Count III, *infra*).

PETITIONERS

- 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 attached Exhibit A).
- 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. Frederick A. Hanson, RRNA Board Member, citizen and owner of property at W322 N7574 Reddelien Road.
- v. Doris Lattos, RRNA Board Member, citizen and owner of property at W322 N7516 Reddelien Road.
- vi. James Wozniak, RRNA Board Member, citizen and owner of property at W322 N7548 Reddelien Road.
- vii. Donna Anderson, citizen and owner of property at N73 W32375 River Road.
- viii. Brad Barke, citizen and owner of property at W322 N7458 Reddelien Road.
- ix. Carol Barke, citizen and owner of property at W322 N7458 Reddelien Road.
- x. James Baumgartner, citizen and owner of property at N73 W32275 Reddelien Road.
- xi. Hilda Baumgartner, citizen and owner of property at N73 W32275 Reddelien Road.
- xii. Douglas Bruch, citizen and owner of property at W322 N7508 Reddelien Road.
- xiii. Charlene Cary, citizen and owner of property at N73 W32365 River Road.

- xiv. Annabelle M. Dorn, citizen and owner of property at W322 N7356 Reddelien Road.
- xv. Linda Bruch, citizen and owner of property at W322 N7508 Reddelien Road.
- xvi. Paulette Draeger, citizen and owner of property at W322 N7448 Reddelien Road.
- xvii. William C. Gleisner, III, citizen and owner of property at W322 N7516 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.

SECTION I: THE AGENCY ACTION OR INACTION WHICH IS THE BASIS FOR THE REQUEST FOR A CONTESTED HEARING.

The Petitioners seek a contested case hearing on the DNR's North Lake Boat Launch Manual Code 3565.1 Approval issued November 4, 2010 in FILE REF: IP-SE-2009-68-05745-05750 (the "Permit") whereby DNR issued a permit to itself which authorized it to construct a public boat launch on North Lake located on property owned by the DNR at SE ¼, S17, T8N, R18E, Town of Merton, Waukesha County (otherwise known as the "Kraus Site"). A copy of the Permit is attached as Exhibit B.

**SECTION II: THE PERMIT IS DEFICIENT
ON ITS FACE AND AS APPLIED TO THE FACTS.**

**A. The Permit Understates The Area Of Wetlands That Will Be
Filled By The Proposed Development.**

**i. The DNR incorrectly applied the Legislature’s
definition of wetlands.**

The Permit should not have been issued because the DNR failed to correctly apply Wisconsin’s statutory definition of wetlands, and thus grossly understated the true extent of wetlands affected by the boat launch in the Permit’s Findings of Fact (“FOF”). Petitioners maintain that the area marked in green on attached Exhibit C (“Disputed Area”) contains additional wetland area not identified as such by the DNR on Exhibit C. See also the Report of Jeff Kraemer, Certified wetland delineator, attached as Exhibit F.

Wis. Stats. §23.32(1) defines a wetland as “an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions.” This same definition is used by the DNR throughout the Administrative Code.¹ This definition does not require the actual presence of aquatic or hydrophytic vegetation for an area to be deemed a wetland. The Disputed Area in attached Exhibit C marked in green has the necessary soils and hydrology to meet

¹ There are 23 instances where the DNR uses that definition in the Administrative Code:

- NR 104.02, NR 109.03, NR 47.82, NR 103.02, NR 47.12, NR 540.03, NR 553.03, NR 329.03, NR 328.33, NR 350.03, NR 117.03, NR 115.03, NR 1.95, NR 328.03, NR 214.03, NR 118.03, NR 182.04, NR 131.03, NR 132.03, NR 204.03, NR 700.03, NR 500.03, NR 600.03.

Wisconsin's statutory definition of a wetland regardless of the presence or absence of aquatic or hydrophytic vegetation. See Attachment F of Dr. O'Reilly's 9/30/2010 Affidavit which is attached to this Petition as Exhibit H. In addition, Petitioners will submit videotapes showing that the area where the proposed parking lot will be placed is in fact largely comprised of land where water is located at, near, or above the land surface. Therefore DNR's wetland determination in the Permit, which in part was based upon the absence of aquatic or hydrophytic vegetation, is contrary to statute and invalid.

The failure to conduct proper wetland delineations is further demonstrated by reports made by the experts of the NLMD and RRNA, such as the October 1, 2010 Report by Jeffrey Kraemer, a Certified Wetland Delineator, in attached Exhibit E, which reads in part:

[The DNR] wetland determination within the boat launch site is significantly flawed and biased. As a professional wetland ecologist with significant experience delineating wetlands throughout the State of Wisconsin, I can point to numerous situations where [the DNR] has made wetland determinations within similar landscape settings ... that contradict [the Kraus] determination.

ii. The DNR failed to follow its own Past Policies and Practices concerning Wetlands.

Alternatively, even applying the improper wetland delineation standards used by the DNR, the delineation was faulty. The DNR's determination that the Disputed Area in attached Exhibit C lacked the necessary aquatic or hydrophytic

vegetation to be deemed wetland for purposes of the Permit was contrary to the DNR's own policy and practice.

However, contrary to the DNR's own practices and policies, the DNR mowed the Disputed Area during its growing season and prior to the wetlands assessment, thus disturbing the natural species composition of its vegetation. See Exhibit H, ¶¶6-14 and its Attachments D,E, and F at Bates 000590-000591. By doing so it reached the erroneous (but preordained) conclusion that the Disputed Area did not exhibit wetland vegetation. . Therefore the wetland determination used by the DNR for the Permit is invalid.

B. The Permit Was Issued in Violation of Wis. Stats. Chapters 30 and 281.

i. The DNR failed to identify Navigable Waters on the Kraus Site.

Petitioners object to the Permit because it was issued in violation of Wis. Stats. §30.12 [and/or §30.20 and §281.31(1)] which requires a permit to build structures or place deposits on the bed of navigable waters. Wis. Stat. §30.10(2) provides: “[A]ll streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.”

The DNR asserts that it considered the navigable waters of North Lake and its wetland complex in issuing the Permit (See Exhibit B, FOF #2).

However, Petitioners maintain that there are additional navigable waters which the DNR failed to identify and thus failed to consider in issuing the Permit.

These navigable waters exist outside North Lake's wetland complex as defined by the DNR in yellow in attached Exhibit C. These navigable waters are located in the "Grove of Trees" marked in orange in attached Exhibit E. As is also clear from Exhibit E, these navigable waters in the grove of trees connect to an unnamed stream to their north and thus drain into North Lake.

Petitioners maintain that the parking lot authorized by the Permit will be built over these unconsidered navigable waters, thus filling in and destroying them. The DNR was alerted to the presence of these navigable waters (see Exhibit B, FOF #8, section L). The DNR has neither acknowledged these navigable waters nor conducted navigability tests in this area. By not conducting navigability tests in the area to be covered by the parking lot, the DNR has abdicated its responsibilities under Wis. Stats. §30.12 and the Public Trust Doctrine.

ii. The identification of Navigable Waters in the Permit is impermissibly vague.

The Permit states "North Lake and portions of its wetland complex are navigable-in-fact at the project site and are impacted by the proposed project" (Exhibit B, FOF #2). This is impermissibly vague and does not specify what portion of the project site contains navigable waters which will be "impacted." Petitioners and the public have the right to know the extent of the impact. Wis.

Stats. §30.10(2) additionally specifies that navigable waters can only be obstructed (“impacted”) with the permission of the State. This would require the issuance of a permit, under Wis. Stats. §§30.12 or 30.20, for example. By failing to set forth with specificity the navigable waters to be impacted by the development, the Permit is impermissibly vague and/or invalid.

C. The Permit Should Not Have Been Issued Because The DNR Failed To Comply With The Requirements Of Wis. Admin. Code NR §151.

i. The Permit does not comply with the requirements of Wis. Admin. Code NR §151.12(5)(a).

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 ¶4 of Dr. O’Reilly’s 9/3/2010 Affidavit, attached as Exhibit G.

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.* According to the DNR, the design achieves only a 39.9%

TSS removal. *Id.* Thus the Permit does not comply with Wis. Admin. Code NR 151.12(5)(a) *Id.* and the Permit is therefore invalid.

ii. The Permit does not comply with the requirements of Wis. Admin. Code NR §151.12(5)(b).

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.

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 (Exhibit G, ¶5). The Permit thus does not meet the requirements of Wis. Admin. Code NR §151.12(5)(b).

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 (Exhibit G, ¶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.*

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.* This will

increase flooding and surcharge septic tanks in the Reddelien Road Neighborhood.

iii. The Permit does not comply with the requirements of Wis. Stat. § 281.15 or Wis. Admin. Code NR §299.04(1)(b).

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 Exhibit G, ¶4. These effects are not accounted for by the DNR and violate Wis. Stats. §281.15 and Wis. Admin. Code NR § 299.04(1)(b). The Permit is thus invalid.

D. The Permit Was Issued In Violation Of Petitioners' Due Process Rights.

i. The Permit was issued without permitting Petitioners and the NLMD reasonable access to the Kraus Site.

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. See attached Exhibit D.

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 counter the DNR's improper wetlands delineation, 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. 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."

ii. The Permit was issued without affording Petitioners and the Public a reasonable opportunity to Provide Meaningful Comments.

The Permit was issued in violation of the public notice and comment requirements of Wisconsin Law. The DNR held a public informational hearing on September 30, 2010, pursuant to Chapter NR 310 of the Wisconsin Administrative Code. The DNR's comment period ended on October 12, 2010, at 4:30 p.m.

Petitioners' statutory and Due Process rights were violated when Petitioners were prevented from providing meaningful comments during the public hearing by unreasonably limiting each commenter to just three minutes to

make their points and by refusing to respond in a meaningful manner to any of the questions from the commenters, including Petitioners. In fact, the DNR claimed it would get back to those who posed questions at the September 3, 2010 meeting, yet the DNR never did.

E. The Permit Does Not Contain a Proper Water Quality Certification As Required By Law.

The 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 ...” (Exhibit B, FOF #13). This statement falls well short of the standards normally employed and the methodology normally adopted by the DNR when assessing water quality.

One has only to compare the extremely terse statement in Exhibit B, FOF #13 with the lengthy and very specific water quality certification attached as Exhibit I that is customarily issued by the DNR in other cases. The DNR’s failure to provide in the Permit the level of review as is reflected in Exhibit I makes it impossible for the Petitioners to ascertain whether water quality standards have been met. Indeed, the absence of a meaningful water quality certification such as that contained in Exhibit I 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 Exhibit B, FOF #13. Moreover, as is clear from attached Exhibit D, the DNR has engaged in a pattern of deliberate

refusal to permit Petitioners or the NLMD access to the Kraus Site at reasonable and relevant times of the year thus making it impossible to fairly evaluate the accuracy of the DNR's assertion that approval of the Permit will not have any effect on water quality and the potential for pollution pursuant to Wis. Admin. Code NR §103.03 or Wis. Stats. §281.36.

In addition, the single statement in the Permit's 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.

Beyond that, even assuming that the wetlands are not federal, there is no evidence the DNR has obtained a permit under Wis. Stats. §281.36.

F. The Permit does not Include a Proper or Correct Practicable Alternatives Analysis within the meaning of Wis. Admin. Code NR §103.08(3) and (4).

In making water quality determinations for wetlands, Wis. Admin. Code NR §103.08(3)(b) specifies that the DNR shall consider “practicable alternatives to the proposal which will avoid and minimize adverse impacts to wetlands and will not result in other significant adverse environmental consequences.” This is essential in order to fulfill Wisconsin's stated policy of protecting wetlands.²

² See Wis. Admin. Code NR §1.95 which provides “It is the intent of the natural resources board to establish rules policy for the preservation, protection, restoration and management

There is an alternative site to the Kraus Site located on Highway 83, which is often referred to as the “Kuchler Site.” The subject Permit asserts that “The alternative analysis for the proposed project concluded ... access development at the Highway 83 site would result in significant adverse environmental impacts as identified in the findings of fact within the Department’s decision dated March 1, 2010.” Exhibit B, p. 4 at ¶11B. The referenced March 1, 2010 DNR Decision is attached to this Petition as Exhibit J.

i. The DNR March 1, 2010 Decision Demonstrates that the DNR did not Conduct a Practicable Alternative Analysis Concerning the Kraus Site.

In the November 4, 2010 Permit, the DNR completely misconstrues its March 1, 2010 Decision. The March 1, 2010 Decision’s Findings of Fact states that the Kuchler Site will involve “a direct loss of 0.137 acres of wetland” (Exhibit J, p. 4). This is *less* than the 0.16 acres of wetland loss which the DNR states will result at the Kraus Site from the proposed development under the Permit it has granted to itself (Exhibit B, FOF 5).

In terms of the amount of wetland which would be lost, the only reason the DNR gives in its March 1, 2010 Decision that the Kuchler Site will result in

of wetlands in the state of Wisconsin. The administrative rules regarding wetlands shall be applied in such a manner as to avoid or minimize the adverse effects on wetlands due to actions over which the department has regulatory or management authority and to maintain, enhance and restore wetland functions and values.” See also Wis. Admin. Code NR §1.95(4) also provides: the DNR’s Natural Resources Board is committed to a policy which ‘promotes, protects, restores, enhances and preserves the quantity, quality and diversity of Wisconsin's wetlands as a critical component of ecosystems essential to the health and quality of life of our state's diverse citizenry, plants, animals and landscapes.’”

more wetland damage than the Kraus Site is because under the NLMD's "two site" proposal both the Kuchler and Kraus Sites be used together to grant different levels of access to North Lake. According to the March 1, 2010 Decision at Finding of Facts 12(d) and (e) (Exhibit J, p. 5):

The [NLMD] proposes the Department would construct a carry-in only public boat access on the [Kraus] site to provide ice fishing in their dual-site proposal. At minimum 0.071 acres of wetland would be required to provide road access to a carry-in access at the [Kraus] site. Including impacts to both the [Kraus] and [Kuchler] site, the dual site proposal, proposed by [NLMD], would require a minimum of 0.208 acres of wetland fill. The dual-site proposal would have significant adverse impacts to wetlands and a practicable alternative exists to avoid and minimize some of those adverse impacts.

But what the DNR entirely failed to do in the Permit which is the subject of this Petition and in its March 1, 2010 Decision in Exhibit J is to address the requirement that it must consider practicable alternatives that would minimize the impact to wetlands by considering the Kuchler Site, *standing alone*, as an alternative to the Kraus Site, *standing alone*. Even using the DNR's understated calculation of the wetlands impact resulting from the development at the Kraus Site of 0.16 acres, the DNR's finding that the Kuchler Site alternative will only impact 0.137 acres of wetlands means that use of the Kuchler Site alone will clearly result in a lesser impact on wetlands than use of the Kraus Site alone.

It is clear from the March 1, 2010 Decision in Exhibit J that the DNR has never conducted a true practicable alternative analysis as required by Wis. Admin. Code NR §103.08(3) and (4). Therefore, Petitioners request that this

matter be remanded to the DNR with instructions that it be required to conduct a true and complete practicable alternative analysis of the Kraus Site compared to the Kuchler Site in accordance with the regulatory directives under Wis. Admin. Code NR §§1.95 and 103.08 that the impact to wetlands from the proposed development be minimized

ii. The other findings in the March 1, 2010 Decision Demonstrate that the DNR employed entirely Different Standards when Assessing the Kuchler Site than have been Employed in assessing the Kraus Site.

The March 1, 2010 Decision is far more detailed and comprehensive than the November 4, 2010 Permit which is the subject of this Petition. For instance, it has an extensive section on Floristic Diversity (Exhibit J, p. 5), Water Quality (Exhibit J, p. 6), and Wildlife and Wildlife Habitat (Exhibit J, p. 7). The Permit which is the subject of his Petition contains no such analysis. On its face, it appears as if the DNR is employing an entirely different standard when passing judgment on the permit applications of others than it uses when passing judgment where the DNR itself is the applicant. If nothing else, this raises serious questions as to whether the Petitioners have been accorded Due Process under the law.

Of equal significance, as is clear from the correspondence in Exhibit D, the NLMD and the RRNA experts 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 those experts could conduct

tests and make appropriate observations necessary to confirm their measurement and wildlife assessment of the wetlands. At a minimum, the DNR's conclusions regarding floristic diversity, water quality and wildlife habitat in its March 1, 2010 Decision relating to the Kuchler Site must be balanced against an equally rigorous assessment of those same characteristics on the Kraus Site. This can only occur if this matter is remanded to the DNR with instructions that they permit full and unfettered access to the Kraus Site by the experts employed by the RRNA and NLMD.

**SECTION III: COUNTS SUPPORTING
REQUEST FOR A CONTESTED HEARING.**

**COUNT I: THE PETITIONERS ARE ENTITLED TO A HEARING ON
THE DNR'S ISSUANCE OF THE PERMIT UNDER WIS. STATS. §227.42.**

The Petitioners restate and incorporate each of the preceding allegations of Permit deficiencies in Section II as though they are set forth herein in full.

The Petitioners in this matter are all residents of the Reddelien Road Neighborhood (marked with a red line in attached Exhibit A), which is immediately adjacent to the proposed boat launch on the Kraus Site (marked in black in attached Exhibit A), which is the subject of the Permit.

**A. Within The Meaning Of Wis. Stats. §227.42(1)(a), Petitioners'
Substantial Interests Injured Or Threatened By DNR Action
Or Inaction Are As Follows:**

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 by the Permit will result in increased flooding and pollution as well as the surcharging of septic systems on Petitioners' property. 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.

Based on reports from Petitioners' experts and based on the proper application of Wisconsin's statutory definition of wetlands in Wis. Stats. §23.32(1), the construction authorized by the Permit will result in the destruction of a far greater amount wetland area than that claimed by the DNR in the Permit which the DNR issued to itself. Therefore the Petitioners' substantial interest in the preservation of wetlands adjacent to their riparian property is threatened with injury.

Based on further reports from Petitioners' experts and based also on navigability tests conducted by Petitioners, the construction of the parking lot will impermissibly destroy navigable waters which the DNR has failed to identify and also dam or obstruct other navigable waters. Navigable waters are defined in Wis. Stats. §30.10 and are protected by the Public Trust Doctrine. By issuing the Permit to itself without testing for or considering the existence of navigable waters affected by said Permit, the DNR has breached its fiduciary duty under the Public Trust Doctrine. Therefore Petitioners' substantial interests in navigable waters, and as beneficiaries under the Public Trust Doctrine, are threatened with injury.

The Permit was issued in violation of the public notice and comment requirements of Wisconsin Law. The DNR held a public informational hearing on September 30, 2010, pursuant to Chapter NR 310 of the Wisconsin Administrative Code. 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 providing meaningful public comments pursuant to Wis. Admin. Code Ch. NR 310 during the public comment period on September 30, 2010.

The Petitioners are all citizens of the North Lake Management District (NLMD). As noted by the yellow line in the map in attached Exhibit C, the DNR claims that only a very small portion of the Kraus Site contains wetlands. However, as noted by the green lines on attached Exhibit C, the experts of the NLMD and the RRNA have determined that the area of the wetlands is many times larger than that claimed by the DNR.

In point of fact, as is clear from the items in attached 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 confirm their measurement of the wetlands. Without the ability to meaningfully access the Kraus Site, the NLMD and the Petitioners were obstructed from formulating comprehensive or meaningful

comments pursuant to Chapter NR 310. Therefore, Petitioners' substantive statutory and due process rights have been injured by the DNR's actions.

B. Within The Meaning Of Wis. Stats. §227.42(1)(b), There Is No Evidence Of Legislative Intent That The Petitioners' Interests Are Not To Be Protected For The Following Reasons:

Wisconsin Statutes have numerous provisions protecting the rights of property owners and preserving their rights to use and enjoy their property. See, for instance, Wis. Stats. § 844.01 articulating the Legislature's intent that property owners are entitled to protect their property rights, which includes challenging any interference with their use or enjoyment of property.

Petitioners' substantial interest in using and enjoying their property is threatened by the Permit and, as evidenced by Wis. Stat. § 844.01, the Legislature intended that Petitioners be allowed to challenge any such interference. Wis. Stats. §844.01(1) specifically provides: "Any person owning or claiming an interest in real property may bring an action claiming physical injury to, or interference with, the property or the persons interest therein; the action may be to redress past injury, to restrain further injury, to abate the source of injury, or for other appropriate relief."

It has never been the intent of the legislature to permit the type of destruction of wetlands and navigable waters, and the consequent adverse consequences for property owned by the Petitioners. In fact, the intent of the Legislature has always been directly to the contrary. The DNR and the

Legislature have declared it to be the policy of Wisconsin to protect wetlands and navigable waters pursuant to the Wisconsin Administrative Code and Chapters 30 and 281 of the Wisconsin Statutes. For example:

Wis. Admin. Code NR §1.90 provides as follows:

It is the goal of the state of Wisconsin to provide, maintain and improve access to the state's navigable lakes, rivers and streams for the public... The [DNR], alone or in cooperation with local government, shall exercise its management and regulatory responsibilities to achieve this goal and to assure that levels and types of use of navigable waters are consistent with protection of public health, safety and welfare, including protection of natural resources.

Wis. Admin. Code NR §1.95 provides as follows:

It is the intent of the natural resources board to establish rules policy for the preservation, protection, restoration and management of wetlands in the state of Wisconsin. The administrative rules regarding wetlands shall be applied in such a manner as to avoid or minimize the adverse effects on wetlands due to actions over which the department has regulatory or management authority and to maintain, enhance and restore wetland functions and values.

Wis. Admin. Code NR §1.95(4) also provides: the DNR's Natural Resources Board is committed to a policy which "promotes, protects, restores, enhances and preserves the quantity, quality and diversity of Wisconsin's wetlands as a critical component of ecosystems essential to the health and quality of life of our state's diverse citizenry, plants, animals and landscapes."

Wis. Stats. §30.10(2) provides:

[A]ll streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.

Wis. Stats. §281.11 provides:

Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water.

Wis. Stats. §281.31 provides in part:

To aid in the fulfillment of the states role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this states water resources.

In addition, under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 1 of the Wisconsin Constitution, the Petitioners are entitled to both substantive and procedural Due Process in any proceeding before the DNR. Moreover, Wis. Admin. Code NR §150.01(5) provides that the DNR should “Provide an opportunity for public input to the decision-making process.”

C. Within The Meaning Of Wis. Stats. §227.42(1)(c), The Injury To The Petitioners Is Different In Kind Or Degree From Injury To The General Public Caused By The DNR Action Or Inaction Because Of The Following:

The injury and threatened injury to Petitioners is very different in both kind and degree from that which may be suffered by the general public due to the construction at the Kraus Site. As owners of and/or residents on the adjacent property, it is Petitioners’ homes that will be flooded and Petitioners’ septic

systems that will be surcharged. And, as a result, it is they who will suffer from decreased property values.

Petitioners will be less able to use and enjoy their property due to the increased flooding which will be caused by the approved boat launch. Furthermore, as residents on North Lake and landowners directly adjacent to the Kraus Site, they will also suffer injury to a greater degree than the general public from the destruction of wetlands and navigable waters in and around North Lake, particularly those wetlands and navigable waters that are located within the adjacent Kraus Site.

D. Within the meaning of Wis. Stats. §227.42(1)(d), there are a number of disputed facts concerning the Permit:

Disputed facts are set forth in Section II *supra*.

E. The statute or administrative rule other than Wis. Stats. §227.42, Stats., if any, which accords a right to a hearing is:

Wis. Stats. §30.209(1m)(a) and Wis. Admin. Code NR §295.05(5) also accord a right to a hearing as set forth in Counts II & III *infra*.

COUNT II: PETITIONERS ARE ENTITLED TO A HEARING UNDER WIS. STATS. § 30.209(1m)(a) BECAUSE THE PERMIT WAS ISSUED CONTRARY TO WIS. STATS. § 281.31 AND WIS. STATS. CHAPTER 30.

The Petitioners restate and incorporate each of the preceding allegations of Permit deficiencies in Section II and the assertions in Count I as though they are set forth herein in full.

Wis. Stats. §30.209(1m)(a) allows any interested person to apply for administrative review of a permit issued under Wis. Stat. Ch. 30, and it is clear

from the face of the Permit in this case that it was indeed issued pursuant to Chapter 30. Wis. Stats. §30.209(2)(a) states in relevant part, “An administrative hearing under this subsection shall be treated as a contested case under Wis. Stats. Chapter 227.” Therefore, Petitioners are entitled to a contested case hearing by the terms of Wis. Stats. §30.209. Wis. Stats. §30.209(1m)(b) further provides as follows:

(b) If the petitioner is not the applicant, the petition shall describe the petitioners objection to the permit or contract and shall contain all of the following:

1. A description of the objection that is sufficiently specific to allow the department to determine which provisions of this subchapter may be violated if the proposed activity or project under the permit or contract is allowed to proceed.
2. A description of the facts supporting the petition that is sufficiently specific to determine how the petitioner believes the activity or project, as proposed, may result in a violation of the provisions of this subchapter.

For the sake of completeness and clarity, the Petitioners will at this time restate what they have said previously about how the Permit will result in a violation of Wis. Stats. Chapter 30.

Petitioners object to the Permit because the Permit was issued in violation of Wis. Stats. §30.12 [and/or §30.20 and §281.31(1)] which requires a permit to build structures or place deposits on the bed of navigable waters. Wis. Stat. §30.10(2) provides: “[A]ll streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.”

The DNR asserts that it considered the navigable waters of North Lake and its wetland complex in issuing the Permit (See Exhibit B, FOF #2). However, Petitioners maintain that there are additional navigable waters which the DNR failed to identify and thus failed to consider in issuing the Permit. These navigable waters exist outside North Lake's wetland complex as defined by the DNR in yellow in attached Exhibit C. These navigable waters are located in the "Grove of Trees" marked in orange in attached Exhibit E. As is also clear from Exhibit E, these navigable waters in the grove of trees connect to an unnamed stream to their north and thus drain into North Lake.

Petitioners maintain that the parking lot authorized by the Permit will be built over these unconsidered navigable waters, thus filling in and destroying them. The DNR was alerted to the presence of these navigable waters (see Exhibit B, FOF #8, section L). The DNR has neither acknowledged these navigable waters nor conducted navigability tests in this area. By not conducting navigability tests in the area to be covered by the parking lot, the DNR has abdicated its responsibilities under Wis. Stats. §30.12.

The Permit states "North Lake and portions of its wetland complex are navigable-in-fact at the project site and are impacted by the proposed project" (Exhibit B, FOF #2). This is impermissibly vague and does not specify what portion of the project site contains navigable waters which will be "impacted." Petitioners and the public have the right to know the extent of the impact. Wis. Stats. §30.10(2) additionally specifies that navigable waters can only be

obstructed (“impacted”) with the permission of the State. This would require the issuance of a permit, under Wis. Stats. §§30.12 or 30.20, for example. By failing to set forth with specificity the navigable waters to be impacted by the development, the Permit is impermissibly vague and/or invalid.

Pursuant to Wis. Stat. § 30.209(1m)(c) further activity on the proposed development should be stayed pending the administrative hearing. Such a stay is necessary to prevent significant adverse impacts and/or irreversible harm to the environment that would occur from the filling and paving over of navigable waters that the DNR failed to consider or account for in authorizing the development under the Permit.

COUNT III: PETITIONERS ARE ENTITLED TO A HEARING UNDER WIS. ADMIN. CODE NR 299.05(5) BECAUSE THE PERMIT VIOLATES WIS. STAT. § 281.15 AND WIS. ADMIN. CODE NR §299.04.

The Petitioners restate and incorporate each of the preceding allegations of Permit deficiencies in Section II and the assertions in Counts I & II as though they are set forth herein in full.

Wis. Admin. Code NR §299.05(5) states in part: “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 Chapter 227, Stats.” That same section goes on to provide as follows: “A request for a contested case hearing shall include a written statement giving specific reasons why the proposed activity violates the standards under §NR 299.04(1)(b) and provide specific information explaining

why the petitioner's interests are adversely affected by the department's determination.” Wis. Admin. Code NR §299.04(1)(b) provides in part: “The department shall, upon receipt of the complete application, determine whether it has reasonable assurance that the proposed activity will ... (b) Comply with the following water quality standards: ... 3. Water quality standards adopted under §281.15, Stats., and 33 USC §1313).” Wis. Admin. Code NR §281.15 provides:

Water quality standards shall consist of the designated uses of the waters or portions thereof and the water quality criteria for those waters based upon the designated use. Water quality standards shall protect the public interest, which include the protection of the public health and welfare and the present and prospective future use of such waters for public and private water systems, propagation of fish and aquatic life and wildlife, domestic and recreational purposes and agricultural, commercial, industrial and other legitimate uses. In all cases where the potential uses of water are in conflict, water quality standards shall be interpreted to protect the general public interest.

For the sake of completeness and clarity, the Petitioners will at this time restate what they have said previously about how the Permit will result in a violation of Wis. Admin. Code NR §299.04.

The 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 ...” (Exhibit B, FOF #13). This statement falls well short of the standards normally employed and the methodology normally adopted by the DNR when assessing water quality. One has only to compare the extremely terse statement in Exhibit B, FOF #13 with the lengthy and very specific water quality certification

attached as Exhibit I that is customarily issued by the DNR in other cases. The DNR's failure to provide in the Permit the level of review as reflected in Exhibit I makes it impossible for the Petitioners to ascertain whether water quality standards have been met. Indeed, the absence of a meaningful water quality certification such as that contained in Exhibit I 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 Exhibit B, FOF #13.

Moreover, as is clear from attached Exhibit D, the DNR has engaged in a pattern of deliberate refusal to permit Petitioners or the NLMD access to the Kraus Site at reasonable and relevant times of the year thus making it impossible to fairly evaluate the accuracy of the DNR's assertion that approval of the Permit will not have any effect on water quality and the potential for pollution pursuant to Wis. Admin. Code NR §103.03 or Wis. Stats. §281.36.

In addition, the single statement in the Permit's 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.

Even assuming for the sake of argument that the wetlands are not federal, there is no evidence the DNR has obtained a permit under Wis. Admin. Code NR §281.36.

**SECTION IV: PETITIONERS REQUEST
REVIEW OF THE FOLLOWING ISSUES:**

Petitioners request that the following issues be reviewed in the contested hearing.

1. Does the wetlands delineation used by the DNR in connection with the Permit understate the impact to wetlands? In particular:
 - a) Will the proposed development at the Kraus Site impact more than 0.16 acres of wetland as claimed by the DNR?
 - b) Did the DNR conduct a proper practicable alternative analysis under Wis. Admin. Code NR §103.08?
 - i. Did the DNR misconstrue the meaning of its March 1, 2010 Decision in Exhibit J?
 - ii. Should the DNR be required to compare the proposed destruction 0.16 acres of wetland on the Kraus Site with the 0.137 acres of proposed wetland destruction on the Kuchler Site?
 - c) Does the Disputed Area in marked in green in attached Exhibit C meet the wetland soil and hydrology standards of Wis. Stats. §23.32(1)?
 - d) Did the DNR define wetlands on the Kraus Site contrary to the definition of wetlands from Wis. Stats. §23.32(1)?
 - e) Did the DNR's mowing of the Kraus Site artificially alter the species composition of the vegetation at the Kraus Site for purposes of wetland delineation?

- f) Was the mowing of the site prior to the wetlands assessment contrary to the DNR's own policy and practice?
- 2. Did the DNR properly assess the impact to navigable waters from the proposed development? In particular:
 - a) Does the area marked in orange in attached Exhibit E contain navigable waters within the meaning of Wis. Stats. §30.10(2)?
 - i. If so, does that render the Permit invalid?
 - ii. Should the DNR be required to conduct further navigability tests?
 - b) Does the Permit identify impacted navigable waters with sufficient specificity?
- 3. Does the proposed development authorized by the Permit comply with Wis. Admin. Code NR § 151.12(5)(a) ? In particular:
 - a) Should the access road proposed in the Permit be considered a new “development” rather than a “redevelopment” under Wis. Admin. Code NR §§151.002(39) and 151.12(5)(a)
 - b) Does the Permit comply with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2?
- 4. Does the proposed development authorized by the Permit comply with Wis. Admin. Code §NR 151.12(5)(b)? In particular:
 - a) Are the culverts proposed in the project plans adequate to handle the volume of water that will flow out of the wetland complex on and adjacent to the Kraus Site?

- b) Will the proposed parking lot 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?
 - c) Will this surcharge septic systems and cause flooding in the Reddelien Road Neighborhood?
5. Does the Permit comply with Wis. Stat. § 281.15 and Wis. Admin. Code NR §§ and 299.04(1)(b)? In particular:
- a) Will the storm water treatment system for the roadway remove oils and grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff?
 - b) Will the failure to do so increase pollution in the Reddelien Road Neighborhood and to North Lake?
6. Did the DNR's repeated denial of access to the publically owned Kraus Site prevent the Petitioners and NLMD from providing meaningful comments pursuant to Wis. Admin. Code §§. NR 150.01(5) and 310?
- a) Did this denial of access violate the statutory and due process rights of the Petitioners and NLMD?
7. Did the DNR's conduct at and following the public informational hearing on September 30, 2010 violate the Petitioners' and the public's statutory and due process rights? In particular:
- a) Was the restriction of three minutes per commenter unreasonable?

- b) Did the DNR fail to adequately respond to questions and issues raised at the public hearing?
8. Did the DNR fail to conduct the required water quality certification as required under Wis. Stat. § 281.15, Wis. Admin. Code §§ NR 103 and 299, and Section 401 of the Federal Clean Water Act (33 USC § 1341) and/or Wis. Stat. § 281.36?

**SECTION V: PETITIONERS
REQUEST THE FOLLOWING RELIEF:**

1. Pursuant to Wis. Stat. §§ 227.42, 30.209(2) and Wis. Admin. Code NR §299.05(5) and the rules of practice and procedure of the Wisconsin Department of Natural Resources in Wis. Admin. Code NR §2.05, for a contested hearing in accordance with the procedures set forth in Wis. Stats. §227.42 on Permit No. IP-SE-2009-68-057450-05750, issued November 4, 2010;
2. FOR AN ORDER pursuant to Wis. Stat. §30.209(1m)(c) staying the project covered by IP-SE-2009-68-05745-05750, including any further work on the project of any kind and including the bidding of any work in connection with the project, pending the contested hearing which is sought in this Petition. **[PLEASE NOTE:** By virtue of Wis. Stats. §30.209(1m)(d), the stay requested in this paragraph is automatic and shall stay in effect until either the Department denies the stay or a duly appointed hearing examiner determines that it is unnecessary];

3. FOR AN ORDER staying the project covered by IP-SE-2009-68-05745-05750, including any further work on the project of any kind and including the bidding of any work in connection with the project, pending the contested hearing which is sought in this Petition;
4. FOR AN ORDER withdrawing the Permit, reversing the Permit, and/or remanding the Permit to the DNR for re-evaluation;
5. FOR AN ORDER to the DNR mandating it to allow Petitioners and the NLMD access to the publically owned Kraus Site during the growing season next summer, 2011 to conduct its own studies (e.g., wetlands delineation and navigability assessments).
6. FOR AN ORDER remanding this matter to the DNR and requiring it to complete a proper and complete practicable alternative analysis between the Kraus Site and the Kuchler Site.
7. FOR AN ORDER prohibiting the mowing or other alteration at the Kraus Site during the growing season so that wetlands can be properly delineated;
8. FOR AN ORDER vacating the Permit;
9. FOR AN ORDER to the DNR mandating a re-delineation of wetlands on the Kraus Site in a manner conforming to state law and to the DNR's past policy and practice;
10. FOR AN ORDER to the DNR mandating it to conduct navigability tests on the area marked in orange on attached Exhibit E;

SECTION VI: COMMITMENT TO APPEAR:

As required by Wis. Stats. §30.209(1m)(b)3 and Wis. Admin. Code NR §299.05(5), Petitioners' representatives will appear at the requested contested case hearing and will present information and evidence supporting their objections.

Dated at Hartland, Wisconsin this 22nd day of November, 2010.

LAW OFFICES OF WILLIAM C. GLEISNER, III
Counsel for the Petitioners

By: _____

William C. Gleisner, III, Esq.
State Bar No. 1014276
Named Petitioner & Lead Counsel
Email: wgleisner@sbcglobal.net
Matthew W. Surridge, Esq.
State Bar No. 1079807
Email: msurridg@yahoo.com
300 Cottonwood Avenue, Suite No. 3
Hartland, Wisconsin 53029
Telephone: (262) 367-1222
Fax: (262) 367-1236

Of Counsel for the Petitioners
William H. Harbeck, Esq.
State Bar No. 1007004
Quarles & Brady, LLP
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone: 414-277-5853
Fax: 414-978-8853
Email: william.harbeck@quarles.com