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March 22, 2013

Hand Delivered
Hon. J Mac Davis
Waukesha County Circuit Court
515 W Moreland Blvd
Waukesha, WI 53188-2411

Re: *Reddelien Road Neighborhood Association, et al. v. DNR,* Waukesha County Circuit Court Case No. 10CV5341 (administratively consolidated with *NLMD, et al. v. DNR,* Waukesha Court Case No. 12CV1751)

Dear Judge Davis,

We are at this time filing the Petitioners' Brief-in-Chief in the above entitled cases. We had been concerned that we would not be able to have our expert, Donald Reinbold, recreate Exhibit 14 by today. However, we were able to locate him and we received his recreation of that exhibit a very short while ago by overnight mail. Because we were able to make the filing today, it is our assumption that the stipulated schedule will remain in place. Thus, the DNR's Response will be due by the 22nd of April and our Reply will be due by the 8th of May. The Court has also set aside May 23rd for a possible hearing. Unless the Court directs otherwise, we believe that a formal Order incorporating that stipulated briefing schedule is unnecessary, since it was announced and agreed to by counsel at the hearing before this Court on the 19th of February.

We are also filing at this time a separately bound and indexed Appendix. This is intended to be of use and benefit of the Court and counsel as they review the enclosed Brief-in-Chief. While we will serve the Brief on DNR's counsel by email and overnight mail, the Appendix is very large and so will only be provided to opposing counsel by overnight mail. We are also providing one set of the Brief and Appendix for each of the above entitled cases so that one set can be placed in the file jacket of each case.

Respectfully,

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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

Petitioners,

vs. Case No. 10-CV-5341

The Department of Natural Resources ("DNR"),

Respondent.

North Lake Management District ("NLMD"), et al.

Petitioners,

vs. Case No. 12-CV-1751

The Department of Natural Resources ("DNR"),

Respondent.

PETITIONERS' BRIEF-IN-CHIEF

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INTRODUCTION

The North Lake Management District (NLMD) and Reddelien Road Neighborhood Association (RRNA) [hereafter, the "Petitioners"] submit this as their combined Brief-in-Chief[1] in both Case 12CV1751 (hereafter, Case 1751) and Case 10CV5341 (hereafter, Case 5341). The Petitioners are also herewith filing a separately bound Appendix.

A.

This case is not about stopping the DNR from achieving public access to North Lake. It is not even about stopping the DNR from achieving public access through and by the Kraus Site, if absolutely necessary. This case is about insuring that the DNR fairly and transparently applies the same rules and law to itself, **when it seeks a permit from itself**, that it applies to everyone else. This case is also about insuring that the DNR conducts the correct tests and applies the correct standards so as to insure that in achieving public access it does not unnecessarily damage important ecosystems (such as North Lake and adjacent wetlands), or unnecessarily harm the riparian citizens who reside around that lake. If this means requiring the DNR to revise its plans up to and including "starting over," the Petitioners submit that it is what ought to be expected of a state agency that is charged with the duty of protecting ecosystems and the rights of all the citizens to the benefit and enjoyment of those ecosystems.

B.

On November 4, 2010, the DNR issued two permits to itself in connection with its proposed boat launch at the Kraus Site, adjacent to North Lake. The construction project authorized by those permits will allow for the placement of significant amounts of fill material

[1] In their briefs, the Petitioners will adopt the following nomenclature when referring to the records. Each volume of the 2011 navigability hearing before ALJ Boldt will be referenced as follows: "TR1" for the September, 19th transcript; "TR2" for the September 20th transcript; "TR3" for the September 21st transcript; "TR4" for the October 31st transcript; and "TR5" for the November 1st transcript. Each volume of the 2012 storm water hearing before ALJ Boldt will be referenced as follows: "TRA" for the April 18th transcript and "TRB" for the April 19th transcript. The TR reference will be followed by an appropriate page reference (e.g., TR1, pp. 15-16). It is also important to note that all depositions were admitted into evidence. *See* TR5, pp. 311-312. References to the accompanying Appendix will be styled "App." followed by the appropriate page number.

directly into navigable waters as defined in Wis. Stat. §30.10. That project also will result in substantial untreated storm water runoff into almost 15 acres of wetlands adjacent to North Lake.

Permits regulating the placement of fill materials into navigable waters are governed by Wis. Stat. Chapter 30. Permits regulating the discharge of storm water into wetlands are regulated by Wis. Admin. Code NR Chapter 103. When issuing permits to itself, the DNR uses what it calls a "Manual Code procedure."[2] Under this procedure, the DNR acknowledges that it is subject to the same statutory and regulatory requirements it imposes on other citizens who seek similar permits,[3] but it is the sole judge of how to comply with those requirements.

With regard to DNR's Manual Code Approval permit[4] which authorized it to place fill in navigable waters (which is the subject of Case 1751), the DNR argued that it did not need to evaluate whether its project met the standards under Chapter 30 because, it asserted, when the navigable waters that are impacted by the fill are also in wetlands, DNR need only undertake an analysis under NR 103 which supplants Chapter 30. The ALJ agreed with DNR.

With regard to the Storm water Grant of Coverage (or the "Storm Water Permit"[5]) (which is the subject of Case 5341), the DNR acknowledged that because storm water discharges from its project would impact wetlands, it was required to comply with NR 103. But as the RRNA found out during the course of the remanded storm water permit proceedings in April of 2012, the DNR never actually made the required findings regarding the potential storm water impacts to wetlands specifically set forth in NR §103.08(4)(a). This not only renders the Storm Water

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[2] As discussed in detail *infra*, the DNR's Manual Code Approval procedure is used by the DNR to unilaterally determine how statutes and rules will apply to the DNR when the Agency is seeking a permit **from itself** of the type sought from that Agency by ordinary citizens.

[3] Judge Boldt opened the navigability hearing on September 19, 2011 by stating: "[T]hese are substantive requirements that the [DNR] has imposed upon itself. Among those are [Wis. Stat. §30.12] (3m) relating to individual permits. Again, I'm all under 30.12…And then it sets forth standards in sub. (c) "The [DNR] shall issue an individual permit to a riparian owner for a structure or a deposit … if the [DNR] finds that… 'The structure or deposit will not … be detrimental to the public interest, and the structure or deposit will not materially reduce the flood flow capacity of a stream.'" TR1, pp. 19-21; App., pp. 164-165.

[4] The DNR refers to the MC Approval as the equivalent of a "permit." *See Wakeman 10-17-11 Deposition*, pp. 5 & 8; App., pp. 268-269.

[5] DNR Engineer Hartsook states that what he issued on November 4, 2010 is a "storm water permit." *See, e.g.*, TRA, p. 19; App., p. 208.

Permit invalid (the subject of Case 5341), it undercuts DNR's argument in the Manual Code proceeding (Case No. 1751) that it could ignore Chapter 30 by doing an NR 103 analysis.

In ruling in favor of the DNR on the Storm Water Permit, the ALJ ignored the DNR's failure to establish that it had undertaken the analysis or issued the findings mandated by NR 103.08(4)(a). The ALJ did not event list that issue as one that he reviewed. Instead, the ALJ simply referenced testimony by the DNR Water Resources Engineer Bryan Hartsook, who issued the permit that "he relied on the indication by wetland water quality staff that a Ch. 103 alternatives analysis had been conducted to the Department's satisfaction on the wetland fill issue." *See* July 18, 2012 ALJ Decision, Finding of Fact (FOF) 7 at App., p. 136. However, an alternatives analysis is only one component of the findings that NR§103.08(4)(a) requires. The ALJ simply did not address in his decision the RRNA's contention that there was no evidence in the record of the other required findings under §103.08(4)(a).[6]

One additional issue is pertinent to the Storm Water Permit: i.e., whether the DNR's proposed access road to the boat launch is "redevelopment" under Wis. Admin. Code NR §151.12 thus requiring a lower degree of storm water protection for discharges of total suspended solids into the wetlands, or is "new development" which would impose a higher degree of protection. That proposed paved access road will not only significantly expand the existing dirt access path, it will contain a stretch where some 150 feet goes completely off the existing footprint into the surrounding navigable wetlands. The DNR argued, and the ALJ agreed, that because "driveways" are considered "redevelopment" under DNR guidelines, the entire new access road was "redevelopment," thus ignoring facts that much of the proposed expansion would deviate from the current road's footprint and thus be completely new.

[6] As this Court will recall, DNR's failure to conduct an appropriate NR 103 determination was not an issue that was initially remanded by this Court in its January 6, 2012 Order (App., pp. 161-163) because at that time the RRNA had no idea that a NR 103 determination had not been done. RRNA discovered that one had not been done in the course of the proceedings leading up to and including the April 2012 hearing. This Court has ruled that the RRNA's contention that DNR failed to comply with NR 103 is an appropriate subject for judicial review. *See* November 14, 2013 Official Transcript of this Court's Bench Decision, at p. 21; App., p. 270.

THE BACKGROUND OF THE PETITIONERS' DISPUTE WITH THE DNR.

A. The DNR has Become a Law Unto Itself.

Over the past thirty years the DNR has developed a set of procedures and practices which place it in a virtually unassailable position vis-à-vis citizens, particularly owners of riparian property. Without regard to who is in power in Madison, the DNR continues to grow more powerful. However, like every other agency, the DNR ought to be required to be reasonable, fair and transparent in its dealings with the riparian citizens of Wisconsin.

The DNR has developed what it calls the Manual Code Approval (hereafter, "MC Approval") permit procedure which allows it to unilaterally determine how rules will apply to itself when it is seeking a permit **from itself** of the type sought from the DNR by ordinary citizens. In furtherance of the MC Approval in this case, the DNR also issued a "Storm Water Permit" to itself without telling anyone, including those who will be affected by its issuance. The latter practice occasioned the following exchange between this Court and counsel for the DNR in a hearing on June 17, 2011:

> THE COURT: All right. Ms. Milligan, … I find it kind of interesting the DNR applied to itself [for a permit]. Most people in this world would like to be both the applicant and the judge on their application. … What kind of … law is that? The DNR can apply to itself and not tell anybody and grant it? That's what you just said, right?
> MS. MILLIGAN: Correct, your Honor. The DNR is in charge of the storm water permitting, and there is not really any other agency it could apply to get storm water permit coverage.

Court's Official Transcript of June 17, 2011 Hearing, pp. 14-15.

B. The Petitioners Have Reason to Fear the Actions of the DNR.

The long and complicated history of the DNR's relationship with North Lake cannot be ignored in assessing the present conduct of the DNR and its efforts to build a boat launch at the Kraus Site. The significant damage which the DNR has in fact inflicted upon North Lake and its citizens in the past (by disregarding its own rules and the recommendations of its own experts) is precisely what motivates the Petitioners in Case 1751 and Case 5341 to so strenuously insist that

the DNR must follow the letter of the law and its own rules before proceeding with a public launch at the Kraus Site.

In the case of *Froebel v. DNR*, 217 Wis. 2d 652, 579 N.W.2d 774 (1998), the DNR did not follow its own rules and the recommendations by its own experts when it took down Funks Dam in 1992, which was then located to the northeast of North Lake. *Id.* at 659. An ALJ found that the actions of the DNR in taking down Funks Dam "caused or significantly contributed to environmental damage in the Oconomowoc River and North Lake…" *Id.* at 661. An ALJ found that this damage was foreseeable by the DNR. *Id.* at 660. Despite lengthy litigation by the NLMD and a private citizen (Kurt Froebel) to force the DNR to clean up the environmental mess it had made when it took down Funk's Dam, the ALJ and the Court of Appeals concluded that they did not have the power to force the DNR to rectify the environmental damage it had caused **after the fact**. *Id.* 661-62. According to the author of the *Froebel* decision, Judge Nettesheim:

> We join in the ALJ's criticisms of the DNR's practices in this case. We would expect the DNR, as the protector of this state's natural resources and the chief enforcer of our laws protecting those assets, to abide by the rules which it imposes and enforces on others. We also would expect it to abide by the promises and representations it makes to the public regarding its own activities. These expectations may perhaps explain why the legislature has not deemed it necessary to create laws which make the DNR subject to the requirements imposed on others. However, we cannot rewrite the existing laws to accommodate Froebel's legitimate complaints.

Froebel, *Id.* at 673.

The DNR is judge and jury of its own conduct; there is no outside agency policing what it does. If DNR causes harm, under *Froebel* it can do so with impunity. So because of *Froebel*, the Petitioners cannot wait until after the DNR acts and the damage is done. That is because there is unrefuted evidence in Cases 1751 and 5341 that establishes that the DNR did not comply with the applicable statutes and regulations, and thus did not conduct the correct tests, before issuing itself the two permits for the boat launch it proposes to construct on North Lake at the Kraus Site. Since the DNR is policing itself and is answerable only to itself this Court should at a minimum require the DNR to strictly adhere to the law and its own regulations. *Froebel* makes it

clear that after the launch is built the Petitioners will be without any remedy to rectify any resulting environmental damage from any failure by the DNR to comply with the law and with its own regulations.

C. The Petitioners' Concerns are Not Theoretical Nor do They Stem From an Imagined Threat that is Unlikely to Materialize.

In building their boat launch on the Kraus Site, the DNR plans to fill a very large navigable wetland complex with tens of thousands of pounds of asphalt. The navigable wetlands are a precious natural resource in their own right, and the Petitioners have the right to assurances that the actions of the DNR will not unnecessarily damage those wetlands and the wildlife which find refuge and sustenance there.[7] Those wetlands also constitute a significant aesthetic part of the ecosystem adjacent to North Lake and form an integral aesthetic part of the Reddelien Road neighborhood, and this too is protected under NR 103.[8] In addition, these wetlands now protect North Lake from very substantial quantities of unfiltered farm nutrients[9] and also prevent excessive flooding of the Reddelien Road neighborhood, which in turn will surcharge neighborhood septic systems and cause additional pollution of North Lake.[10]

The DNR has not presented any evidence of how its boat launch project at Kraus will affect the ability of the wetland complex to filter out farm nutrients before they reach North Lake or how it will impact on the Reddelien Road neighborhood. However, the DNR does admit that it

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[7] According to Wis. Admin. Code NR §103.03(1): "To protect, preserve, restore and enhance the quality of waters in wetlands and other waters of the state influenced by wetlands, the following water quality related functional values or uses of wetlands … shall be protected… (e) Habitat for aquatic organisms in the food web including, but not limited to fish, crustaceans, mollusks, insects, annelids, planktonic organisms and the plants and animals upon which these aquatic organisms feed and depend upon for their needs in all life stages; (f) Habitat for resident and transient wildlife species, including mammals, birds, reptiles and amphibians for breeding, resting, nesting, escape cover, travel corridors and food…"

[8] Also according to Wis. Admin. Code NR §103.03(1): "To protect, preserve, restore and enhance the quality of waters in wetlands and other waters of the state influenced by wetlands, the following water quality related functional values or uses of wetlands … shall [also] be protected… (g) Recreational, cultural, educational, scientific and natural scenic beauty values and uses."

[9] Testimony established that water from more than 100 acres of farm fields to the west of the navigable wetlands empty directly into those navigable wetlands. TR3, pp. 140-141; App., pp. 189-190.

[10] Professor O'Reilly testified: "I do know that the Reddelien Road [neighborhood] sits only a few feet above the wetland and the lake, the narrow neighborhood that's on this isthmus area, and that there is very little clearance on the septic systems, and so any backing up of water onto that area could affect septic systems by flooding them when the roadway is flooded." TRA, p. 189; App., p. 232.

has never conducted any study to determine what might happen to the Reddelien Road neighborhood if the construction of their project increases the water in the southern navigable wetland located within the large southern green circle on Ex. 2-002 (discussed below). TR4, p. 244-245; App., pp. 204-205.[11] Moreover, the DNR Official charged with conducting the manual code review of the Kraus Site testified that he never conducted a flood flow analysis anywhere on that site. TR1, p. 214; App., p. 175.[12]

The Petitioners face the prospect of another Funks Dam. But this time the stakes are far higher, particularly for the riparian citizens who live in the Reddelien Road neighborhood. It is not too much to ask that the DNR be required to do the necessary tests under the law before forever altering the precious ecosystems that comprise the 14.57 acres of navigable wetland adjacent to North Lake and the Reddelien Road neighborhood. As the *Froebel* case teaches, if the DNR is wrong again, there is no remedy for the citizens of North Lake; the DNR will simply claim Sovereign Immunity and move onto its next adventure.

D. <u>The Citizens of Reddelien Road are in Harm's Way</u>.

The issue of the riparian citizens who live in the Reddelien Road neighborhood present a special case. There are approximately 100 citizens who own property in the Reddelien Road neighborhood next to North Lake, of whom forty are petitioners in the above cases (through and with the Reddelien Road Neighborhood Association, Inc. [RRNA]).[13] For all of the citizens of Reddelien Road, who are also riparian owners on North Lake, this case is not about public

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[11] During his deposition testimony DNR Water Engineer Wood stated that there had been no studies done about how the DNR project might affect Reddelien Road. Mr. Wood gave the following testimony at his deposition:

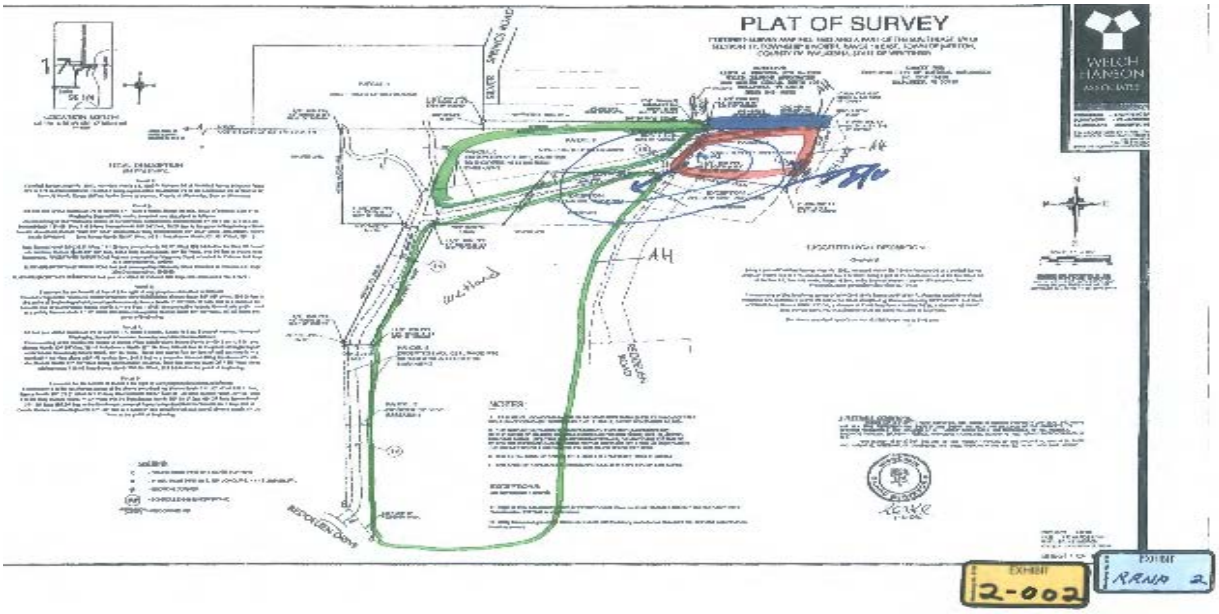
> Q. Is there any way the water – assuming that the large circle in green on Exhibit 2 [later marked as Exhibit 2-002 at the hearing which is the subject of Case 1751] became full with water, is there any way that that could wash east over the homes that are located on Reddelien Road?
> A. I don't know an answer to that without more detailed information.
> Q. And the DNR has not acquired that information?
> A. Not to my knowledge.

Wood 8-26-11 Deposition, p. 39; App., p. 281.

[12] Professor O'Reilly testified: ""My opinion is that the [§30.12(3m)(c)3] flood flow analysis should be done for the entire site and the impact on all of the neighboring properties should be analyzed." TR2, p. 130; App., p. 186.

[13] The boundaries of this neighborhood are shown by the red line on Exhibit 00, in the Appendix at p. 282.

access. The Reddelein Road citizens don't oppose public access; they favor it.[14] However, as is clear from Exhibit 2-002[15] (below), the DNR's proposed boat launch will be built smack in the middle of a large 15 acre navigable wetland complex that extends into the very heart of the Reddelien Road neighborhood.



In the Manual Code Proceedings below, Petitioners and the DNR stipulated that the entire areas circled in green on Exhibit 2-002 (above) are both "navigable waters" and "wetlands."[16] In fact, the DNR's proposed access road will be threaded along and through the navigable wetlands and, as is clear from Exhibit 12 (App., p. 284), the football-field size parking lot will have to be tightly squeezed in between the existing residential homes of two of the RRNA's members. In addition, as can be seen from a close examination of Exhibit 2-002, the Reddelien Road neighborhood lies to the east and to the south of that huge navigable wetland complex.

[14] The NLMD has proposed public access for precisely the same number of boats on the other side of North Lake at a place called the "Kuchler Site," which is in an urban environment. TR4, pp. 58-59; App., p. 195. However, the DNR insists on using the Kraus Site, which is located in the middle of a wetlands and a residential neighborhood.

[15] This exhibit was introduced into evidence at TR1, p. 50; App., p. 166. An 11' x 17' version is in the Appendix at p.283. The above exhibit is how it looked after the deposition of Andrew Hudek on August 25, 2011, but before it was marked upon by other experts during the MC Approval hearing during the fall of 2011.

[16] The stipulation provided: "[With] reference to Exhibit 2-002… DNR and the petitioners [stipulate] that the areas in green, both to the south of the access road which runs towards the lake and to the north of the access road, are navigable and also consist of wetlands." *See* TR1, pp. 231-32; App., p. 176.

In terms of the navigable waters and the Reddelien Road neighborhood, the proposed boat launch is anything but inconsequential or ordinary. The navigable wetland complex consists of 14.57 acres, and the Kraus Site sits on 6.59 acres of that navigable wetland.[17]

DNR's proposed construction of the 1500 foot long access road leading to the launch will result in the placement of large amounts of fill directly into the navigable waters adjacent to that road. This would force an average citizen to seek a Chapter 30 permit from the DNR authorizing such fill. In addition, because large amounts of untreated storm water from that access road will flow unimpeded into wetlands, the DNR would customarily require an average citizen to submit to a NR 103 analysis of the impacts from that discharge and comply with DNR findings under NR §103.08(4)(a). Instead, unlike an average citizen, the evidence in this case shows that the DNR has ignored both Chapter 30 and NR 103.

Long ago, the DNR could have redone or at least modified the storm water permit and the MC Approval so as to address the legitimate concerns of the Reddelien Road citizens. At the very minimum, they could have met with those citizens and their experts to discuss improvements that might be made to those plans. Instead, the DNR has charged ahead with their plans, as if what was written on November 4, 2010 was somehow etched in granite. If they now have to start over, the DNR has no one to blame but itself.

THE PETITIONS FOR JUDICIAL REVIEW IN CASE 1751 AND CASE 5341.

The DNR has repeatedly claimed in this Court that there is no relationship between Case 1751 and Case 5341. However, the Petitions themselves help explain in part the critical relationship which does in fact exist between these two cases. This relationship can be seen in the italicized issues set forth below from the Petitions in Cases 1751 and 5341.

[17] *See* TR4, p. 167; App., p. 202. According to the DNR's storm water permit application (Exhibit 01-007 to 01-008; App., pp. 239-240), DNR owns 6.59 acres of the navigable wetland complex and will disturb 1.71 acres. In that application, DNR claims that only .16 acres of wetland will be impacted by the access road and parking lot (Exhibit 01-008; App., p. 140) but a DNR official has testified that fill material needed just to construct the access road will impact 1.4 acres of wetland. TR4, p. 167; App., p. 202.

A. The Petition in Case 1751.

The current Petition in Case 1751 is dated June 1, 2012 and was filed with this Court on June 1, 2012. It is styled "Joint Petition of the NLMD and the RRNA for Judicial Review."[18] The issues identified in that June 1, 2012 Petition are as follows:

1. *That the Decision upholding the MC Approval be set aside and/or invalidated due to DNR's failure to specifically subject its application concerning the proposed construction of the access road to the substantive requirements of Chapter 30, including the provisions of Wis. Stats. §30.12(3m)(c).*[19]
2. That the Decision upholding the MC Approval be set aside and/or invalidated due to the DNR's failure to specifically issue a Chapter 30 permit for the placement of fill or a structure in the lakebed of North Lake.
3. That the Decision upholding the MC Approval be set aside because it is based on an erroneous interpretation of the law contrary to Wis. Stats. §227.57(5).
4. That the Decision upholding the MC Approval be set aside and or invalidated because it is not supported by substantial evidence in the record contrary to Wis. Stats. §227.57(6).
5. *For a determination that no NR 103 determination was ever done at any time in connection with the project and thus the assertion by the DNR that it must only comply with NR 103 is of no consequence* [Emphasis Supplied]…

B. The Petition in Case 5341.

The current Petition in Case 5341 is dated August 3, 2012 and was filed with this Court on that date. It is styled "RRNA Petition for Resumption of Judicial Review Following §227.57(7) Remand."[20] The issues identified in that August 3, 2012 Petition are as follows:

1. Does the proposed development authorized by the Hartsook Decision 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 §151.12(5)(a) or 151.12(5)(a)2?
2. *Did the DNR comply with NR 103 prior to the issuance of its storm water permit in November 2010?*
   a) Did the DNR conduct… an analysis of the impacts from the proposed project in terms of the wetlands water quality standards set forth in NR 103.03 [see NR 103.08(3)(c)], including the 'wetlands functional values' analysis DNR was required to undertake pursuant to NR 103.08(2)?
   b) Did the DNR ever [make] a NR 103.08(4) determination, as required by the General Permit [Emphasis Supplied]*?*

[18] A copy of this Joint Petition is contained in the accompanying Appendix, at pp. 101-111.
[19] This issue relates to NR 103 because the DNR claimed in Case 1751 that it did not need to do a Wis. Stat. §30.12(3m)(c) analysis specifically because of its compliance with NR 103. This became especially significant when the Petitioners discovered in Case 5341 that the DNR had never complied with NR 103.
[20] This Petition for Resumption of Jurisdiction is set forth in the accompanying Appendix, pp. 112-117.

As can clearly be seen from the above, the italicized ¶5 from the Petition in Case 1751 refers to the exact same issue (the failure to do a NR 103 determination) as does ¶2 from the Petition in Case 5341.

The close interrelationship between Cases 1751 and 5341 extends far beyond the Petitions. As the evidence and arguments discussed in this brief will clearly show, despite the fact that the Kraus Site lies in a "navigable wetland," the DNR argued in the navigability hearing in Case 1751 (hereafter, the "*1751 Hearing*") that it did not have to satisfy the requirements of Wis. Stat. Chapter 30 (which governs navigable water) because it had satisfied the "more stringent" requirements of Wis. Admin. Code NR Ch. 103 (which governs wetlands).[21] It wasn't until the RRNA finally had an opportunity to pursue the hearing which is the subject of Case 5341 (hereafter, the "*5341 Hearing*"), that the Petitioners discovered, much to their surprise, that the DNR had never at any time conducted a proper NR 103 determination at the Kraus Site. This discovery not only vitiates the Storm Water Permit which is the subject of Case 5341; it completely undercuts the DNR's claim that it did not have to comply with Chapter 30 in issuing the MC Approval permit which is the subject of Case 1751.

THE ALJ's DECISIONS

A. Case 1751 and Navigable Waters.

The Petitioners initially sought a contested case hearing on the issues of whether the DNR had taken all required steps necessary to protect wetlands and navigable waters at the Kraus Site. In December 2010 the DNR decided to allow the Petitioners to have a contested case hearing only as to navigability.[22] A contested case hearing was held in 2011 over a five day period in the fall. On May 4, 2012 ALJ Boldt rendered his decision,[23] the judicial review of which is now the subject of pending Case 1751. In that Decision, ALJ Boldt made a number of

[21] *See, e.g.*, p. 43 of the DNR's March 12, 2012 Post-Hearing Brief, in the Appendix, p. 278.
[22] *See* DNR Decisions of December 13 and 23, 2010, attached to the Petitioners' June 1, 2012 Joint Petition and also set forth in the accompanying Appendix, pp. 150-160.
[23] A full copy of ALJ Boldt's May 4, 2012 Decision is included in the Appendix, pp. 118-132.

Findings of Fact and Conclusions of Law, including the following that are central to this judicial review proceeding:

> 6. The instant case represents the first known legal challenge to the DNR's use and application of the Manual Code approval process…
>
> 7. Both hearing requests [from the NLMD and the RRNA] were granted only on limited issues relating to whether an area of the property constitutes navigable waters or is a navigable waterway under Wisconsin law…
>
> 10. Consistent with its longstanding usual practice, the DNR **did not separately evaluate whether the fill to be placed in the navigable wetland adjacent to the access road met the standards under Wis. Stat. §30.12(3m)(c)** for placing fill on the bed of a navigable water, **nor did it make specific findings in the MC Approval in regard to Wis. Stat. §30.12(3m)(c) for that fill** [Emphasis Supplied].
>
> 11. **The DNR had already evaluated placement of that fill for compliance with the wetland standards in Wis. Admin. Code ch. NR 103, which are stricter than and also encompass the standards in Wis. Stat. §30.12(3m)(c)**…The specific terms and conditions of the NR 103 wetland fill water quality certification were not an issue referred to the [DHA] for Hearing. [Emphasis Supplied].

As will be demonstrated below, the ALJ's findings that the requirements of Chapter 30 do not apply to the DNR's placement of fill in navigable waters because NR 103 supplants Chapter 30 when the navigable waters are also in or part of wetlands are erroneous as a matter of law. In addition, the ALJ's conclusion that the DNR had evaluated placement of fill under the wetland standards set forth in NR 103 are not supported by substantial evidence. The ALJ's decision also rejected the Petitioners' alternative contention that Chapter 30 applies because portions of the

proposed access road will be built in the lakebed of North Lake. *See* May 4, 2012 Decision, ¶¶FOF 16-17; App., pp. 123-124). However, in reaching this conclusion the ALJ ignored the unrefuted evidence establishing that the east-west channel where the DNR intends to place fill is below the Ordinary High Water Mark (OHWM) of North Lake, and his own finding that water from North Lake flowed into and out of this area. *Id*., FOF¶15. Further, the ALJ's Conclusions of Law fail to address this contention and his decision ignores the Wisconsin Supreme Court's holdings in *State v. Trudeau,* 139 Wis. 2d 91, 101-102, 408 N.W.2d 337 (1987), which case is discussed below Thus, any of the ALJ's findings of fact regarding lakebed lack substantial evidence and are erroneous as a matter of law.

B. Case 5341 and Storm Water Control.

On the same day the DNR issued the MC Approval, November 4, 2010, the DNR also secretly issued to itself a Storm Water Permit, authored by DNR Engineer Hartsook. As this Court knows from the extensive procedural history in this Court, it took the RRNA over one year to obtain an evidentiary hearing on the Storm Water Permit. Finally, a hearing was held on that Storm Water Permit before ALJ Boldt from April 18 to 19, 2012. ALJ Boldt rendered his decision on following the storm water hearing on July 18, 2012,[24] the judicial review of which is now the subject of pending Case 5341.

During the course of the proceedings leading up to and including the Case *5341 Hearing*, the RRNA sought evidence that the DNR had issued the proper determination and findings required under NR 103.08(4)(a) due to the fact that the evidence showed that storm water from the proposed access road (some of which will be completely untreated) will be discharged into the adjacent wetlands. The RRNA issued three separate open records requests[25] seeking any NR 103 documentation and also subpoenaed the file of DNR's Brian Hartsook to be produced at the commencement of the storm water hearing. When DNR failed to come up with a document

[24] A full copy of ALJ Boldt's July 18, 2012 Decision is included in the accompanying Appendix, pp. 133-140.
[25] *See* Exhibits 9, 10 and 11 set forth in the Appendix, pp. 241-248.

reflecting that it had made the required NR 103.08(4)(a) findings, the RRNA advanced that additional failure as another key reason for invalidating the Storm Water Permit.

But the ALJ's Findings ignored that failure, not listing it as an issue subject to his "summary rulings" which were confined to the three issues that had been remanded.[26] Instead, pertinent to this judicial review proceeding, the ALJ's Conclusions of Law only addressed the RRNA's assertion that the proposed expansion of the access road should be considered "new development" under NR 151, as opposed to "redevelopment" which led to the RRNA's assertion that the project did not comply with the TSS removal standard under that code provision.[27]

The ALJ ignored a number of facts concerning NR 103. The ALJ did not even comment on the failure of the DNR to produce any documentation or proof in response to the Petitioners' three open record requests (as well as two more requests made by counsel during the storm water hearing) that it had ever made the required NR 103.08(4)(a) findings. In doing so the ALJ ignored the mandate of Section 1.2.2 in the WPDES General Permit No. WI-S067831-3 specifying that no Storm Water Permit could be issued until "the [DNR] determines that the land disturbing construction activity and associated storm water discharges comply with the wetland water quality standards provisions in ch. NR 103."[28] The ALJ ignored Mr. Hartsook's testimony that he could not issue a Storm Water Permit if the DNR had failed to comply with NR 103. The ALJ ignored Mr. Hartsook's admission that he had never seen an NR 103 determination. Despite Mr. Hartsook's assumption that a NR 103 determination existed somewhere in the MC Approval file (which is the subject of Case 1751), the ALJ ignored the fact that Mr. Hartsook admitted that he had never reviewed the MC Approval file.

The ALJ's decisions in Case 1751 and Case 5341, and the implications of those decisions, will be discussed further in this brief, *infra.*

[26] *See* July 18, 2012 ALJ Decision, FOF Par. 4, sub items 1-3 in the Appendix, pp. 134-135.
[27] The ALJ's summary rulings also addressed the two other issues that had been remanded which the RRNA has dropped for the purposes of its resumed judicial review proceeding.
[28] Excerpts from the General Permit, including 1.2.2, are in the Appendix, pp. 264-267.

STANDARD OF REVIEW

Judicial review is governed principally by Wis. Stat. 227.57. To begin with, Wis. Stat. §227.57(1) specifies that review shall be confined to the record. The Petitioners wholeheartedly agree that Judicial Review should be restricted to the record before the ALJ (in the *1751 Hearing* and the *5341 Hearing*) and, insofar as relevant, the pleadings and record of procedural hearings that have been conducted from time to time before this Court during the past two years, particularly in Case 5341.

The DNR's November 4, 2010 MC Approval and Storm Water Permit should be set aside under Wis. Stat. §227.57(5) because the DNR ignored and failed to properly apply Chapter 30 in issuing its Manual Code Approval for the boat launch (Case 1751) and erroneously interpreted and applied NR 103 and NR 151.12 in issuing the storm water permit (Case 5341). Both permits also should be set aside under Wis. Stat. §227.57(6) because critical findings of fact by the ALJ are not based on substantial evidence, or are contrary to uncontradicted evidence or concessions and stipulations made by the DNR.

A. <u>The Standard of Review for Conclusions of Law under Wis. Stat. §227.57(5).</u>

Wis. Stat. §227.57(5) specifies that "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Because the DNR completely ignored the provisions of Wis. Stat. §30.12(3m)(c) in issuing the Manual Code Approval, the DNR is entitled to no deference concerning that statute.

Similarly, DNR's "interpretation" of the law that the administrative code procedures pertaining to wetlands (NR 103) supplant the statutory requirements pertaining to navigable waters (Chapter 30) are entitled to no deference. According to the Wisconsin Supreme Court in *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995): "The guiding principle is

that statutory interpretation is a question of law which courts decide de novo…." *Id.* at 659. With respect to the Storm Water Permit, DNR's failure to apply NR 103.08(4)(a) by not undertaking the required analysis and issuing the required findings is entitled to no deference.

Additionally, the ALJ's finding that certain areas along the east-west portion of the proposed access road where the DNR intends to place fill does not constitute "lakebed" ignores Wisconsin Supreme Court precedent (*Trudeau)* and is entitled to no deference.

Finally, DNR's interpretation of NR 151.12 (that the proposed access road constitutes "redevelopment") , should be entitled to little or no deference because it is contrary to DNR's own guidance and defies common sense since large portions that road will be built in woods and wetlands completely off the footprint of the existing dirt road.

B. The Standard of Review for Findings of Fact under Wis. Stat. §227.57(6).

Wis. Stat. §227.57(6) specifies that "[i]f the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. **The court shall, however, set aside agency action** or remand the case to the agency **if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence** in the record [Emphasis Supplied]."

Petitioners assert that if the DNR has conceded or stipulated to a fact then a finding of fact that ignores that concession or stipulation cannot stand. Petitioners also submit that if an ALJ ignores uncontroverted but relevant evidence, then the Decision of the ALJ is to that extent subject to reversal.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bucyrus-Erie v. DILHR,* 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). Under §227.57(6), an agency's decision may be set aside, "when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be

such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." *Target Stores v. LIRC,* 217 Wis. 2d 1, 11, 576 N.W.2d 545 (1998).

Here, the ALJ's finding that the east-west portion of the proposed access road which the DNR intends to fill does not constitute "lakebed" is not supported by substantial evidence. There also is no "substantial evidence" that DNR complied with the requirements of NR 103 in issuing either the Manual Code Approval or Storm Water Permit. In fact, there is *no documentary evidence at all* to this effect; there are only the unsupported and uncorroborated assertions by DNR personnel that they understood an analysis had been done.

In addition, DNR's conclusion that the entire access road should be classified as "redevelopment" under NR 151.12 is not supported by substantial evidence.

C. The Standard of Review for Discretionary Acts under Wis. Stat. §227.57(8).

The Legislature did not enact §227.57(8) with the intention that it would never be relevant. Discretion must have some reasonable boundaries. And this in turn presupposes that there must be legitimate criteria for the exercise of even the broadest agency discretion. That is undoubtedly why the Legislature specified that a court may reverse an agency action "if it finds that the agency's exercise of discretion **is outside the range of discretion delegated to it by law**… [Emphasis Supplied]." Courts have agreed. "Because the department acted under invalid criteria, it never exercised its statutory discretion …" *State ex rel. Clifton v. Young,* 133 Wis. 2d 193, 201, 394 N.W.2d 769 (Ct. App. 1986).

Here the facts show an agency that has become so convinced of the correctness of its rules, and its interpretation and application of same, that it will (mis)apply those rules and disregard a clearly applicable statute. There is no law delegating such "discretion" to the DNR; in fact, the effort to arrogate such discretion to itself borders on arbitrary conduct. And this abuse of discretion is clearly the result of the prerogatives the DNR assumes under its highly unusual and unregulated use of what it has come to call the "manual code approval" procedure.

STATEMENT OF FACTS

A. Facts Adduced at the *1751 Hearing*.

Sometime in 2010 the DNR applied **to itself** for a permit to build a boat launch at the Kraus Site. Thereafter, on November 4, 2010 the DNR issued **to itself** a permit to build that launch which it styled a "Manual Code 3565.1 Approval" (hereafter, "MC Approval"), which was marked Exhibit 1-001, et seq. in the hearing which is the subject of Case 1751. App., pp. 141-145.[29] This MC Approval, or permit, only authorizes the DNR to do the following:

1) Grade more than 10,000 square feet on the bank of the lake;
2) Install a boat ramp and 2 outfall structures on the bed of the lake;
3) Install 4 culverts crossing over wetlands; and
4) Place fill in up to .16 acres of wetland.

Exhibit 1-002, *id.,* Finding of Fact (FOF) No. 1.

The MC Approval says nothing about placing fill or material in any navigable waters. While the MC Approval mentions the word "navigable" four times, it does not identify the location of any navigable water or specify what if any fill or material would be placed in any navigable water.

The MC Approval does make a finding of fact that "North Lake and portions of its wetland complex are navigable-in-fact at the project site and are impacted by the proposed project." Exhibit 1-002, *id.,* FOF 2. In addition, the MC Approval does find that North Lake is an Area of Natural Resource Interest under NR §1.05(3) because it "contain(s) endangered or threatened species or aquatic elements identified in the Wisconsin Natural Heritage Inventory." Exhibit 1-002, *Id*, FOF 2.

According to the MC Approval, DNR resource managers also acknowledged that the Kraus Site is part of a wetland complex consisting of approximately 12 acres. Exhibit 1-003, *id.*, ¶9C (DNR officials later acknowledged that there are in fact 14.57 acres of navigable wetland[30]). The DNR proposes to construct a year round public boat launch with 16 car trailer stalls, which

[29] The Manual Code Approval is also referred to as Exhibit 203. *See* TR4, p. 36; App., p. 194.
[30] *See* TR4, p. 167; App., p. 202.

includes two car only stalls, and a launch ramp (Exhibit 1-002, *id.,* Finding of Fact (FOF) 4. Lakebed substrate at the launch consists of sand, gravel and cobble. Exhibit 1-003, *id.,* ¶9B.

With regard to Exhibit 2-002 (App., p. 283) (pictured above at page 8), the DNR has not identified any particular area in the "navigable wetlands" as being more navigable than any other area, nor has it identified any boundary line between the wetlands and any navigable water within the said "navigable wetlands." Thus, the evidence is uncontroverted that all of the areas circled in green on Exhibit 2-002 are navigable and thus subject to Wis. Stat. §30.12(3m)(c).

The orange circle to the east of the northern green circle on Exhibit 2-002 is where the proposed parking lot will be located. *Hudek 8-25-11 Deposition*., p. 50; App., p. 274. The solid blue line running east to west to the north of that orange circle is a swale or stream. *Hudek 8-25-11 Deposition,* pp. 27-29; App., pp. 271-273. According to DNR Expert Hudek:

Q So both the northern green circle, southern green circle and the blue line, which denotes a stream, are navigable waterways?

A Navigable, that would meet the definition of the State, correct [Emphasis supplied].

Hudek Deposition, p. 62; App., p. 275.

Later in his deposition Mr. Hudek was asked to discuss his understanding of the swale in relationship to North Lake. He gave the following testimony:

Q Okay. So as to that location, that would be below the ordinary high water mark and considered to be part of the public trust?

A I would consider the swale as a navigable waterway subject to the public trust.

Id. at 149; App., p. 276.

The navigable wetlands within the green circles on Ex. 2-002 extend far beyond the boundaries of the Kraus Site, and in fact extend far into the Reddelien Road neighborhood (the name of neighborhood can clearly be seen on Ex. 2-002 to the east and south of the southern green circle). There is testimony that the entire area of the wetlands complex is 14.57 acres (TR4, p. 167; App., p. 202), of which the DNR owns 6.59 acres. Exhibit 01-008; App., 240. The DNR admits that the Kraus Site project will impact 1.71 acres but claims that only .16 acres of wetland will be impacted by the access road and parking lot. *Id.* However, a DNR official has testified that fill material needed just to construct the access road will impact 1.4 acres of wetland. TR4, p. 167, at lines 15 to 22; App., p. 202. Petitioners would also note that the .16 acres of alleged direct wetland impact not account for the amount of additional wetland and navigable water which will be impacted beyond the boundaries of the access road and parking lot, as discussed *infra*. There is evidence that the northern navigable wetlands (in the small green northern circle on Exhibit 2-002) interact with the southern navigable wetlands (in the large green circle, also on Exhibit 2-002). TR3, p. 32; App., p. 188.

Mr. Tom Peters (the neighbor to the North of the Kraus Site) testified that he sees water flowing both east and west from North Lake into the swale or stream, and then back into North Lake. TR1, pp. 277-278; App., p. 178. When the water gets high enough in the navigable wetlands, the water will flow east into the lake. *Id.* According to Peters, when North Lake gets high enough, the water direction reverses and water flows from the lake into the navigable wetlands. Mr. Peters was asked "at the point at which the unnamed stream intersects with North Lake, the water to your personal observation has flowed both into and out of North Lake?" TR1, 277-78; App., p. 178. And Mr. Peters answered: "That is correct." *Id.* DNR Engineer Pete Wood corroborated Mr. Peter's testimony, stating that he thought "Mr. Peters actually made a good summary of this." TR5, p. 256; App., p. 207. Dr. O'Reilly also agreed that between North Lake and the navigable wetlands, water flows in and out. TR2, p. 56; App., p. 181.

There is testimony that water from more than 100 acres of farm fields to the west of the navigable wetlands empty directly into those navigable wetlands (TR3, pp. 140-141; App., pp. 189-190), but no Wis. Stat. §30.12(3m)(c)3 flood flow analysis has ever been done by the DNR (TR1, p. 214; App., p. 175 and TR2, pp. 48-49; App., pp. 179-180) and so there is no evidence concerning the probable effect of the boat launch on the amount, duration or frequency of water flow from the farm fields into the wetlands or the Reddelien Road neighborhood.

It is important to place the proposed parking lot into proper perspective. As can be seen from Ex. 12,[31] a very large football-field sized piece of asphalt is going to be dropped into a Reddelien Road neighborhood and sandwiched in between two residential homes, the one to the south belonging to Fritz Hanson and the one located to the north belonging to Tom Peters. In addition, the DNR's proposed parking lot is to be placed in the exact location where water ebbs and flows between the wetland complex and North Lake. TR1, p. 275; App., p. 177. According to Professor O'Reilly, the proposed parking lot (in the orange circle on Ex. 2-002), consisting of a large piece of asphalt, is a structure and will reduce flood flow capacity of the stream which is identified in blue on Exhibit 2-002. TR2, p. 62; App., p. 182.

There are other significant facts derived from the testimony at the *1751 Hearing* and those additional facts will be referenced in the following arguments of this brief.

B. Facts Adduced at the *5341 Hearing*.

On November 4, 2010, DNR approved its own application and issued to itself a Storm Water Permit for the boat launch at the Kraus Site. *See* Exhibit 02-001, et seq.; App., pp. 146-149 (the "Storm Water Permit") signed by Brian Hartsook under General Permit WPDES WI-5067831-3, at Exhibit 04-001, et seq.; App., pp. 264-267 (the "General Permit"). That General Permit contains a number of preconditions to its use to support a permit such as the Storm Water Permit DNR's Mr. Hartsook issued, including the following specific exclusion:

[31] An 11' x 17' version of Exhibit 12 is in the Appendix, p. 284.

> **1.2 Exclusions**
> The following are not eligible for coverage under this permit:…
>
> > 1.2.2 Land disturbing construction activity and associated storm water discharges that affect wetlands, **unless the [DNR] determines** that the land disturbing construction activity and **associated storm water discharges comply with the wetland water quality standards provisions in ch. NR 103**, Wis. Adm. Code [Emphasis supplied].

In fact, Mr. Hartsook acknowledged that he could not base a permit such as the one DNR issued on November 4, 2010 on the above General Permit in the absence of a determination by the DNR under NR 103. As Hartsook testified in the *5341 Hearing*:

> Q Can we agree -- looking at Page 4 again, and I just want to get you on the record on this, can we agree that if the DNR had **not**[32] done a water quality determination under [General Permit Section] 1.2.2, you would not have been authorized to use this general permit to issue [the November 4, 2010] permit. Would that be a correct statement?
> A [HARTSOOK] Yes, sir.

TRA, p. 29; App., p. 210.

On the eve of the *5341 Hearing*, the RRNA became concerned because the DNR had not produced proof of a NR 103 determination, despite three requests. The RRNA had not received any response to two open record requests for a NR 103 determination for the Kraus Site, and only received a partial response to a third request just before the hearing. *See* Exhibits 9, 10 and 11; App., pp. 241-248. Just before the start of the *5341 Hearing* on April 18, 2012, the DNR finally responded but only with a document that had not been issued under NR 103 and did not comply with all of the specifications of a NR §103.08(4)(a) determination. TR**A**, pp. 119-120; App., pp. 231A-231B; Cf. TR**B**, pp. 119-120; App. 237-238. The failure of the DNR to produce a NR 103 determination came as a complete surprise to the RRNA and its counsel. Therefore, counsel for the RRNA aggressively pursued the whereabouts of the NR 103 during the *5341 Hearing*. To begin with, counsel for the RRNA made the following statement at that hearing:

> MR. GLEISNER: Judge [Boldt], I'm going to make a representation to you for the record. We are prepared to prove that we have made three separate [open record] requests to the DNR [for a copy of the NR 103 determination]. We got some

[32] Counsel for the RRNA and the DNR have agreed that although the word "not" is missing from the paper transcript it is in fact audible on the tape recording of that transcript. *See* Agreement, App., pp. 210A-210D.

> partial production yesterday. We still have not seen the NR 103 determination to which Mr. Hartsook is referring… All we're asking is that Ms. Landretti [counsel for the DNR in the April 2012 hearing] or Mr. Hartsook or … folks at the DNR locate this water quality determination and furnish it to us.
>
> MR. HARBECK: [I]f there hasn't been an NR 103 study that determined that the storm water discharges comply with the wetland water quality standards, that's directly at issue here in terms of the validity of the [storm water] permit. So it's – it goes to that issue and the question is, it's not in the record, we haven't seen it, so that's the point.

April 18, 2012 Hearing; TRA, pp. 30-32; App., pp. 211-213.

The RRNA counsel renewed its above request on April 19, 2012 (TRB, pp. 119-120; App., pp. 237-238), but no NR 103 determination was ever produced during that hearing, or following that hearing. It is clear that the analysis and determination which the RRNA sought is the one specified in Wis. Admin. Code NR §103.08(4)(a). TRB, p. 120; App., p. 238.

C. Facts Concerning "New Development" vs. "Redevelopment" (*5341 Hearing*).

The evidence adduced during the *5341 Hearing* showed that the existing pathway where the proposed access road will be located is not an improved driveway or road. According to the testimony of Engineer Don Reinbold[33] and Professor O'Reilly, [34] the existing pathway is parent earth material with no improved gravel or pavement surface, and much of the current path is covered with vegetation. TRA, pp. 55-59; App., pp. 222-226. Considerable evidence was also adduced at the hearing which demonstrated that large portions of the proposed access road were not "redevelopment." Engineer Reinbold testified that none of the existing path would be used because it would be necessary to remove all of the parent dirt and replace it with fill, gravel and asphalt. TRA, pp. 55-58; App. pp. 222-225.

Mr. Reinbold and Professor O'Reilly testified that the proposed access road often would not replace older development, as required by the definition in NR 151.002(39). Large sections

[33] Donald Reinbold, one of the Petitioners' experts, has been a highway engineer for 40 years. He was the Project Engineer on the Marquette Interchange. He testified about his credentials at TRB, pp. 48-54; App., pp. 215-221.

[34] Professor Neal O'Reilly is one of the Petitioners' principal experts. Professor O'Reilly has a PhD in hydrology and teaches that and several other water courses at the Marquette University School of Engineering. He worked for the DNR for 16 years as a water management specialist. His CV was received into evidence as Exhibit 001R-001 to 001R-015; App., pp. 249-263.

of the proposed access road will be built where no previous road or path has ever existed. TRA, pp. 58-59; App., pp. 225-226. A large portion of the proposed access road will be built in the navigable wetlands and wooded area adjacent to the current path. It is hard to see, by any reasonable logic, how the portion of the road that will deviate from the current path can fairly be characterized as "redevelopment." Furthermore, a significant stretch of the proposed access road completely "leaves the reservation" (the existing path) and will be constructed entirely in the adjacent virgin wetlands. TRA, pp. 71-73; App., pp. 227-229.

Petitioners' Engineer Reinbold further testified that it would be necessary to cut down at least 400 good sized mature hardwood trees in order to build the proposed access road. TRA, p. 58; App., p. 225. The DNR did not offer any evidence that contradicted the assertion that 400 trees would have to be sacrificed to build the proposed access road. Logic strongly suggests that the land where these 400 trees are located cannot be any sort of existing road, path or even trail. A standing tree is an obstacle to a path; not part of a path.

The DNR concedes that their Kraus boat launch project will disturb approximately 1.71 acres. Ex. 01-008 (App., p. 240). To the extent the footprint of the proposed north-south access road (the re-development project) will be located where grown trees of the hardwood variety referenced by Mr. Reinbold now exist, then by the terms of DNR's own Ex. 35 (App., pp. 285-289) that footprint will be new development.

The DNR has also stipulated in connection with Exhibit 14-001 (which is set forth below and is also contained at App., p. 290) that 150 feet of the east-west access road will be complete off the existing path or gravel driveway. TRA, p. 79-80; App., pp. 230-231. A fortiori, logic dictates that at least that part of the proposed east-west access road in the area of the 150 feet (or any other area which is completely off the footprint of the existing path) is new development. In the same way, logic dictates that the portion of the access road which will be built through woodland is likewise new development.

There are other significant facts derived from the testimony at the *5341 Hearing* and those additional facts will be referenced in the following arguments of this brief.

ARGUMENT

I. THE MANUAL CODE APPROVAL (CASE 1751) IS INVALID BECAUSE THE DNR FAILED TO APPLY CHAPTER 30 TO ITS PROPOSED PLACEMENT OF FILL INTO NAVIGABLE WATERS TO EXPAND THE ACCESS ROAD.

The DNR conceded that it did not apply Chapter 30's requirements to its proposed placement of fill into navigable waters in connection with expansion of the access road. The ALJ found this as a fact, consistent with DNR's usual practice when the navigable waters were also wetlands.

> Consistent with its longstanding usual practice, the DNR did not separately evaluate whether the fill to be placed in the navigable wetland adjacent to the access road met the standards under Wis. Stat. §30.12(3m)(c) for placing fill on the bed of a navigable water, nor did it make specific findings in the MCA approval in regard to Wis. Stat. §30.12(3m)(c) for that fill.

See May 4, 2012 ALJ Decision, Finding of Fact (FOF) ¶10, App., pp. 118-132 (Hereafter, "5/4/12 ALJ FOF ¶__").

The DNR argued that it did not need to comply with Wis. Stat. Chapter 30 when assessing the impact of the proposed access road on navigable water because the DNR had already evaluated placement of fill in compliance with the wetland standards in Wis. Admin. Code ch. NR 103, which are "more stringent" than and also encompass the standards in Wis. Stat. §30.12(3m)(c). App., p. 278. The ALJ adopted DNR's position, finding that DNR need not apply the requirements of Chapter 30 when the navigable waters to be impacted by the proposed fill are also wetlands. 5/4/12 ALJ FOF ¶11.

As will be explained below, NR 103 does not, and cannot, supplant Chapter 30 when navigable waters are in issue, regardless of whether those navigable waters are also located within wetlands. But, more importantly, the RRNA discovered in Case 5341, much to their surprise, that no documentation or proof existed that the DNR actually ever made the findings

required under NR 103.08(4)(a) with respect to its proposed boat launch. Even though such findings would not excuse DNR from also adhering to the separate requirements of Chapter 30, DNR's failure to establish that it undertook a proper analysis under NR 103 means that it's claims in Case 1751 about NR 103 are without merit.

A. Chapter 30 Applies on its Face Whenever Materials are to be Placed in Navigable Waters.

Wis. Stats. §30.12(1)(a) states that "no *person* may … deposit any *material* or place any structure upon the bed of any navigable water where no bulkhead line[35] has been established [Emphasis Supplied]." Further, Wis. Stats. §30.12(3m)(c) provides, in part, that the DNR must make specific findings when materials (or "deposits") are to be placed in navigable waters:

> The department shall issue an individual permit to a riparian owner for a structure or a deposit pursuant to an application under par. (a) **if the department finds that *all* of the following apply**:
> 1. The structure or deposit will not materially obstruct navigation.
> 2. **The structure or deposit will not be detrimental to the public interest**.
> 3. **The structure or deposit will not materially reduce the flood flow capacity of a stream** [Emphasis Supplied].

B. The DNR is Subject to the Substantive Requirements of Chapter 30.

There is nothing within the four corners of Chapter 30 which states that it does not apply to the DNR. In particular, there is nothing in §§30.10 or 30.12, Wis. Stat., that suggests in any way that those provisions to not apply literally and in their entirety to the DNR. In fact, the language of the DNR's internal document setting forth the guidelines for its Manual Code 3565.1 Approval procedure explicitly provides as follows:

> All [DNR] projects, where Chapters 30 and 31 … would apply **if built by a private individual**, must receive … approval … prior to construction. **Decisions will be based on the standards in the appropriate statues and administrative rules that would apply to similar privately sponsored projects** [Emphasis supplied].

TR4, pp. 36, 63; App., pp. 194-196 & Exhibit 203.

[35] Mr. Wakeman testified as follows during the *1751 Hearing*:

> Q. Now, referencing Section 30.12 of the statutes, I am going to ask you, as a regulator, are you aware of whether or not a bulkhead line has been established with regard to any of the area that is referenced on Exhibit 2-002 at any point.
> A. I don't believe so.

TR4, p. 74; App., p. 198.

There was no dispute that the substantive requirements of Chapter 30 apply in all respects to DNR projects. As the ALJ in this case stated on September 19, 2011, when he opened the *1751 Hearing*:

> **The specific legal standards** that we referenced in the notice were the substantive requirements of Wisconsin Statutes 30.01(4m), **30.10(1) and (2), 30.12(3m) and (c)**, as well as the Manual Code that we referenced earlier. … **[T]hese are the substantive requirements that the Department has imposed upon itself** [Emphasis supplied].

TR1, pp. 19-20; App., p. 164.

DNR's Andy Hudek, who has handled between 150 and 200 Chapter 30 or water quality certification applications each year (TR4, p. 132; App., p. 201), testified:

> Q. Are the standards the same for when you're reviewing a Manual Code approval as opposed to a private party permit?
> A. Whether it's a Manual Code approval or whether it's a private application, we review the activity in light of the applicable standard.
> Q. So the same project is treated identically the same? …
> A. Yes.

TR1, pp. 206-207; App., p. 174. *See also* TR4, p. 194; App., p. 203.

DNR Engineer Wakeman, who testified that he had handled hundreds of Chapter 30 and water quality certification applications during his lengthy career at DNR (TR4, p. 9; App., p. 193) additionally testified:

> Q. At what point does this Manual Code approval discuss or talk about Chapter 30 approval?
> A. In the paragraph under sponsor it talks about the project has been reviewed and found to be consistent with the standards of Chapter 30, 281 … Wisconsin Stats. and Chapters 102, 103, 150, 151, 216, 299, 320, 329 and 341 of the Wisconsin Administrative Code.
> Q. And so that means, in other words, that the agency, the DNR, acknowledges the fact that it is bound by the standards in Chapter 30…
> A. It is consistent with the standards of those statutes and codes, correct.

TR4, pp. 62-63; App., p. 196.

Quite simply, Chapter 30 applies by its terms to everyone. Wis. Stats. §30.12(1)(a) states that "**no person** may … deposit any material or place any structure upon the bed of any navigable water where no bulkhead line has been established [Emphasis supplied]." Wis. Stat. § 281.01(9) defines "person" to mean "an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, **state agency** or federal

agency [Emphasis supplied]." The Legislature did not exempt the DNR from any part of Wis. Stat. Chapter 30. No matter how many "manual code" procedures the Agency may establish, the fact remains immutably the same. In *Milwaukee v. Firemen's Relief Association*, 42 Wis. 2d 23, 165 N.W.2d 384 (1969) the Supreme Court found that a statute is "applicable to all legal entities, **including all branches of government**, **unless specifically exempted by the Legislature** [Emphasis supplied]." *Id.* at p. 39.

C. NR 103 Can Never "Trump" Chapter 30.

Based on what the RRNA discovered during the *5341 Hearing* on the Storm Water Permit, as it turns out there is no documentation reflecting that DNR ever made a proper NR 103 determination at the Kraus Site. However, even assuming that the DNR had conducted an NR 103 determination at the Kraus Site, doing so would not override the application of Chapter 30 and its requirements applicable to *all* navigable waters, be they in wetlands or not.

Article IX, Section I of the Wisconsin Constitution protects navigable waters in trust for the public. The Legislature promotes this public trust in navigable waters in part through Chapter 30. In fact, Chapter 30 is a codification of the public trust doctrine. *See State v. Trudeau*, 139 Wis. 2d 91, 101-102, 408 N.W.2d 337 (1987).[36] To suggest that an agency rule could ever supersede a statutory mandate which codifies a constitutional doctrine is clearly wrong. Beyond that, an agency rule in the administrative code can never trump any statute.

If an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid. In *Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659, the Supreme Court overturned an agency rule, stating in part: "An agency

[36] *See also In re Crawford County Levee & Drainage District v. Hutson*, 182 Wis. 404, 196 N.W. 874 (1924), where our Supreme stated:

> [I]t is not a question of state policy as to whether or not we shall preserve inviolate our navigable waters. … We are the trustee of the navigable waters within our borders … And this trust we cannot diminish or abrogate by any act of our own. Neither the state nor this court has anything to do with the wisdom of the policy of keeping inviolate our navigable waters. The supreme law [embodied in the Wisconsin Constitution] so directs, and its mandate not only justifies but compels the continuance of the policy.

Id. at 409.

interpretation is not reasonable if it contradicts either the language of a statute or legislative intent. In those cases in which a conflict arises between a statute and an administrative rule, the statute prevails." *Id.*, at ¶72.

Indeed, it is hornbook law that since a legislative body is the source of an agency's power, "the provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation." 1A Sutherland on Statutory Construction, §31.02 (4th Ed. 1985).[37]

Nowhere in NR 103 is there anything to the effect that it supersedes Chapter 30 when navigable waters are encountered in a wetland. When questioned about his justification for not applying Chapter 30 to the proposed access road construction in the navigable wetlands, Mr. Wakeman, a senior member of the DNR staff, gave the following testimony:

> Q. Is there [any place] in NR 103 that you are aware of that it says that Chapter 30 doesn't apply to navigable wetlands?
> A. Not to my knowledge.
> Q. Is there [any place] in NR 103 that you are aware of that navigable wetlands are referenced?
> A. Without having to read the whole document again and refresh my memory, I don't – I don't believe so.
> Q. Is there [any place] that you are aware of that navigable wetlands are defined by the Department.
> A. The term navigable is defined and the term wetland is defined. I can't recall a definition that specifically identifies or defines a navigable wetland. It would have to be pieced together.

TR4, pp. 77-78; App., p. 199.

Mr. Wakeman testified that if "fill" is placed in a "navigable wetland" it is regulated under NR103, but if a "structure" is placed in a wetland then it is regulated under Chapter 30.

[37] And there are very definite limits on the extent to which an agency can claim "implied power" under a statute. As the Wisconsin Attorney General said in an opinion to one of the first Secretaries of the DNR, at 68 Op. Atty. Gen. 264 (1979):

> In the absence of an express grant of authority, the question of what powers may be 'fairly implied' by an enabling statute must be addressed in light of the maxim that such statutes are to be 'strictly construed to preclude the exercise of power which is not expressly granted,' *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978); *Racine Fire and Police Commission v. Stanfield*, 70 Wis. 2d 395, 399, 234 N.W.2d 307 (1975). And, if doubts remain, 'any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority.' *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971).

Id. at *8-9.

TR3, pp. 160-161; App., pp. 191-192. However, §30.12(1)(a) does not make that distinction. The requirements are the same, whether someone seeks to place a structure **or** fill on the bed of navigable water.

In short when navigable waters which are also located in wetlands are to be impacted by the placement of fill materials, the requirements of **both** Chapter 30 and NR 103 should apply. In concluding that the DNR need not separately evaluate whether the proposed access road fill met the requirements of Wis. Stats. 30.12(3m)(c) or make specific findings required by this statute for that fill, the ALJ erred as a matter of law. Accordingly, the Manual Code Approval must therefore be set aside.

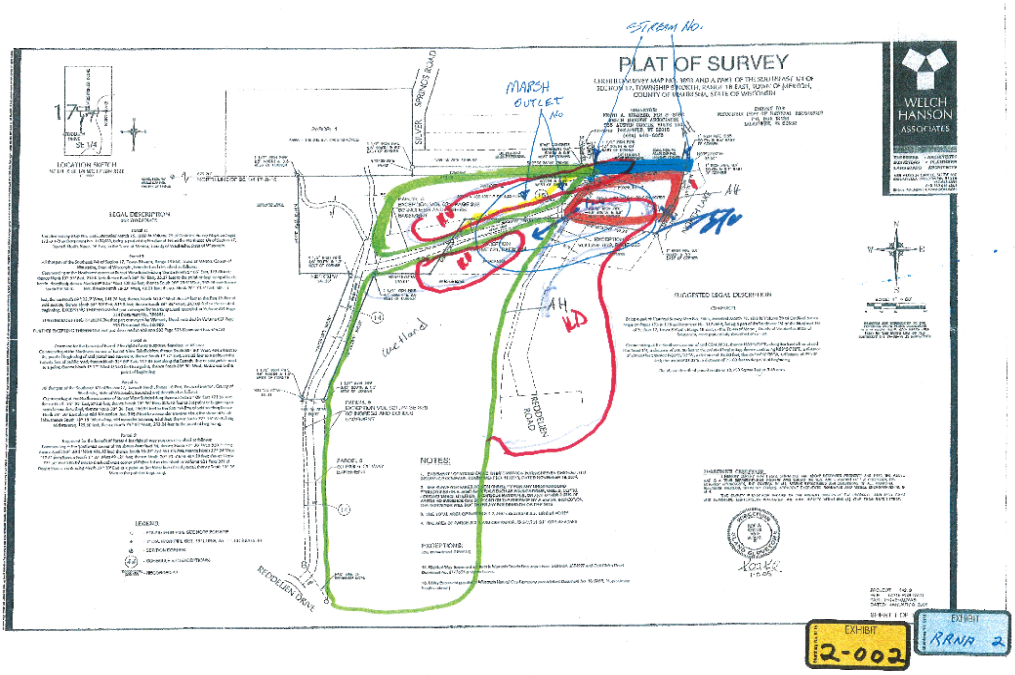
II. A CHAPTER 30 PERMIT IS NEEDED BECAUSE THE PROPOSED ACCESS ROAD WILL BE BUILT IN THE *LAKEBED* OF NORTH LAKE.

A. The Proposed East-West Access Road is Below the Ordinary High Water Mark of North Lake, is Connected to North Lake, and Thus is Lakebed.

The focus of both Case 1751 and Case 5341 comes down to the proposed east-west access road which the DNR plans to build right through the heart of the navigable wetlands on the Kraus Site. In connection with its proposed expansion of the access road, the DNR proposes to place a significant amount of fill material into the navigable wetlands both on the pathway of that proposed road and adjacent to the existing east-west access road.

Not only do the requirements of Chapter 30 apply to the fill material because the adjacent wetlands in this area are navigable, Chapter 30 applies because that area of the Kraus site constitutes lake bed. It is lakebed because it is connected to North Lake; its elevations are below the ordinary high water mark of North Lake, and water from North Lake flows into and out of this area. Under *State v. Trudeau*, 139 Wis. 2d 91, 408 N.W. 2d 337 (1987), the requirements of Chapter 30 apply whether or not lakebed is navigable. Below is another version of Exhibit 2-002, this time with additional markings from the *1751 Hearing.* In his own handwriting, Professor O'Reilly notes on this version of Exhibit 2-002 that the solid blue line to the north of the

proposed parking lot is a stream, and that it extends west all the way to a point between the two green circles on that exhibit to what he calls a "marsh outlet." [38] TR2, pp. 134-136; App., p. 187.



As mentioned, the above Exhibit 2-002 (a large copy is at App., 283) is different from the exhibit on page 8, *supra*, because it contains the markings which were placed on it by witnesses during the *1751 Hearing*.[39] Professor O'Reilly further testified that the swale or stream (lying to the east of the marsh outlet and north of the proposed parking lot) is navigable within the meaning of Wis. Stat. §30.10(2). TR2, pp. 132-133; App., pp. 186-187. "[T]here is a bed and bank on both the north and south sides of the channel. It's clearly observable in the field. It's clearly observable on the topographic maps … taken by Kapur and Associates and I believe it has all the characteristics of a stream channel." TR2, p. 49:19-25; App., p. 180.[40]

[38] Cf. Wis. Stat. §30.10(2).

[39] The exhibit on page 8, *supra*, is how Exhibit 2-002 looked after the deposition of Andrew Hudek on August 25, 2011, but before it was marked upon by other experts during the MC Approval hearing during the fall of 2011. The above Exhibit 2-002 is how it looked after the completion of the *1751 Hearing*.

[40] Elevations in the bed of this stream channel show "that the bed of that channel is below the ordinary high water mark of the lake and that it's my opinion that this stream channel is part of the lakebed." TR2, p. 86; App., p. 183. Professor O'Reilly also opined, "… all of the bed elevations are below the ordinary high water mark established by Robert Wakeman of the Wisconsin DNR, so they're below 897.76." *Id.*, p 87; App., 183.

The following is testimony from the DNR's Mr. Hudek, given at his deposition before the *1751 Hearing*. In referring to what became Ex. 2-002 Mr. Hudek testified:

10	**Q**	**So both the northern green circle, southern green**
11		**circle <u>and the blue line, which denotes a stream</u>,**
12		**<u>are navigable waterways?</u>**
13	**A**	**<u>Navigable, that would meet the definition of the</u>**
14		**<u>State, correct</u> [Emphasis supplied].**

Hudek Deposition, p. 62; App., p. 275.

Later in his deposition Mr. Hudek was asked to discuss his understanding of the swale in relationship to North Lake. He gave the following testimony:

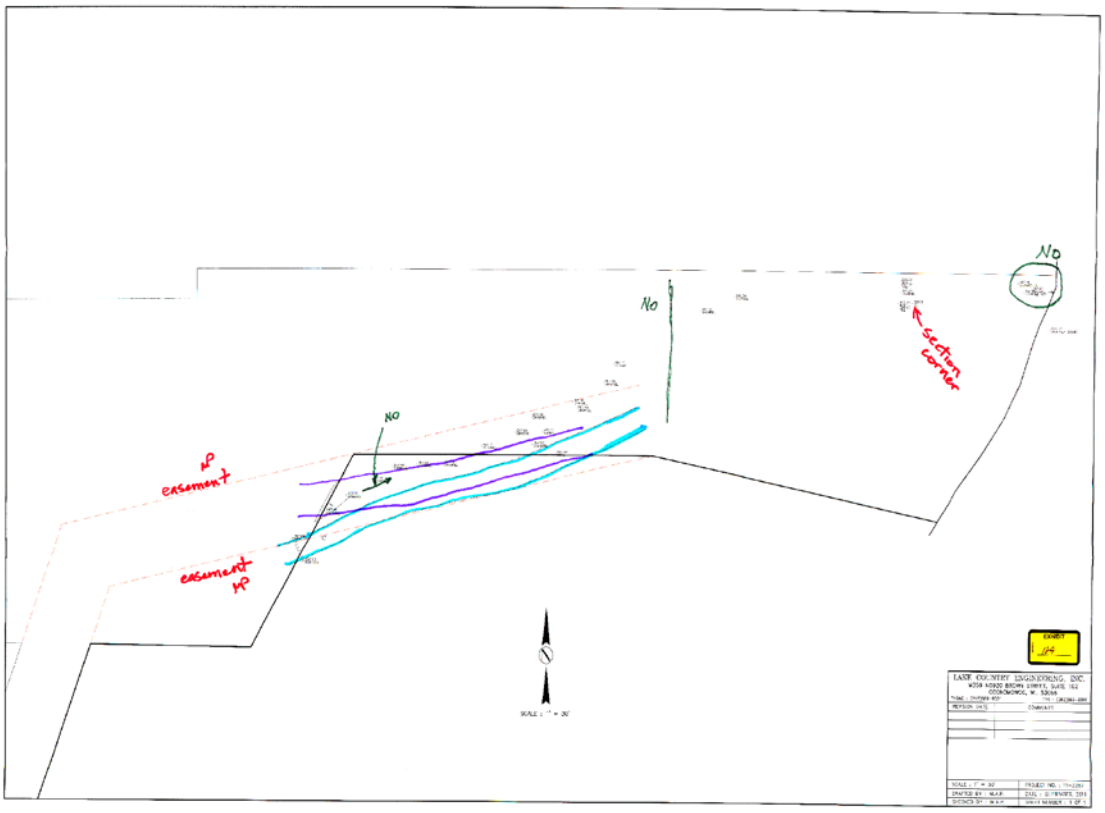
18	**Q**	**<u>Okay. So as to that location, that would be below</u>**
19		**<u>the ordinary high water mark and considered to be</u>**
20		**<u>part of the public trust?</u>**
21	**A**	**<u>I would consider the swale as a navigable waterway</u>**
22		**<u>subject to the public trust.</u>**

Id. at 149; App., p. 276.

Below is a copy of Exhibit 129[41] (App., p. 291) prepared by Petitioners' expert surveyor, Mr. Powers. TR1, pp. 74-75; App., p. 169. With this exhibit, one can see how the stream or swale to the north of the proposed parking lot continues west into the specific area where the east-west access road will be built. The broken red dash lines on Exhibit 129 represent the boundaries of the easement within which the DNR's proposed east-west access road must be located. TR1, p. 76; App., p. 169. Powers identified the existing path which the DNR plans to expand into an access road by blue lines on Exhibit 129. TR1, p. 81; App., p. 171. Powers then drew the approximate location of the proposed DNR access road in purple on Exhibit 129. TR1,

[41] In addition, a digital copy of Exhibit 129 is on the CD inside the front cover of the Appendix which will afford the Court the opportunity to "zoom" in on the numbering on that exhibit. Several points are clear about this exhibit.

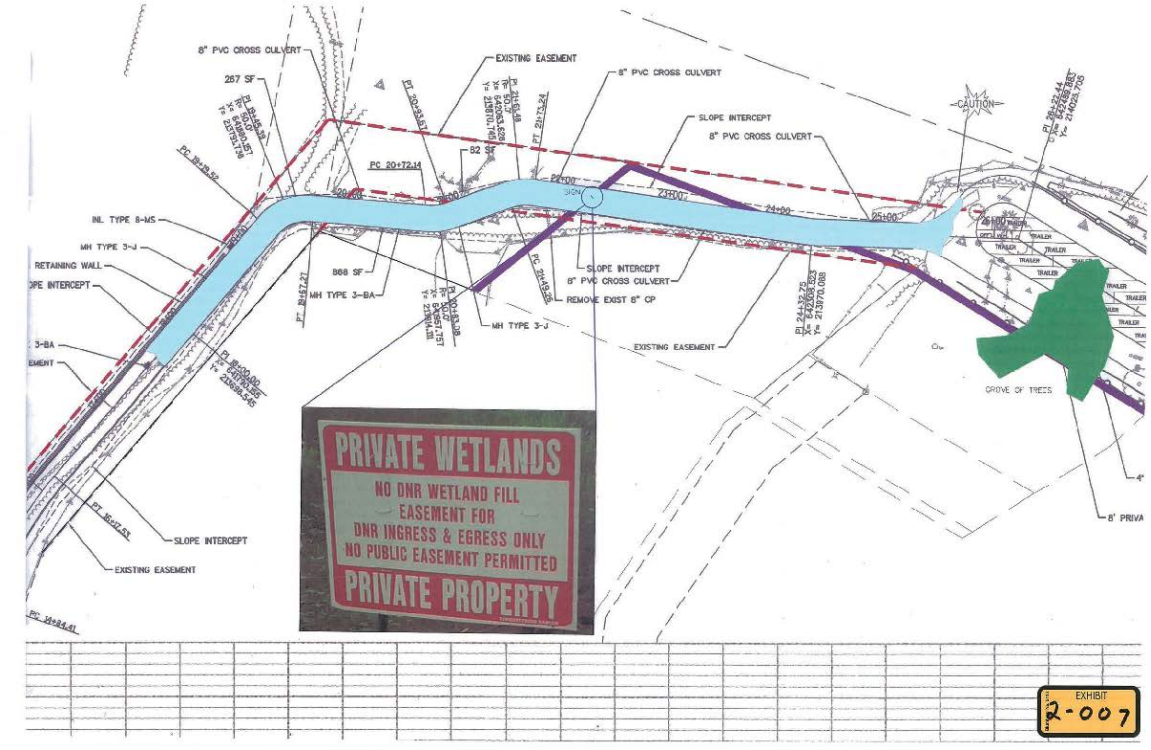
p. 86; App., p. 172. According to the DNR, the ordinary high water mark (OHWM) for North Lake is at 897.96 feet above sea level. TR1, p. 80; App., p. 170.



All of Powers measurements on Exhibit 129, in the area where the proposed east-west access road will go, clearly show that it will lie below the ordinary high water mark of North Lake. According to Powers, "[E]ven if I adjusted all my elevations to the current SEWRPC elevation, all my shots would still be below the ordinary high water mark of 897.76." TR1, p. 86; App., p. 172. Exhibit 2-007 (App., p. 293) is set forth below. This exhibit was also prepared by Surveyor Powers . TR1, pp. 51-53; App., p. 166. According to Powers the broken red dashed line on Exhibit 2-007[42] represents the easement noted on Exhibit 129, within which the DNR's proposed access road must be built, and corresponds to the same broken red line on Exhibit 129. TR1, p. 52; App., p. 166. The light blue line running east to west in the middle of Ex. 2-007

[42] Exhibit 2-007 (App., p. 293) and 2-006 (App., p. 292) are actually identical.

represents the proposed east-west access road to the parking lot. TR1, p. 52; App., p. 166. As one can see from observing Exhibit 2-007 (a large copy at App. 293), the red and white sign on Exhibit 2-007 is located exactly in the path of the DNR's proposed access road.



A navigability-in-fact test (see outtake from Exhibit 17N at the right)[43] was conducted by the RRNA which produced clear proof of navigable water in the very place where the proposed access road will be built. The

[43] In *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 412 N.W.2d 505 (Ct. App. 1987), the Court noted that the navigability-in-fact test is the keystone' for determining whether a body of water is navigable. *Id.* at 589. The *Menomonee Falls* Court observed that at least since 1952 it has been the law in Wisconsin that any stream is navigable-in-fact if it is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes. *Id.* at 586. The Court goes on to underscore that the navigability-in-fact test is the only test which the courts will recognized for determining navigability. *Id.* at 591.

navigation test conducted by the RRNA on behalf of the Petitioners (Ex. 17-N[44]) shows a young woman (Paige Hanson at right) paddling in the navigable water where the proposed access road will be located, past the sign which is clearly visible in Exhibit 2-007.[45] According to the Petitioners' surveyor, that sign is located on the property of Fritz Hanson (TR1, p. 53; App., p. 167) right in the middle of where the proposed access road will cross the northwest corner of Hanson's property. TR1, pp. 51-53; App., pp. 166-167. According to Paige Hanson (TR1, p. 130; App., p. 173) the water had a current flowing from east to west (from the direction of North Lake) and she testified that the water was two feet deep. TR1, p. 131; App., p. 173. Professor O'Reilly further testified that "the channel running along the north side of the property from the lake to where the sign was shown … in the [video of Paige] Hanson which is in that triangle area where the easement crosses the Hanson property … that location is below the ordinary high water mark." TR2, p. 127; App., p. 185.

Mr. Tom Peters (the neighbor immediately to the North of the Kraus Site) testified that he sees water flowing both east and west from North Lake into the swale, and then back into North Lake. TR1, pp. 277-278; App., p. 178. When the water gets high enough in the navigable wetlands, the water will flow east into the lake. *Id.* When North Lake gets high enough, the water direction reverses and water flows from the lake into the navigable wetlands. Mr. Peters was asked "at the point at which the unnamed stream intersects with North Lake, the water to your personal observation has flowed both into and out of North Lake?" TR1, 277-78; App., p. 178. Mr. Peters answered: "That is correct." *Id.*

[44] The videotape marked as Exhibit 17N is on the CD inside the front cover of the accompanying Appendix.

[45] Mr. Wakeman testified as follows (at TR4, p. 125; App., p. 200):

> Q. [W]hat I'm trying to get at is where the young girl was paddling and she paddled past the sign, was there or was there not a bed and bank?
> A [WAKEMAN]. There's bed and bank and an ordinary high water mark.
> Q. So that would be navigable water?
> A [WAKEMAN]. Yes.

DNR Engineer Pete Wood corroborated Mr. Peter's testimony, stating that he thought "Mr. Peters actually made a good summary of this." TR5, p. 256; App., p. 207. Dr. O'Reilly also agreed that water flows in and out of North Lake from the navigable wetlands. TR2, p. 56; App., p. 181. In fact, the ALJ found that "the testimony of all parties established that water would flow west during high water, high enough to flow over the ice berm at the edge of the lake, and east toward North Lake as it drained from the northern wetlands…" 5/4/12 ALJ FOF ¶15.

In short, the area starting from the western shore of North Lake into the swale or stream to the north of the proposed parking lot and continuing to the area adjacent to the east-west access road where the DNR intends to place fill to expand that road (where Paige Hanson paddled her canoe) is (1) below the ordinary high water mark of North Lake, and (2) is connected to North Lake. It thus is part of the lakebed.

B. Under *Trudeau*, the Proposed East-West Access Road Will be Built in the Lakebed of North Lake and Requires a Chapter 30 Permit.

Because the area where DNR intends to construct portions of the proposed east-west access road is below the ordinary high water mark of North Lake it is in fact part of the ***lakebed*** of North Lake. Even though DNR has stipulated that this area is navigable, it makes no difference whether it is or not. It needs only to be connected to North Lake and be below the lake's ordinary high water mark. According to our Supreme Court in *State v. Trudeau,* 139 Wis. 2d 91, 408 N.W.2d 337 (1987):

> **An area need not be navigable to be lakebed.** If the land is part of the navigable lake, then the fact that the specific area cannot be navigated is irrelevant. … Lakebed may be heavily vegetated by plants rising far above the water. The court of appeals stated in *Houslet v. Natural Resources Department,* 110 Wis. 2d 280, 287, 329 N.W.2d 219 (Ct. App. 1982): **'[T]he public interest in and title to the navigable waters in this state attaches to more than the open and perpetually navigable waters contained in lakes, rivers and streams. It extends to areas covered with aquatic vegetation within the *ordinary high water mark* of the body of water in question.'** Public ownership of the bed applies whether the water is deep or shallow [Emphasis supplied].

Id. at 103-104.

This area is thus subject to the public trust and Chapter 30's requirements apply:

> Section 30.12 and ch. 30, Stats., generally codify a number of common law doctrines regarding the ownership of the beds of navigable waters. 'The title to the beds of **all lakes** and ponds, and of rivers navigable in fact as well, **up to the line of ordinary high-water mark**, within the boundaries of the state, **became vested** in it at the instant of its admission into the Union, **in trust to hold the same so as to preserve to the people forever** the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law.' **This is as true of the beds of the Great Lakes as it is of lesser inland waters** [Emphasis supplied].

Id. at 101.

III. THE ALJ COMPLETELY IGNORED THE IMPACT ON THE LAKEBED OF NORTH LAKE IN LIGHT OF THE *TRUDEAU* DECISION.

The ALJ ignored the unrefuted facts, established through surveys of ground elevations conducted by both the DNR and Mark Powers, that certain portions of the proposed east-west access road which DNR plans to fill are below the OHWM of North Lake and thus constitute "lakebed" requiring a Chapter 30 permit. The evidence cited by the ALJ simply does not contradict this. And the ALJ compounded this error by failing to consider or acknowledge the Supreme Court's decision in *State v. Trudeau, supra,* that holds that if an area is lakebed, Chapter 30 applies.

For this independent reason, DNR's failure to undertake a Chapter 30 evaluation and issue findings meeting the requirements of Chapter 30 render the Manual Code Approval invalid and it should be set aside.

IV. THE STORMWATER PERMIT IS INVALID BECAUSE: (1) THE DNR DID NOT UNDERTAKE THE ANALYSIS AND ISSUE THE FINDINGS REQUIRED UNDER NR103.08(4)(a); AND (2) DNR MISCHARACTERIZED THE PROPOSED ACCESS ROAD AS "REDEVELOPMENT" UNDER NR 151.

A. <u>For the Storm Water Permit to be Eligible under the General Permit an NR 103 Determination was Required</u>.

As described above, DNR's November 4, 2010 storm water grant of coverage (the "Storm Water Permit") was issued to the DNR by DNR's Mr. Hartsook under General Permit WPDES WI¬5067831-3 (Ex. 04) (the "General Permit"). As the General Permit makes explicit, construction activities and storm water discharges that impact wetlands are not eligible for coverage under the General Permit unless the DNR "determines that the ... construction activity

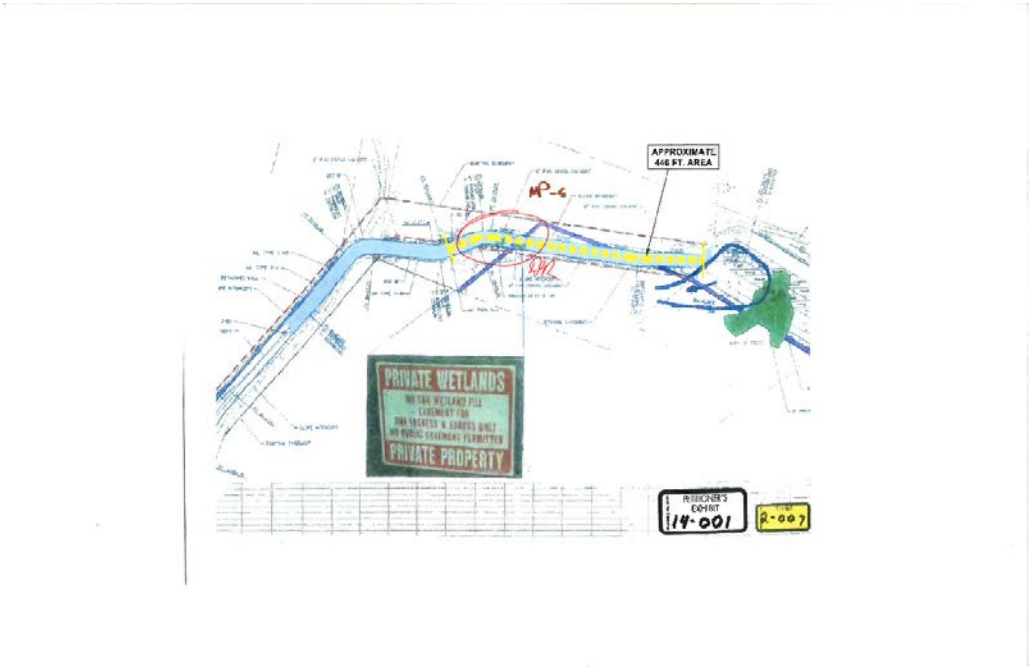
and associated storm water discharges comply with the wetland water quality standard provisions in ch. NR 103 . . . ."

> **1.2 Exclusions**
>
> The following are not eligible for coverage under this permit:...
>
> 1.2.2 Land disturbing construction activity and associated storm water discharges that affect wetlands, **unless the [DNR] determines** that the land disturbing construction activity and associated storm water discharges **comply with the wetland water quality standards provisions in ch. NR 103**, Wis. Adm. Code [Emphasis supplied].

The land disturbing activities and storm water discharges associated with the project will impact the wetlands surrounding the proposed access road. In fact, there are two stipulations with the DNR that cover the following facts. The DNR has stipulated that the areas circled in green on Exhibit 2-002, immediately adjacent to the existing access road are navigable wetlands (TR1, pp. 231-232; App., p. 176). Mr. Hartsook testified that completely untreated runoff will enter the navigable wetlands from the proposed access road for a distance of 446 feet. TRA, p. 21; App., p. 209. A second stipulation between the Petitioners and the DNR (put on the record at TRA, pp. 79-80; App., pp. 230-231), confirms that the proposed access road will go right through those wetlands, and largely untreated storm water runoff will discharge into those wetlands for a distance of 446 feet. Exhibit 14-001 is set forth on the following page.[46]

The yellow line on Exhibit 14-001 (next page) represents a total of 446 feet where untreated storm water will flow into the navigable wetlands, again according to the stipulation at TRA, pp. 79-80; App., pp. 230-231. An 11' x 17' copy of Exhibit 14-001 is contained in the accompanying Appendix at p. 290.

[46] This is one of seven large (36' x 48') exhibits that were lost by the ALJ's Office. Fortunately, Petitioners had 11 x 17 copies of Exhibit 14-001. The Petitioners' expert, Don Reinbold, marked on Exhibit 14-001. The Petitioners and the DNR agreed that Mr. Reinbold could recreate his markings on Exhibit 14-001 but Reinbold was out of town. Counsel for the Petitioners finally tracked Reinbold down in Florida and sent him Exhibit 14-001 by overnight mail with a request that he remark the exhibit. The remarked exhibits arrived just before this brief had to be filed.



Therefore, because wetlands will be impacted by the DNR's proposed project, in order to be eligible for coverage under the General Permit the DNR had to prove that the storm water discharges complied with NR 103.

B. The Surprising Revelation in Case 5341 That the Required NR 103 Determination Was Lacking.

The RRNA approached the evidentiary hearing in Case 5341 concerning the Storm Water Permit in April of 2012 with the full expectation that they would finally see the NR 103 determination which had been so often referenced during the hearing on the MC Approval (which is the subject of Case 1751). Much to their surprise, the NR 103 determination never materialized; just the opposite. In spite of three open record requests made by their consultant Professor O'Reilly for such a determination (Exhibits 9, 10 & 11; App., pp. 241-248), no such determination has ever been produced by the DNR. The RRNA then subpoenaed DNR's Storm Water Permit file. Mr. Hartsook produced that file at the beginning of the hearing, and there are no NR 103.08(4)(a) findings within it. Exhibit 1, introduced at the storm water hearing in April of 2012. The absence of an NR 103 determination came as a complete surprise to the RRNA and its counsel. Therefore, counsel for the RRNA pursued the whereabouts of the NR 103 in the

5341 Hearing. To begin with, counsel for the RRNA made the following statement at that hearing:

> MR. GLEISNER: Judge [Boldt], I'm going to make a representation to you for the record. We are prepared to prove that we have made three separate [open record] requests to the DNR [for a copy of the NR 103 determination]. We got some partial production yesterday. We still have not seen the NR 103 determination to which Mr. Hartsook is referring… All we're asking is that Ms. Landretti [counsel for the DNR in the April 2012 hearing] or Mr. Hartsook or … folks at the DNR locate this water quality determination and furnish it to us.
>
> MR. HARBECK: [I]f there hasn't been an NR 103 study that determined that the storm water discharges comply with the wetland water quality standards, that's directly at issue here in terms of the validity of the [storm water] permit. So it's – it goes to that issue and the question is, it's not in the record, we haven't seen it, so that's the point.

TRA, pp. 30-32; App., pp. 211-213.

The RRNA counsel renewed its above request on April 19, 2012 (TRB, pp. 119-120; App., pp. 237-238. but no NR 103 determination was ever produced. TRB, p. 120. The analysis and determination which the RRNA sought is the one specified in Wis. Admin. Code NR §103.08(4)(a). TRB, pp. 119-120; App., pp. 237-238. On the last day of the *5341 Hearing*, Professor O'Reilly testified as follows:

> Q. In response to your three [open record] letters … have you ever seen an NR 103 determination for the site?
> PROFESSOR O'REILLY: All I have seen is the document that was handed to me yesterday…
> Q. It's not an NR 103 determination?
> PROFESSOR O'REILLY: It's not a determination…

TRA, pp. 120-121; App., pp. 231A-231B.

C. <u>The DNR has the Burden of Proving That the Project Complies with NR 103 Water Quality Standards</u>.

NR 103.03 sets forth Wisconsin's wetland water quality standards. Subsection (1) describes the functional values that are to be protected, and subsection (2) sets forth certain criteria that are to be used to assure the maintenance of those functional values. Several of the criteria in sub.(2) are applicable to the types of substances that would be contained in the storm water runoff from the access road, such as oils and grease, gas, road salt, and PAHs. (See, e.g.,

NR §103.03(2)(a) "Liquids, fill or other solids or gas"; NR §103.03 Sub. (2)(b) "Oils"; and Sub. 2(d) "substances which are toxic or harmful to human, animal, or plant life").

NR §103.08(1) requires the "project proponent" (here the DNR) to show, "based on the factors in sub (3), that "the proposed activity conforms with the provisions of NR 103." In other words, it was the DNR's burden in its storm water application (located at Exhibit 01-004 to 01-019; not included in the Appendix) to make this showing.

An official 2007 DNR memorandum by Attorney Michael J. Cain, who is a well-respected former Staff Counsel at DNR, entitled "A Template for Reasoned Environmental Planning, located on the DNR website,"[47] confirms that the applicant must show compliance with NR103.

According to Mr. Cain: "The project proponent [here, the DNR] has the burden of proof to show that they have complied with [NR 103].... [W]e have stressed this in our training to assure that the program staff [e.g., Mr. Hartsook] require the applicant to submit all information necessary to allow us to assess whether they have met [the NR 103] standards [Emphasis in the original]." *Id.*, Cain, at p. 5. According to Cain, whenever a project will impact wetlands it is the project applicant's burden to provide all needed information and the applicant must prove that the requirements of NR 103 have been met. *Id*., Cain, at p. 6. Mr. Cain then outlines "what is required of [DNR] staff at the time of application. *Id*., Cain at p. 7. A great deal of information is to be accumulated so that the decision making process is done correctly. *Id*. at pp. 7 to 13.

There is no evidence that this information was accumulated, let alone analyzed by Mr. Hartsook before his issuing his permit. Nowhere does DNR's storm water permit application make any reference, much less any showing, that the storm water discharges to the wetlands

[47] Located at http://dnr.wi.gov/wetlands/documents/TemplateEnvPlanNR103.pdf. This is in the nature of an admission by a party. Moreover, this Court can take Judicial Notice of this document. *See Wisconsin Medical Society v. Morgan*, 2010 WI 94, 328 Wis. 2d 469, 787 N.W.2d 22 ("This court has taken judicial notice of state records that are available at the seat of government in Madison that are easily accessible." *Id.* at ¶18, fn. 7); *Meyers v. Bayer AG*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448 ("[A] court may take judicial notice of facts easily accessible and capable of immediate and accurate determination." Dissent of Justice Roggensack, *Id.* at ¶ 81).

comply with the NR 103.03 wetland water quality standards. As a consequence, the DNR's storm water application in this case was deficient on its face and it was not eligible for coverage under the General Permit.

D. The Grant of Coverage Fails to Make the Required Determination of Compliance with NR 103.

i. DNR Failed to Consider the Storm Water Impacts to the Wetlands from the Project.

Upon receiving the permit application, NR §103.08(3)(c) requires the DNR, in its role as reviewer of the application (to itself), to consider, among other things, "impacts which may result from the activity" on the standards enunciated under NR §103.03. According to Mr. Cain, "if a project passes the 'initial screening' ... then all the factors in NR §103.08(3)(b)-(f) **must be analyzed** [Emphasis supplied]. *Id*. at p. 15. Further, Mr. Cain states, "This step of the process allows us to assess all steps to 'avoid and minimize' impacts [to wetlands] and to consider **'other adverse environmental consequences,'** such as impacts to critical upland resources, in our review of the project [Emphasis supplied]." *Id*. at p. 15. Again, Mr. Hartsook did not do any of this, although he was charged with reviewing the DNR's application and in fact is the one who acted to approve that application.

Then Mr. Cain proceeds to review some of the points which DNR staff should consider during the project review process under NR 103. These include the following:

> iv. Secondary impacts analysis, e.g., will there be secondary impacts on **wetland functional values** caused by this project (these could include changes in hydrology)? vi. Cumulative impacts analysis. **What impacts may occur, based upon past or reasonably anticipated impacts on wetland functional values of similar activities in the affected area?** [Emphasis in the original]

Id. at p. 16.

Again, Mr. Hartsook conceded that he did not consider any of this before issuing the storm water permit. But then, he only had the project application three days before he issued the permit. Mr. Cain then states as follows:

> The final analysis, as indicated above, is whether the project will result in 'significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences... **Note that the last part of the test, i.e., 'other environmental consequences,' requires that we look at issues other than wetland issues.** [Emphasis supplied].

Id. at 16.

ii. DNR Failed to Make Required Findings that the Project Complied with the Water Quality Standards Set Forth in NR 103.

After conducting this required review, NR §103.08(4)(a) then requires the DNR (again as project reviewer) "to make a finding" that the requirements of NR 103 have been satisfied. NR §103.08(4)(a)[48] specifically states:

> **(4)** (a) Except as provided in par. (b), (c) or (d), **the department shall make a finding that the requirements** of this chapter are satisfied if it determines that the project proponent has shown all of the following:
> 1. No practicable alternative exists which would avoid adverse impacts to wetlands.
> 2. If subd. 1. is met, all practicable measures to minimize adverse impacts to the functional values of the affected wetlands have been taken.
> 3. If subds. 1. and 2. are met, utilizing the factors in sub. (3) (b) to (g) and considering potential wetland functional values provided by any mitigation project that is part of the subject application, **that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences** [Emphasis supplied].

NR §103.08(4) is very clear; "the department **shall** make a finding [Emphasis supplied]." That does not allow for any discretion. Professor O'Reilly, a former water quality specialist for the DNR who also has been involved as a private consultant in many projects affecting wetlands, confirmed that the DNR (as project reviewer) should have subjected the Storm Water Permit application to the requirements of NR 103, and should have issued a written determination and findings as required by NR 103.08(4), which was never done in either Case 5341 or 1751.[49] The Cain memorandum similarly calls for a set of specific findings and conclusions of law. Mr. Cain then states as follows:

[48] It is specifically the determination pursuant to NR §103.08(4)(a) which Professor O'Reilly asked for in his open record requests and which he did not find any evidence of in the *1751 Hearing*. *See* TRB, pp. 118-120.
[49] *See* TRA, p. 30; TRB, pp. 118-120.

> Form of Decision. When the final regulatory decision is made, whether it is a solid waste decision or a water regulatory decision, it should reflect in the findings of fact and conclusions of law that a review was completed in accordance with Chapter NR 103 and what the findings were.

Id. at 17.

This does not allow for some type of "narrative" compliance. There must be specific findings of fact and conclusions of law, and there are none of those in either Case 1751 or 5341. In spite of these explicit code requirements, Mr. Hartsook testified that (1) he did not make any analysis under NR 103 (as required by NR §103.08(3)(c)), and (2) that he did not issue any determination or findings that the proposed project complied with the requirements of NR 103 (as required by NR 103.08(4)). In fact, there is nothing in the November 4, 2010 Storm Water Permit (App., pp. 146-149) which even mentions NR 103. Nor is there any such determination in the certified record pertaining to this proceeding or in Mr. Hartsook's Storm Water Permit file. According to Mr. Hartsook's testimony in the *5341 Hearing*:

> Q. And I just want to be clear for the record. You, yourself, did not do an NR 103 determination?
> MR. HARTSOOK: No.
> Q. And you, yourself, did not see a physical copy, as in paper copy, of an NR 103 determination?
> MR. HARTSOOK: No, and I don't need to.

TRB, pp. 105-106; App., pp. 235-236.

It is hard to understand how the DNR engineer charged with ensuring coverage eligibility under the General Permit can claim he didn't need to see the actual NR 103 determination that the store water discharges and related construction activity were compliant with NR 103. But, as it turns out, it would be difficult for him to see it since it was never prepared.

E. <u>The Failure to Make a NR 103 Determination Invalidates the Storm Water Permit which is the Subject of Case 5341</u>.

As noted, DNR's November 4, 2010 Storm Water Permit was issued to the DNR by Mr. Hartsook under General Permit WPDES WI-5067831-3, and Mr. Hartsook testified at the *5341 Hearing* that he would not have been authorized to issue the Storm Water Permit if the DNR had

not done a NR 103 determination within the meaning of 1.2.2 of the General Permit. According to Mr. Hartsook:

> Q Can we agree -- looking at Page 4 again, and I just 19 want to get you on the record on this, can we agree that if the DNR had **not**[50] done a water quality determination under [General Permit Section] 1.2.2, you would not have been authorized to use this general permit to issue a permit. Would that be a correct statement?
> A [HARTSOOK] Yes, sir.

TRA, p. 29; App., p. 210.

Mr. Hartsook claims that the NR 103 determination exists and is in the Case 1751 record. However, he never saw it or reviewed it before he issued the November 4, 2010 Storm Water Permit in question. TRB, pp. 105-106; App., pp. 235-236. But Mr. Bertolacini, DNR's Storm Water Program coordinator, whom ALJ Boldt describes as an expert on storm water issues and NR 103, expected a DNR Storm Water Engineer such as Mr. Hartsook to consider NR 103 before issuing a Storm Water Permit. According to Mr. Bertolacini:

> Q. So from a policy standpoint the anticipation is that the storm water engineer who reviews the application where there's wetland effect would look at NR 103?
> A [MR. BERTOLACINI]: They would look at the discharge to a wetland and how that discharge, you know, can be treated before discharge to the wetland.

TRB, p. 16; App., p. 234.

As the evidence showed, the DNR has stipulated that large areas immediately adjacent to the existing access road are navigable wetlands (*see* the stipulation at TR1, pp. 231-232; App., p. 176 concerning the green circles on Exhibit 2-002, at App. p. 283). Mr. Hartsook readily acknowledged that the proposed access road will go right through those wetlands, and that untreated storm water runoff will discharge into those wetlands for a distance of 446 feet. TRA, p. 15; App., p. 209. The only treatment of storm water runoff will be the removal of some percentage of suspended solids. There will be no treatment of chemicals contained in the storm water runoff, such as oils, gas, grease, or road salts. TRA, pp. 37-38; App., pp. 214A-214B.

[50] Counsel for the RRNA and the DNR have agreed that although the word "not" is missing from the paper transcript it is in fact audible on the tape recording of that transcript. *See* Agreement, App., pp. 210A-210D.

V. THE PROJECT DOES NOT COMPLY WITH THE STORM WATER TSS REDUCTION REQUIREMENTS SET FORTH IN NR 151.12(5).

Wisconsin Admin. Code Ch. NR 151.12 establishes post-construction performance standards applicable to the reductions in total suspended solids (TSS) carried in storm-water runoff from construction sites. NR §151.12(5)(a)1 specifies that if the site is "new development" the contractor is to reduce the TSS load by 80%. NR §151.12(5)(a)2 specifies that if the site is "redevelopment" a contractor is to reduce the TSS load by 40%.

The DNR's storm water permit application analysis concluded that the proposed project complied with the TSS (total suspended solids) removal requirements set forth in NR 151.12(5). DNR came to this conclusion based on its determination that the proposed parking lot constituted "new development" and that the proposed access road constituted "redevelopment" under the Code. *See* Ex. 3-004-005, App., pp. 297-298, Ex. 16-001, App., pp. 299-300; TRA, pp. 190-92; App., pp. 303-314. As a consequence, it concluded that while the parking lot had to comply with the 80% TSS reduction performance standard set forth in NR 151.12 (5)(a)1, the proposed access road need only meet the 40% TSS reduction requirement set forth in NR 151.12 (5)(a)2. *Id*. DNR then concluded (using a weighted average) that the combined TSS reduction requirement was 54.10%, and that the project met this requirement because the overall TSS reduction measures would achieve a 57.5% TSS reduction. *Id*.

The ALJ concurred with DNR's classification of the access road as "redevelopment" because of its existing use as a gravel road and because the development of "urban lawns" for construction projects are redevelopment under DNR guidance. 5/4/12 Decision FOF ¶9.

As demonstrated at the *1751 Hearing*, because the entire proposed twenty-four foot wide access road does not constitute "redevelopment," but is instead "new development," significant portions of the proposed access road were subject to the 80% TSS reduction requirement set forth in NR 151.12(5)(a)1. And even assuming that the replacement of the existing 12-foot wide dirt road with another 12-foot wide paved road would be "redevelopment" and that only the 12

feet of additional road width that the DNR intends to build would be "new development," the unrefuted evidence was the project still does not comply with the TSS reduction requirements. *See* Ex. 29, App., p. 302; TRA pp. 199-200. App., pp. 303-314.

Further, the ALJ's equating the heavily wooded wetlands into which the road will be expanded as equivalent to an "urban lawn" is nonsensical and without factual or legal support.

A. The Entirety of the Proposed Access Road is "New Development."

Under NR §151.002(11), "development" means residential, commercial, industrial or institutional land uses and associated roads." NR §151.002(39) defines "New development" as "development resulting from the conversion of previously undeveloped land or agricultural land uses." NR §151.002(39) defines "Redevelopment" as "areas where development **is replacing** older development." DNR classified the entire proposed access road on the Kraus Site as "redevelopment."

The evidence adduced during the *5341 Hearing* showed that the existing pathway where the proposed access road will be located is not an improved driveway or road. According to the testimony of Engineer Don Reinbold and Professor O'Reilly, the existing pathway is parent earth material with no improved gravel or pavement surface, and much of the current path is covered with vegetation. TRA, pp. 55-56; App., pp. 222-223. To build the proposed access road, it will also be necessary to cut down 400 large hardwood trees. TRA, p. 58; App., p. 225.

DNR also produced a string of emails which were marked and received as Exhibit 35 at the hearing. App., pp. 285-288. On page 2 of that Exhibit DNR Storm Water Engineer Pete Wood states "Existing buildings, driveways, and lawn areas are considered development. **However, wooded areas and other natural areas are not considered development** [Emphasis Supplied]." DNR Exhibit 35; App., p. 286. As Professor O'Reilly testified, this assumes that the driveway serves the building and the lawn is landscaping associated with the building. Professor O'Reilly further noted that on the DNR site there is no building. Don Reinbold testified that 400

mature hardwood trees would be removed as part of the project. Professor O'Reilly noted that if you need to remove 400 trees in a 0.85 acres disturbance area that the site should be classified as wooded and that area should be considered new development.

Courts have defined "replace" to mean to supplant with an equivalent. *Olenick v. Government Employees Ins. Co.,* 346 N.Y.S. 2d 320, 321 (NY Appellate Division 1973); *see also Illinois Central Railroad v. Franklyn County,* 56 N.E.2d 775, 779 (Ill. 1944). Webster's New World Dictionary (1966) offers the following definition of "replace:" "To put back in a former place, position, condition." In other words, "replace" connotes the substitution of an original with the equivalent of the original. However, in this case the access road proposed expands considerably on the original, by doubling its size and replacing the existing dirt road with pavement.

When the access road is properly characterized as new development, the project obviously does not comply with the 80 % TSS reduction requirements under NR 151.12(5)(a)1. (The DNR's calculations reflect that only about 57 % TSS would be removed. See Exs. 3-004-005, App., pp. 297-298 *see also,* Ex. 16-001; App. pp. 299-300. An 80% TSS removal rate would mean that it the project fell about 23% short. *See* Ex. 28, App., p. 301; TRA pp.197-99, 202-204, App., pp. 303-314.

B. <u>At a Minimum, at Least Half of the Proposed Access Road is New Development.</u>

Even if replacement of the existing dirt road with a paved road of the same width could be considered "redevelopment," the portions of the proposed access road that deviate from the current path's footprint are not "redevelopment." Large sections of the east-west proposed access road will be built where no previous road or path has ever existed. In fact, a significant stretch of the proposed access road completely "leaves the reservation" (the existing path) and will be constructed entirely in the adjacent wetlands. This is reflected in part on Petitioners Ex. 14-001.

App., p. 290 (see above).[51] It was established earlier that the solid blue line on Ex. 14-001 is where the proposed access road will be located, based on the engineering drawings of the DNR. It was also established that the "Private Wetlands" sign on Exhibit 14-001 is located right in the middle of the proposed east-west access road. It was stipulated at the hearing that 446 feet of the proposed roadway located along the east-west road, marked by a yellow line on Ex. 14-001 below will not receive any runoff treatment. TRA, pp. 79-80; App., pp. 230-231. *See also* Ex. 03-005; App., p. 298.

It was also stipulated at the 5341 Hearing that at least 150 feet of the proposed east-west road (circled in red above) will be built completely in the navigable wetlands. By reference to Exhibit 14-001, the DNR agreed as follows: "[A]t least 150 of the proposed access road [shown by a red circle above] is completely off the existing footprint of the current path and… 446 feet of the proposed east/west access road [shown by the yellow broken line above] will not have any storm water treatment." TRA, p. 80; App., p. 231. The "Private Wetlands" sign located in this portion of the proposed road is exactly where Paige Hanson paddled a kayak in Exhibit 17N (on a CD on the inside cover of the Appendix). Quite clearly, this is not an area "where development is replacing older development under NR 151.002(39);" instead, like the other areas where the proposed access road is leaving the current footprint, that 150 feet is new development that is "replacing" navigable wetland.

Further, the DNR did not offer any evidence that contradicted the assertion that 400 trees would have to be sacrificed to build the proposed road. Logic strongly suggests that the land where these 400 trees are located cannot be any sort of existing road, path or even trail. A standing tree is an obstacle to a path; not part of a path.

[51] This is one of seven large (36' x 48') exhibits that were lost by the ALJ's Office. Fortunately, Petitioners had 11 x 17 copies of Exhibit 14-001. The Petitioners' expert, Don Reinbold, marked on Exhibit 14-001. The Petitioners and the DNR agreed that Mr. Reinbold could recreate his markings on Exhibit 14-001 but Reinbold was out of town. Counsel for the Petitioners finally tracked Reinbold down in Florida and sent him Exhibit 14-001 by overnight mail with a request that he remark the exhibit. The remarked exhibits arrived just before this brief had to be filed.

On page 2 of DNR's Exhibit 35, DNR Storm Water Engineer Pete Wood wrote "wooded areas and other natural areas are not considered development." Exhibit 35, App., p. 286. To the extent that the footprint of the proposed access road will be located where grown trees of the hardwood variety referenced by Mr. Reinbold now exist or will go into the wetlands, then by the terms of DNR's own Ex. 35 that footprint will be new development.

Had the DNR correctly classified even just the 12-foot expansion of the road as "new development," it would have been required to reduce TSS discharges by 66.99% under DNR's weighted approach. *See* Ex. 29, App., p. 302. Again, however, DNR's own analysis reflected that it was only achieving a removal rate of slightly above 57%. *See* Exs. 3-004-005, App., pp. 297-298 *see also,* Ex. 16-001; App., pp. 299-300.

C. Whether the Proposed Access Road is Partially or Entirely "New Development," the DNR's TSS Reduction Determination was Faulty.

The RRNA presented evidence (discussed above) that if the proposed access road is considered new development, the 80% TSS reduction requirements under NR §151.12(a)1 will not be satisfied. The RRNA also presented evidence (discussed above) that even if only half of the proposed access road is considered "new development," the TSS reduction requirement still will not be satisfied. This evidence was not refuted. Instead, the DNR's position and analysis, at the time the permit was issued, hinged on its conclusion that the entire proposed access road was "redevelopment." Because this was erroneous, the storm water permit should be remanded for a proper analysis under NR §151.12(5)(a).

D. The Storm Water Permit Should Be Remanded.

The DNR was required to conduct an analysis under NR 103 and to issue findings of compliance before issuing the storm water permit to itself. There is not a scintilla of evidence that it did so. Based on the code requirements, as confirmed by Mr. Cain's interpretation of NR 103, the DNR's Kraus Site project, like any other project that impacts wetlands, was required to undergo an NR 103 Determination under NR §103.08(4)(a).

The General Permit required this; NR 103 required this; Mr. Cain exhaustively details the reasons for such a requirement and spells out what has to be done. However, despite file searches and three open record requests, no evidence of a NR 103 Determination relating to the storm water discharges to the wetlands was produced.

In addition, the DNR mischaracterized the proposed access road as "redevelopment" when all, or a significant part of that road will clearly be "new development." By doing so, its TSS reduction analysis and conclusions were defective. For these reasons, the storm water permit is deficient and should be remanded.

CONCLUSION

The DNR is judge and jury of its own conduct; there is no outside agency policing what it does. If DNR causes harm, under *Froebel* it can do so with impunity. So because of *Froebel*, the Petitioners cannot wait until after the DNR acts and the damage is done. That is because there is unrefuted evidence in Cases 1751 and 5341 that establishes that the DNR did not comply with the applicable statutes and regulations, and thus did not conduct the correct tests, before issuing itself the two permits for the boat launch it proposes to construct on North Lake at the Kraus Site. Since the DNR is policing itself and is answerable only to itself this Court should at a minimum require the DNR to strictly adhere to the law and its own regulations. *Froebel* makes it clear that after the launch is built the Petitioners will be without any remedy to rectify any resulting environmental damage from any failure by the DNR to comply with the law and with its own regulations.

This case is not about stopping the DNR from achieving public access to North Lake. It is not even about stopping the DNR from achieving public access through and by the Kraus Site, if absolutely necessary. This case is about insuring that the DNR fairly and transparently applies the same rules and law to itself, **when it seeks a permit from itself**, that it applies to everyone else. The DNR should have known that it had made mistakes in its issuance of the permits for the

boat launch at the Kraus Site many years ago. Instead of doing those permits over a long time ago, it pressed ahead perhaps in the hope that it could force a neighborhood of aggrieved citizens to quit because they would not have the resources or the will to continue the fight. The time has now come at long last to require the DNR to follow its own rules and the laws of Wisconsin in acting upon its own permit applications. Because it did not do so here, both permits should be set aside.

Dated March 22, 2013.

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