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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

State ex rel. Reddelien Road Neighborhood Association, Inc. ("RRNA"),
F. Robert Moebius, David Draeger, Frederick A. Hanson, Doris Lattos,
James Wozniak, Donna Anderson, Brad Barke, Carol Barke, James
Baumgartner, Hilda Baumgartner, Douglas Bruch, Linda Bruch, Charlene
Cary, Annabelle M. Dorn, Paulette Draeger, William C. Gleisner, III, Margo Hanson,
Christine Janssen, Frank Janssen, Brian Kennedy, Mary Lou Kennedy, Mitchell
Kohls, Joseph G. Krakora, Marie Krakora, Charles Luebke, Patricia Luebke, Mary
Mitchell, David Mirsberger, Patti Mirsberger, Jill Moebius, Gerhard Palmer, Betty
Palmer, Aletta Ruesch, Thomas Schwartzburg, Stephanie Smith, William Timmer,
Suzanne Timmer, Deborah Wozniak, Daniel Yuhas, and Jennifer Yuhas,

J. M. DAVIS

CLERK OF COURTS ^{Petitioners,}

vs.

DEC - 3 2010

Case No.
Case Code: 30607
Administrative Agency Review

10CV05099

THIS IS AN AUTHENTICATED COPY OF AN ORIGINAL DOCUMENT FILED IN THE CLERK OF COURTS OFFICE WAUKESHA COUNTY.
The Department of Natural Resources ("DNR"),
an agency of the State of Wisconsin,

FILE

Respondent.

PETITION FOR JUDICIAL REVIEW

Petitioners, by counsel, hereby petition for Judicial Review pursuant to Wis. Stats. §§30.209(3), 227.52 and 227.57 of a November 4, 2010 "North Lake Boat Launch Manual Code 3565.1 Approval" issued by the Wisconsin Department of Natural Resources ("DNR") in connection with DNR FILE REF: IP-SE-2009-68-05745-05750 (the "Permit"). A copy of the Permit is attached to this Petition as Appendix A.

I. PRELIMINARY ALLEGATIONS.

A. This Petition Is Necessary Given The Wording Of The Permit.

1. On November 4, 2010, the DNR issued a document entitled "North Lake Boat Launch Manual Code 3565.1 Approval" (the "Permit"), attached as Appendix A. Pursuant to the Permit, the DNR approved its own proposal to construct a public boat launch on North Lake on property that the DNR itself owns at SE ¼, S17, T8N, R18E, Town of Merton, Waukesha County (known as the "Kraus Site"). At its conclusion, the Permit contains a Notice of Appeal Rights. The appeal rights referred generally to both "judicial review" and the right to request a "contested case hearing, if applicable...." (Permit, p. 5).
2. On November 22, 2010, the Petitioners filed a timely Petition for a Contested Hearing seeking administrative review of the Permit under Wis. Stats. §227.42 and other laws and regulations. A true and exact copy of the Petition for a Contested Hearing is attached to this Petition as Appendix B.
3. The Permit specifies at its conclusion: "The request for a contested case hearing does not extend the time period for filing a petition for judicial review."
4. Even though Petitioners have filed a timely Petition for a Contested Hearing (seeking administrative review), in order to preserve their rights

to seek judicial review, Petitioners are now also filing this Petition for Judicial Review with the Court.

B. Petitioners Intend to Seek A Stay Of This Action Until The Completion Of Administrative Review Pursuant To Their Request For A Contested Hearing.

5. Petitioners have just filed the Petition for a Contested Hearing in accompanying Appendix B. In connection with this Petition for Judicial Review, the Petitioners intend to seek at an appropriate time a stay this action until the completion of the Contested Hearing.
6. Staying this action will preserve the parties' and the Court's resources pending administrative review.

II. THE PARTIES.

A. The Respondent.

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

B. The Petitioners.

8. The Petitioners in this Petition are the same Petitioners who are seeking administrative review of the Permit pursuant to their Petition for a Contested Hearing attached as Appendix B, consisting of the following:
 - i. Reddelien Road Neighborhood Association, Inc., ("RRNA") W322 N7516 Reddelien Road (the boundaries of the Reddelien Road Neighborhood are marked with a solid red line in Exhibit A of attached Appendix B).

- ii. F. Robert Moebius, RRNA President, citizen and owner of property at W322 N7492 Reddelien Road.
- iii. David Draeger, RRNA Board Member, citizen and owner of property at W322 N7448 Reddelien Road.
- iv. William C. Gleisner, III, RRNA Board Member, citizen and owner of property at W322 N7516 Reddelien Road.
- v. Frederick A. Hanson, RRNA Board Member, citizen and owner of property at W322 N7574 Reddelien Road.
- vi. Doris Lattos, RRNA Board Member, citizen and owner of property at W322 N7516 Reddelien Road.
- vii. James Wozniak, RRNA Board Member, citizen and owner of property at W322 N7548 Reddelien Road.
- viii. Donna Anderson, citizen and owner of property at N73 W32375 River Road.
- ix. Brad Barke, citizen and owner of property at W322 N7458 Reddelien Road.
- x. Carol Barke, citizen and owner of property at W322 N7458 Reddelien Road.
- xi. James Baumgartner, citizen and owner of property at N73 W32275 Reddelien Road.
- xii. Hilda Baumgartner, citizen and owner of property at N73 W32275 Reddelien Road.

- xiii. Douglas Bruch, citizen and owner of property at W322 N7508
Reddelien Road.
- xiv. Charlene Cary, citizen and owner of property at N73 W32365
River Road.
- xv. Annabelle M. Dorn, citizen and owner of property at W322 N7356
Reddelien Road.
- xvi. Linda Bruch, citizen and owner of property at W322 N7508
Reddelien Road.
- xvii. Paulette Draeger, citizen and owner of property at W322 N7448
Reddelien Road.
- xviii. Margo Hanson, citizen and owner of property at W322 N7574
Reddelien Road.
- xix. Christine Janssen, citizen and resident of property at W322 N7288
Reddelien Road.
- xx. Frank Janssen, citizen and resident of property at W322 N7288
Reddelien Road.
- xxi. Mitchell Kohls, citizen and owner of property at N73 W32435
River Road.
- xxii. Brian Kennedy, citizen and owner of property at N73 W32295
Reddelien Road.
- xxiii. Mary Lou Kennedy, citizen and owner of property at N73 W32295
Reddelien Road.

- xxiv. Joseph G. Krakora, citizen and owner of property at W322 N7478
Reddelien Road.
- xxv. Marie Krakora, citizen and owner of property at W322 N7478
Reddelien Road.
- xxvi. Charles Luebke, citizen and owner of property at N72 W32225
Reddelien Road.
- xxvii. Patricia Luebke, citizen and owner of property at N72 W32225
Reddelien Road.
- xxviii. Mary Mitchell, citizen and owner of property at N73 W32435
River Road.
- xxix. David Mirsberger, citizen and owner of property at N72 W32455
River Road.
- xxx. Patti Mirsberger, citizen and owner of property at N72 W32455
River Road.
- xxxi. Jill Moebius, citizen and owner of property at W322 N7492
Reddelien Road.
- xxxii. Gerhard Palmer, citizen and owner of property at W322 N7288
Reddelien Road.
- xxxiii. Betty Palmer, citizen and owner of property at W322 N7288
Reddelien Road.
- xxxiv. Aletta Ruesch, citizen and owner of property at W322 N7536
Reddelien Road.

- xxxv. Thomas Schwartzburg, citizen and owner of property at W322 N7574 Reddelien Road.
- xxxvi. Stephanie Smith, citizen and owner of property at N73 W32305 Reddelien Road.
- xxxvii. William Timmer, citizen and owner of property at N72 W32455 Reddelien Road.
- xxxviii. Suzanne Timmer, citizen and owner of property at N72 W32455 Reddelien Road.
- xxxix. Deborah Wozniak, citizen and owner of property at W322 N7548 Reddelien Road.
- xl. Daniel Yuhas, citizen and owner of property at W322 N7392 Reddelien Road.
- xli. Jennifer Yuhas, citizen and owner of property at W322 N7392 Reddelien Road.

III. WITHIN THE MEANING OF WIS. STATS. §§30.209(3) AND 227.53(1)(b), THE PETITIONERS ARE AGGRIEVED PARTIES WHOSE SUBSTANTIAL INTERESTS HAVE BEEN AFFECTED BY THE DNR'S ISSUANCE OF THE PERMIT TO ITSELF.

- 9. The Petitioners are aggrieved by the DNR's issuance of the Permit, and the development of the boat launch authorized by the Permit affects their substantial interests.
- 10. The Petitioners are residents of the Reddelien Road Neighborhood (marked with a red line in Appendix B, Exhibit A), which is immediately

adjacent to the proposed boat launch on the Kraus Site (marked in black in Appendix B, Exhibit A), which is the subject of the Permit.

11. The Petitioners have a substantial interest in using and enjoying their property in the Reddelien Road Neighborhood adjacent to the Kraus Site. Based on reports from Petitioners' experts, the construction of the access road, parking lot, and boat launch authorized by the Permit will result in increased flooding and pollution on or near Petitioners' neighborhood as well as the surcharging of septic systems on Petitioners' property. This will impair Petitioners' use and enjoyment of their property, reduce the value of that property and damage their interest as riparian owners in North Lake.
12. Based on reports from Petitioners' experts and based on the proper application of Wisconsin's statutory definition of wetlands in Wis. Stats. §23.32(1), the construction authorized by the Permit will result in the destruction of a far greater amount of wetland area than that claimed by the DNR in the Permit which the DNR issued to itself. Therefore the Petitioners' substantial interest in the preservation of wetlands adjacent to their riparian property is threatened with injury.
13. Based on further reports from Petitioners' experts and based also on navigability tests conducted by Petitioners, the construction of the parking lot at the Kraus Site will impermissibly destroy navigable waters which the DNR has failed to identify and also dam or obstruct other navigable

waters. Navigable waters are defined in Wis. Stats. §30.10 and are protected by the Public Trust Doctrine. By issuing the Permit to itself without testing for or considering the existence of all of the navigable waters affected by the Permit, the DNR has breached its fiduciary duty under the Public Trust Doctrine. Therefore Petitioners' substantial interests in navigable waters, and as beneficiaries under the Public Trust Doctrine, are threatened with injury.

14. The Permit was issued in violation of the public notice and comment requirements of Wisconsin Law and Due Process. The DNR did hold a public informational hearing on September 30, 2010, pursuant to Chapter NR 310 of the Wisconsin Administrative Code. The DNR's comment period ended on October 12, 2010, at 4:30 p.m. As set forth more fully *infra*, the Petitioners' statutory and Due Process rights were violated when Petitioners were prevented from providing meaningful public comments pursuant to Wis. Admin. Code Ch. NR 310 at the public hearing on September 30, 2010.

15. The Petitioners are all citizens of the North Lake Management District (NLMD). As is reflected from the items in Appendix B, Exhibit D, the DNR denied the NLMD and the RRNA reasonable access to the Kraus Site during the growing season and during the period of time when threatened and endangered species would be present so that they could conduct tests and make appropriate observations in order to further

evaluate and/or confirm their measurement of the wetlands and navigable waters that would be impacted by the proposed development. Without the ability to meaningfully access the Kraus Site, the NLMD and the Petitioners were obstructed from independently assessing the impact to wetlands and navigable waters and from formulating comprehensive or meaningful comments to the proposed development pursuant to Chapter NR 310. Therefore, Petitioners' substantive statutory and Due Process rights have been injured by the DNR's actions.

IV. THE PERMIT WAS ISSUED IN VIOLATION OF WIS. STATS. CHAPTERS 30 AND 281.

A. The DNR Failed To Identify Navigable Waters On The Kraus Site.

16. The Permit was issued in violation of Wis. Stats. §30.12 and/or §281.31(1) which requires the issuance of a separate permit to build structures or place deposits on the bed of navigable waters. Wis. Stat. §30.10(2) provides: “[A]ll streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state.”
17. The DNR asserts that it considered the navigable waters of North Lake and its wetland complex at the Kraus Site in issuing the Permit (See Appendix A, FOF #2). However, there are additional navigable waters which the DNR failed to identify and thus failed to consider in issuing the Permit.

18. The DNR defined the wetland complex at the Kraus Site as consisting of the area marked in yellow in attached Exhibit C of Appendix B.
19. There are additional navigable waters located in the “Grove of Trees” marked in orange in Exhibit E of Appendix B. These navigable waters in the Grove of Trees connect to an unnamed stream to their north and thereby drain into North Lake.
20. The parking lot authorized by the Permit will be built over these additional navigable waters, thus filling in and destroying them.
21. The DNR was alerted to the presence of these navigable waters (see Appendix A, FOF #8, section L).
22. The DNR has not conducted navigability tests in the entire area to be covered by the parking lot.
23. By not conducting navigability tests in this area, the DNR has failed to comply with the requirements of Chapter 30, and the Permit is invalid.

B. The Identification Of Navigable Waters In The Permit Is Impermissibly Vague.

24. The Permit states “North Lake and portions of its wetland complex are navigable-in-fact at the project site and are impacted by the proposed project” (Appendix A, FOF #2). The Permit, however, does not specifically identify what portion of the project site contains navigable waters that will be “impacted.”
25. Petitioners and the public have the right to know the extent of the impact. Wis. Stats. §30.10(2) additionally specifies that navigable waters can only

be obstructed (“impacted”) with the permission of the State. Wis. Stats. §30.12 requires a permit where structures are to be placed upon navigable waters.

26. By failing to set forth with specificity the navigable waters to be impacted by the development, the Permit is impermissibly vague and/or invalid.

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

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

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

28. For purposes of Wis. Admin. Code NR §151.12(5)(a) the DNR evidently considers this construction of the paved road to be "redevelopment," thus requiring a design that meets only a 40% total suspended solids (“TSS”) removal standard under NR 151.12(5)(a)2.

29. The proposed construction of the road actually represents an approximate 300% increase in the development footprint of the roadway.

30. The roadways’ construction should be considered a “new development” requiring a design that meets an 80% TSS removal standard under NR §151.12(5)(a)1.

31. According to the DNR, the design achieves only a 39.9% TSS removal.
32. The Permit does not comply with Wis. Admin. Code NR 151.12(5)(a) and the Permit is therefore invalid.
 2. **The Permit does not comply with the requirements of Wis. Admin. Code NR §151.12(5)(b).**
33. Wis. Admin. Code NR §151.12(5)(b) requires the institution of Best Management Practices ("BMPs") to maintain or reduce peak runoff discharge rates to the maximum extent practicable, as compared to pre-development conditions for the 2-year, 24 hour design storm applicable to the post-construction site.
34. The construction of the proposed parking lot for the boat launch will interfere with drainage for the residents along Reddelien Road.
35. The DNR's plans for the proposed parking lot specify the use of a 4-inch PVC pipe for drainage.
36. The use of such a pipe will be inadequate to handle the amount of water that will flow out of the wetland complex.
37. The fill for the proposed parking lot has the potential to raise flood water stages on neighboring properties by several feet and shift the current overland flow route onto the neighbors to the south of the Kraus Site.
38. This will increase flooding and surcharge septic tanks in the Reddelien Road Neighborhood.
39. The Permit does not address the issue of peak flood discharges, nor does it require the institution of BMPs for the 2-year, 24 hour storm.

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

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

41. The storm water treatment system for the roadway is not designed to remove oils and grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff. See Appendix B, Exhibit G, ¶4.

42. The DNR did not account for these effects in issuing the Permit.

43. DNR's failure to do so violates Wis. Stats. §281.15 and Wis. Admin. Code NR § 299.04(1)(b). The Permit is thus invalid.

D. The Permit Understates The Area Of Wetlands That Will Be Filled By The Proposed Development In Violation Of Wis. Stats. §23.32(1) And Wis. Admin. Code NR 103.08.

1. The DNR incorrectly applied the Legislature's definition of wetlands.

44. The Permit should not have been issued because the DNR failed to correctly apply Wisconsin's statutory definition of wetlands, and thus grossly understates the true extent of wetlands affected by the boat launch in the Permit's Findings of Fact ("FOF"). The area marked in green on Exhibit C (a map of the area) of Appendix B ("Disputed Area") contains additional wetland area that would be affected by the proposed development, which area was not identified as wetlands by the DNR in the Permit.

45. DNR's wetland determination in the Permit in part was based upon the absence of aquatic or hydrophytic vegetation in various locations at the Kraus Site.
46. Wis. Stats. §23.32(1) defines a wetland as "an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions." This definition does not require the actual presence of aquatic or hydrophytic vegetation for an area to be deemed a wetland.
47. The Disputed Area has the necessary soils and hydrology to meet Wisconsin's statutory definition of a wetland regardless of the presence or absence of aquatic or hydrophytic vegetation. See Dr. O'Reilly's 9/30/2010 Affidavit, in attached Appendix B, Exhibit H, Attachment F.
48. The failure to conduct proper wetland delineations is further demonstrated by reports made by the experts of the NLMD and RRNA, such as the October 1, 2010 Report by Jeffrey Kraemer, a Certified Wetland Delineator in attached Appendix B, Exhibit F which reads in part:

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

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

49. Alternatively, even applying the improper wetland delineation standards used by the DNR, the delineation was faulty. The DNR's determination that the Disputed Area lacked the necessary aquatic or hydrophytic vegetation to be deemed wetland for purposes of the Permit was contrary to the DNR's own policy and practice.
50. The DNR mowed the Disputed Area during its growing season and prior to the wetlands assessment.
51. By doing so it disturbed and altered the natural species composition of the vegetation within the Disturbed Area.
52. Mowing the Kraus Site during the growing season and prior to the wetlands assessment was contrary to DNR's practice and policy in conducting wetlands assessments. See Exhibit H of Appendix B, ¶¶6-14 and its Attachments D, E, and F at Bates 000590-000591.
53. The DNR's wetlands assessment was based, in part, on the determination that the Disputed Area did not exhibit wetland vegetation.
54. Therefore the wetland determination used by the DNR for the Permit is invalid.

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

55. The Permit requires a water quality certification pursuant to Wis. Stats. Chapter 281, and/or Wisconsin Admin. Code Chapters NR 103 and 299.

56. The Permit contains the following statement: “The [DNR] public boat launch will not adversely affect water quality or increase water pollution in the wetlands or in North Lake and will not cause environmental pollution ...” (Appendix A, FOF #13). This statement falls short of the standards normally employed and the methodology normally adopted by the DNR when assessing impacts to water quality from an activity affecting waters of the State.
57. Attached as Exhibit I to Appendix B is an example of a lengthy and detailed water quality certification that DNR has issued in another matter.
58. The DNR’s failure to provide in the Permit the level of review as is reflected in Exhibit I makes it difficult if not impossible to ascertain whether water quality will be met as a result of the Permit.
59. The absence of a meaningful water quality certification such as that contained in Exhibit I deprives the Petitioners and the public of both their Due Process rights and their interests in the waters of the State because they have no way of knowing, let alone assessing, the accuracy of the Permit’s simple and unsupported assertion that the proposed “boat launch will not affect water quality or increase water pollution...”
60. Moreover, as is reflected in Appendix B, Exhibit D, the DNR has refused Petitioners or the NLMD access to the Kraus Site at reasonable and relevant times of the year thus making it impossible to fairly evaluate the

accuracy of the DNR's assertion that approval of the Permit will not have any effect on water quality and the potential for pollution.

61. In addition, the single statement in the Permit's FOF #13 does not satisfy the requirements of the DNR to act as an agent for the Environmental Protection Agency in conducting a full water quality certification under Section 401 of the Federal Clean Water Act (33 USC §1341). Nowhere is there any evidence in the Permit that the DNR conducted the type of investigation and certification process customary for such a project.
62. The DNR thus has not complied with the statutory and regulatory requirements regarding the issuance of a water quality certification for the proposed development authorized by the Permit.
63. Additionally, if the wetlands are not federal, the DNR has not obtained a permit under Wis. Stats. §281.36.

F. The Permit Does Not Include A Proper Or Correct Practicable Alternatives Analysis Within The Meaning Of Wis. Admin. Code NR §103.08(3) And (4).

64. In making water quality determinations for wetlands, Wis. Admin. Code NR §103.08(3)(b) specifies that the DNR shall consider "practicable alternatives to the proposal which will avoid and minimize adverse impacts to wetlands and will not result in other significant adverse environmental consequences." This is essential in order to fulfill Wisconsin's stated policy of protecting wetlands. (See Wis. Admin. Code NR §1.95)

65. There is an alternative site to the Kraus Site located on North Lake on Highway 83, which is often referred to as the “Kuchler Site.” Finding of Fact 11E of the Permit asserts that “The Alternative Analysis for the proposed project concluded: ... Access development at the Highway 83 site would result in significant adverse environmental impacts as identified in the findings of fact within the Department’s decision dated March 1, 2010.” Appendix A, p. 4 at ¶11E. The referenced March 1, 2010 DNR Decision is Exhibit J of Appendix B.

1. The DNR March 1, 2010 Decision demonstrates that the DNR did not conduct a proper practicable alternative analysis comparing the Kraus Site to the Kuchler Site.

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

67. In terms of the amount of wetland which would be lost, the only reason the DNR gives in its March 1, 2010 Decision that the Kuchler Site will result in more wetland damage than the Kraus Site is because it compared its estimate of the wetlands loss at the Kraus Site (0.16 acres) with the *combined* wetlands loss that would result under the NLMD's “two site” proposal of both the Kuchler and Kraus Sites as if used *together*.

According to the March 1, 2010 Decision at Finding of Facts 12(d) and (e)

(Exhibit J of Appendix B, at p. 5):

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

68. In addressing the requirement that it must consider practicable alternatives that would minimize the impact to wetlands, the DNR's analysis did not consider the Kuchler Site, *standing alone*, as an alternative to the Kraus Site, *standing alone*. Even using the DNR's understated calculation of the wetlands impact resulting from the development at the Kraus Site of 0.16 acres, the DNR's finding that the Kuchler Site alternative will only impact 0.137 acres of wetlands means that use of the Kuchler Site alone will result in a lesser impact on wetlands than use of the Kraus Site alone.
69. The DNR has never conducted a proper practicable alternative analysis as required by Wis. Admin. Code NR §103.08(3) and (4). Therefore, Petitioners request that this matter be remanded to the DNR with instructions that it be required to conduct a true and complete practicable alternative analysis of the Kraus Site compared to the Kuchler Site in

accordance with the regulatory directives, under Wis. Admin. Code NR §§1.95 and 103.08, that the impact to wetlands from the proposed development be minimized.

2. The other findings in the March 1, 2010 Decision demonstrate that the DNR employed entirely different standards when assessing the Kuchler Site than it employed in assessing the Kraus Site.

70. The DNR's March 1, 2010 Decision is far more detailed and comprehensive than the November 4, 2010 Permit. For instance, the March 1, 2010 Decision has an extensive section on Floristic Diversity (Appendix B, Exhibit J, p. 5), Water Quality (Appendix B, Exhibit J, p. 6), and Wildlife and Wildlife Habitat (Appendix B, Exhibit J, p. 7). The Permit contains no such analysis.

71. On its face, it thus appears as if the DNR is employing an entirely different standard when passing judgment on the permit applications of others (such as the NLMD's "dual-site" proposal addressed in the March 1, 2010 Decision) than it uses when passing judgment where the DNR itself is the applicant. This raises serious questions as to whether the Petitioners have been accorded Due Process under the law in DNR's processing and issuance of the Permit.

72. In addition, as is reflected in the correspondence in Exhibit D of Appendix B, the NLMD and the RRNA were denied reasonable access to the Kraus Site during the growing season and during the period of time when threatened and endangered species would be present so that those experts

could conduct tests and make appropriate observations necessary to further evaluate and/or confirm their measurement of the wetlands and wildlife impacts from the proposed development.

73. At a minimum, the DNR's conclusions regarding floristic diversity, water quality and wildlife habitat in its March 1, 2010 Decision (in Appendix B, Exhibit J) relating to the Kuchler Site must be balanced against an equally rigorous assessment of those same characteristics in the Permit decision for the Kraus Site.

V. THE PERMIT WAS ISSUED IN VIOLATION OF PETITIONERS' DUE PROCESS RIGHTS.

A. The Permit Was Issued Without Permitting Petitioners And The NLMD Reasonable Access To The Kraus Site.

74. The DNR prevented Petitioners from providing meaningful comments on the DNR's issuance of permits to itself because it failed to accord Due Process to the public – specifically to Petitioners themselves and the North Lake Management District (“NLMD”), members of which include the Petitioners – when it refused to allow Petitioners and the NLMD access to the Kraus Site during the growing season and/or during the period of time when threatened/endangered species would be present at the Kraus Site. See Exhibit D of Appendix B.
75. By denying meaningful access to the Kraus Site during an appropriate time of the growing season to allow Petitioners and the NLMD to conduct the necessary studies, the DNR obstructed Petitioners' and the NLMD's

ability to fully evaluate the DNR's improper wetlands delineation, to formulate comprehensive or meaningful comments to the proposed development, or to otherwise protect their property interests from the DNR's actions at the Kraus Site.

76. DNR's denial of meaningful access has hindered the ability to evaluate whether or not the DNR has complied with the mandate of Wis. Admin. Code Chapters NR 103, NR 299, and Wis. Stats. Chapters 30 and 281.

77. The DNR's denial of meaningful access to publically owned property is fundamentally unfair and unjustified given the DNR's self-dealing on its own project. Therefore, Petitioners' statutory and Due Process rights were violated by the DNR's actions.

78. DNR's denial of reasonable access to the Kraus Site is also contrary to Wis. Admin. Code NR §150.01(5) which provides that DNR is to "provide an opportunity for public input to the decision-making process."

B. The Permit Was Issued Without Affording Petitioners And The Public A Reasonable Opportunity To Provide Meaningful Comments.

79. The DNR held a public informational hearing on September 30, 2010, pursuant to Chapter NR 310 of the Wisconsin Administrative Code.

80. The DNR's comment period ended on October 12, 2010, at 4:30 p.m.

81. During the public hearing DNR's limited each commenter to just three minutes to make their points. At no time during or after the public hearing the DNR did not respond in a meaningful manner to any of the questions from the commenters, including Petitioners.

82. Following the hearing, the DNR did not get back to Petitioners with responses to the questions raised.

83. The Permit thus was issued in violation of the public notice and comment requirements of Wisconsin Law.

WHEREFORE, Petitioners pray for the following relief:

1. FOR AN ORDER pursuant to Wis. Stats. §30.209(1m)(c) staying the project covered by IP-SE-2009-68-05745-05750, including any further work on the project of any kind and including the bidding of any work in connection with the project, pending the completion of the contested hearing which is sought pursuant to the Petition for a Contested Hearing contained in Appendix B;
2. FOR AN ORDER pursuant to Wis. Stats. §227.54 staying the project covered by IP-SE-2009-68-05745-05750, including any further work on the project of any kind and including the bidding of any work in connection with the project, pending the contested hearing which is sought in this Petition for a Contested Hearing contained in Appendix B;
3. FOR AN ORDER pursuant to Wis. Stats. §227.57(4) remanding this case to the DNR for further action because either the fairness of the proceedings or the correctness of the DNR's actions have been impaired by a material error in procedure or a failure to follow prescribed agency procedures.
4. In the alternative, FOR AN ORDER pursuant to Wis. Stats. §227.57(5) setting aside the DNR's action because the DNR has erroneously interpreted a

provision of law and a correct interpretation compels an entirely different result than the one expressed in the Permit.

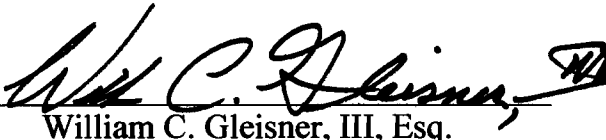
5. In the alternative, if there is not a contested hearing FOR AN ORDER pursuant to Wis. Stats. §227.57(7) setting aside the DNR's Permit as a matter of law and remanding this case to the DNR for further examination and action within the DNR's responsibility.
6. FOR AN ORDER pursuant to Wis. Stats. §227.57(8) remanding the case to the DNR because the DNR has A) acted outside its area of discretion; or B) has acted inconsistently with a DNR rule, a stated DNR policy or a prior DNR practice.
7. FOR AN ORDER withdrawing the Permit, reversing the Permit, and/or remanding the Permit to the DNR for re-evaluation;
8. FOR AN ORDER remanding this matter to the DNR and requiring it to complete a proper and complete practicable alternative analysis between the Kraus Site and the Kuchler Site.
9. FOR AN ORDER to the DNR mandating a re-delineation of wetlands on the Kraus Site in a manner conforming to state law and to the DNR's past policy and practice;
10. FOR AN ORDER remanding this matter to the DNR and requiring it to complete a proper and complete water quality certification for the Kraus Site.
11. FOR AN ORDER to the DNR mandating it to allow Petitioners and the NLMD access to the publically owned Kraus Site during the growing season

next summer, 2011 to conduct its own studies (e.g., wetlands delineation and navigability assessments).

12. FOR AN ORDER prohibiting the mowing or other alteration at the Kraus Site during the growing season so that wetlands can be properly delineated;
13. FOR AN ORDER vacating the Permit;
14. FOR AN ORDER to the DNR mandating it to conduct navigability tests on the area marked in orange on attached Exhibit E;
15. FOR SUCH OTHER RELIEF AS THE COURT DEEMS APPROPRIATE.

Dated at Hartland, Wisconsin this 3rd day of December, 2010.

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