LAW OFFICES OF WILLIAM C. GLEISNER, III

300 COTTONWOOD AVE, STE 3
HARTLAND, WI 53029

WILLIAM C. GLEISNER, III
STATE BAR NO. 01014276

e-mail: wgleisner@sbcglobal.net

PHONE (262) 367-1222
FAX (262) 367-1236

September 24, 2012

By Hand Delivery

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 and *NLMD, et al. v. DNR,* Waukesha Court Case No. 12CV1751

Dear Judge Davis,

We are herewith filing the RRNA's Brief in Opposition to the DNR's Motion to Dismiss Case No. 10CV5341. The motion in question is scheduled to be heard before Your Honor on October 12, 2012 at 3:30 p.m. We are serving all counsel as indicated below.

Respectfully,

William C. Gleisner, III
State Bar No. 1014276
William H. Harbeck
Of Counsel

cc: Diane Milligan, Esq. (by Email & U.S. Mail)
Donald P. Gallo, Esq. (by Email)
J. Steven Tikalsky, Esq. (by Email)

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, et al.

Petitioners,

vs. Case No. 12-CV-1751

The Department of Natural Resources ("DNR"),

Respondent.

RRNA BRIEF IN OPPOSITION TO
DNR'S MOTION TO DISMISS CASE 10-CV-5341

INTRODUCTION

As this Court knows full well, for over one year the DNR has resisted efforts to create a record in this case. In fact, the reason this Court ordered a remand on January 6, 2012 was so that a record could be created that would permit this Court to complete the judicial review of the November 4, 2010 storm water permit, which review proceeding the RRNA commenced on December 20, 2010. As this Court said on December 12, 2011: "But it is the absence of the record that leads the court to [order a remand]." *See* the Transcript of 12-12-11 Hearing before Judge Davis, at p. 4, which is contained in attached Appendix A. In addition, Appendix A contains the

January 6, 2012 Order of Judge Davis. The DNR now moves to dismiss this case on the grounds that this Court does not have jurisdiction over the storm water issues that remain on the table following this Court' remand because, DNR says, this Court's order expressly retaining jurisdiction was invalid. DNR says that the RRNA, instead of seeking the resumption of the judicial review proceedings in accordance with this Court's January 6, 2012 Order, was required to commence yet another, separate judicial review proceeding within 30 days of the ALJ's July 18, 2012 findings, and its failure to do so means the RRNA is thus out of luck.

DNR's arguments, and its reliance on the several cases that it cites, ignores several important facts. First, DNR disregards the crucial fact that the January 6, 2012 Order at issue did not conclude these proceedings, and that the Court specified in its Order that it was "retain[ing] jurisdiction over this matter for purposes of judicial review of the remanded proceedings once they are completed…" *See* ¶5 of this Court's January 6, 2012 Order of Remand.

Second, the DNR said absolutely nothing about ¶5 of the January 6, 2012 Order concerning retained jurisdiction when it responded, under the five-day rule, to the RRNA's draft order following the December 12, 2011 hearing and the Court's oral ruling. The only objections DNR raised to that draft Order pertained to the listing of the issues to be considered on remand. *See* attached Appendix B, which contains the 12-23-11 and 12-29-11 letters of DNR to this Court.

DNR's objections to this Court's retained jurisdiction are unfounded and in any event come too late. DNR's motion to dismiss therefore should be denied.

I. BY FAILING TO OBJECT TO OR APPEAL THIS COURT'S RETENTION OF JURISDICTION WHEN THE ORDER WAS ENTERED, DNR HAS WAIVED ITS CHALLENGE HERE.

As RRNA will show in Section II of this brief, because it was not a final order, the January 6, 2012 Order remanding this proceeding for the creation of a record is far different from those orders in the cases DNR relies upon in support of its motion. But even assuming *arguendo* that it was a final order, the fact is that the order expressly stated that the Court retained jurisdiction of the remanded proceedings once they were completed.

The DNR knew of this Court's intention to retain jurisdiction as early as December 12, 2011, when the Court stated near the conclusion of the hearing that it would do so. *See* Transcript of 12-12-11 Hearing before Judge Davis, p. 4, in Appendix A. The DNR made the strategic decision to withhold any objection to the Court's decision to retain jurisdiction until it was too late as a practical matter for this Court or the RRNA's counsel to do anything about it. Under *Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 WIS. 2d 76, 681 N.W.2d 190, the DNR has waived any objection to this Court's retained jurisdiction.

In *Village of Trempealeau,* Justice Sykes concluded that statutory limits on a court's subject matter jurisdiction only go to a court's competency. Quoting Justice Sykes: "[T]he failure to comply with … statutory conditions does not negate subject matter jurisdiction but may under certain circumstances affect the circuit court's competency to proceed to judgment in the particular case before the court." *Id.* at ¶ 2. Justice Sykes then goes on to conclude that objections to a court's competency

can be waived if not raised in a proper and timely manner. "[B]ecause competency does not equate with subject matter jurisdiction, we see no reason not to apply the rule of waiver to these challenges as a general matter." *Id.* at ¶27. In *Village of Trempealeau*, Justice Sykes then proceeded to discuss at some length the nature of the common law waiver rule and when and under what circumstances it may be applied to defeat challenges to a court's competency:

> [T]he waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice. We have stated that the reasons for the waiver rule go to the heart of the common law tradition and the adversary system. The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error…. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection…. [F]inally, the [waiver] rule prevents attorneys from 'sandbagging' or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal…. [Emphasis supplied].

Id. at ¶15.

DNR could have raised an objection to the court's decision to retain jurisdiction at the December 12, 2011 hearing. It did not. DNR could have raised an objection to the retention provision in the draft order submitted to it under the five-day rule following the hearing setting forth the Court's decision to retain jurisdiction of the remanded proceedings. It did not. DNR could have sought an interlocutory appeal of this court's January 6, 2012 Order. It did not.

After RRNA's counsel wrote to this Court on July 23, 2012 (which letter is contained in attached Appendix C) announcing that the RRNA would shortly proceed to recommence the judicial review proceeding pursuant to this Court's

retained jurisdiction, DNR could have raised an objection to this Court's retained jurisdiction. It did not. When the RRNA filed its Petition for Resumption of Judicial Review on August 3, 2012, DNR could have immediately raised an objection to this Court's retained jurisdiction. It did not.

It was not until August 16, 2012, one day before the time for filing a new petition would expire, that DNR's counsel stated in an email that she intended to move to dismiss these proceedings on the basis that this Court lacked the authority to retain jurisdiction (that email is attached as Appendix D). In that August 16th email DNR counsel asked RRNA's counsel to stipulate to the dismissal of Case 5341. At that time RRNA's counsel was in no position to file a new judicial review petition, even if they had wanted to do so. As reflected in RRNA's response to Ms. Milligan's email, on August 16th Attorney Gleisner was on vacation in Door County and Attorney Harbeck was in deposition out of state. *Id.*

Now the DNR seeks to have this Court dismiss the August 3, 2012 Petition for Resumption of Jurisdiction (the "Resumption Petition") which the RRNA filed in direct reliance upon this Court's unchallenged decision to retain jurisdiction back in mid-December of 2011. Whether or not the DNR made a calculated decision to remain silent on any objection to this Court's retained jurisdiction "for strategic reasons" until it was too late for RRNA to do anything about it, the result DNR now seeks would be unfair. It was the Court itself, *sua sponte*, that announced its decision to retain jurisdiction, and if the DNR thought that this was improper it could have, and should have, raised the issue at the time. Instead, it sat on its hands.

The RRNA of course justifiably relied on the January 6, 2012 Order of the Court in good faith and did exactly as the Court's Order required by resuming these proceedings following the ALJ's findings. To reward DNR's failure to raise the issue of retained jurisdiction when it had numerous earlier opportunities to do so, would fly in the face of fair play.

Applying *Village of Trempealeau* to such tactics, the DNR has waived its objection to this Court's competency to continue with its judicial review. "The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error… [T]he [waiver] rule prevents attorneys from … failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Village of Trempealeau, id.* at ¶15.

II. THE COURT'S DECISION TO RETAIN JURISDICTION DISTINGUISHES THIS CASE FROM THE CASES CITED BY DNR WHERE THE REMAND OCCURRED AS PART OF A FINAL ORDER.

This Court's January 6, 2012 Order of Remand (in Appendix A) specifically retained jurisdiction of this matter so that the Court could complete judicial review of this case. *Id.* at ¶5. In that Order this Court never dismissed this proceeding or entered any type of final judgment.

A. The Case of *Soo Line* Controls over *Gimenez.*

The case of *Soo L. R. Co. v. Department of Revenue*, 143 Wis. 2d 874, 422 N.W.2d 900 (Wis. Ct. App. 1988) strongly supports the Court's retention of jurisdiction pursuant to which RRNA resumed the judicial review proceedings which had been interrupted so that an appropriate record could be created. In *Soo*

Line the trial court concluded that it did not have jurisdiction over a petition filed after a remand because that petition was not timely filed with the clerk of courts and not timely served on the department under 227.53. The Wisconsin Court of Appeals overruled the trial court, holding as follows:

> It is the court's action, not the commission's response, which determines the nature of the proceedings. The court did not terminate the judicial proceeding on its merits after reviewing the agency's determination under sec. 227.57, Stats. It deferred the exercise of its review until the administrative proceedings were completed under sec. 227.56(1)…. No additional petition under sec. 227.53(1)(a) was necessary for Soo Line to obtain judicial review of that order. The fact that it filed and served what it denominated a petition for review did not subject that petition to the filing and service requirements of sec. 227.53(1)(a). Therefore, its failure to comply with the filing and service requirements under sec. 227.53(1)(a) did not deprive the trial court of subject matter jurisdiction to review the commission's order of June 19, 1996 [Emphasis supplied].

Id. at p. 878.

The DNR points to the decision in *Gimenez v. Medical Examining Board,* 229 Wis. 2d. 312, 600 N.W.2d 28 (Wis. Ct. App. 1999). While the *Gimenez* Court distinguishes *Soo Line,* the *Gimenez* Court is not the Wisconsin Supreme Court. Although the *Gimenez* Court disagrees with the *Soo Line* Court, the fact remains that the *Soo Line* decision is still perfectly good law and binding precedent. There are also several important procedural distinctions between the *Gimenez* case and the *Soo Line* case.

Unlike *Soo Line* and the case at bar, the *Gimenez* remand occurred after a "final" decision by the circuit court. *Id.* at 314, 321. In addition, the circuit court in *Gimenez* did not retain jurisdiction pending remand. In fact, *Gimenez* recognizes

that *Soo Line* reached the result it did because in *Soo Line* the circuit court did not relinquish jurisdiction as part of its remand to the agency. According to the *Gimenez* Court:

> [§ 227.56 involves a case] where additional evidence is to be considered. That statute specifically contemplates further proceedings by the circuit court: 'The agency may modify its findings and decision by reason of the additional evidence and *shall file with the reviewing court* the additional evidence together with any modified or new findings or decision.' Sec. 227.56(1) (emphasis added). Therefore, once the agency has considered the additional evidence, it is required to pursue a petition for review with the circuit court. The subsequent review is thus a continuation of the initial action. Here, when we reversed and remanded the action to the Board through the circuit court, we had conducted a complete and final judicial review on the merits [Emphasis supplied].

Id. at 320.

It is true that the *Gimenez* court stated: "The *Soo Line* exception to the § 227.53, Stats., service requirements applies only to cases involving § 227.56, Stats., where additional evidence is to be considered." *Id.* However, §227.57(7) was never before the *Gimenez* court nor did it address an Order of Remand such as here which included an express retention of jurisdiction of the remanded proceedings by the Circuit Court.

In the case at bar it would have been impossible for this Court to order a remand pursuant to §227.56(1). That is because Wis. Stats. 227.56(1) presupposes a contested case hearing.[1] But there was no contested case hearing that preceded this

[1] Wis. Stats. §227.56(1) reads as follows: "Additional evidence; trial; motion to dismiss; amending petition. (1) If before the date set for trial, application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in

Court's ruling on January 6, 2012, precisely because of the DNR's maneuverings which led up to the order for remand. This Court remanded these proceedings under §227.57(7) so that a record could be created. "It is the absence of a record that leads the Court to take this step." *See* Transcript in attached Appendix A of the 12/12/11 hearing before this Court, at 4:18-19.

Just as in *Soo Line,* this Court did not terminate its judicial review upon remand. This Court specifically retained jurisdiction and deferred the exercise of its judicial review until the administrative proceeding was completed. "It is the court's action, not the commission's response, which determines the nature of the proceedings. The court did not terminate the judicial proceeding on its merits after reviewing the agency's determination under sec. 227.57, Stats." *Soo Line, id.* at 878 [Emphasis supplied].

This Court's January 6, 2012 Order was clearly not "a complete and final judicial review on the merits" as was the case in *Gimenez.* Instead, the January 6, 2012 Order reflected an interruption and stay of the previously and properly commenced judicial review proceeding.

Finally, this Court has broad inherent power and discretion to manage its business. DNR cites to no case invalidating an Order by which a circuit court exercises its discretion to retain jurisdiction of remanded proceedings such as presented here.

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the proceedings before the agency, the court may order that the additional evidence be taken before the agency … [Emphasis supplied]."

B. The Issues Presented for Judicial Review in the RRNA's Petition for Resumption of Judicial Review are Properly before this Court.

RRNA's August 3, 2012 Petition for Resumption of Judicial Review seeks review of two issues: one that was specifically set forth in the remand order (Issue 1 – the TSS removal requirements under NR 151.12) and one that addresses whether DNR complied with certain requirements set forth in NR 103 relating to storm water discharges to wetlands. In the interest of saving both the resources of the Court and the parties, RRNA has narrowed the issues by eliminating several issues that were in its initial petition.

DNR complains that the second issue – the NR 103 compliance issue – was not specifically set forth in the remand order (it acknowledges, however, that NR 103 was listed in Issue 6 of the remand order). That issue, as set forth in the Resumption Petition, is as follows:

> 1. 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 make a NR 103.08(4) determination, as required by the General Permit?

As with the other proceedings after remand, the RRNA's contentions concerning this issue are hampered because the administrative record in Case 5341 (including the transcript) of the remanded proceedings before ALJ Boldt has not yet been compiled. Nevertheless, RRNA's counsel will make certain representations at

this time as officers of the Court in order to demonstrate why this new issue is appropriately before the Court.

C. The RRNA Could Not have known about the DNR's Failure to Comply with NR 103 until the Record Establishing that noncompliance was created.

As is clear from the proceedings before this Court last year, the very existence of the storm water permit was not disclosed to the RRNA until after the time for filing a Petition for a Contested Case Hearing and Judicial Review had passed. No discovery was available to the RRNA while this matter was pending before this Court prior to remand. And this Court decided that whether any discovery could be taken in conjunction with a remand would be left to the discretion of the ALJ.

Upon remand pursuant to this Court January 6, 2012 Order, the RRNA sought the right to take discovery. The ALJ responded that the RRNA's discovery would be limited to open record requests. The RRNA made several open records requests. As a result of those requests and Brian Hartsook's testimony at the April 18-19, 2012 hearing (Mr. Hartsook having been called adversely by the RRNA), RRNA was able to conclude, to its considerable surprise, that an NR 103 determination by the DNR as to storm water discharge impacts to the wetlands on the Kraus Site had never been made.

It would have been impossible for the RRNA to specifically raise the NR 103 issue prior to the January 6, 2012 Order of Remand when it had no way of ascertaining whether an NR 103 analysis relating to storm water impacts had ever been done. It only learned an analysis wasn't done at the April 18-19, 2012 hearing.

An NR 103 analysis goes to the very heart of the DNR's application process, including the storm water permit application. In fact, NR 103 compliance is not just any old issue. As reflected in the Resumption Petition, the storm water permit in this case was issued by DNR's Hartsook on November 4, 2010 pursuant to the authority of General Permit WPDES WI-5067831-3 (the "General Permit"). A storm water permit or grant of coverage which is based on the General Permit must comply with the terms of the General Permit. One of the key terms in the General Permit is the following:

> 1.2 Exclusions
> The following are not eligible for coverage under this [general] 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 very purpose of this Court's remand order was to develop a record beyond the paper thin record which the DNR had originally certified for the purpose of judicial review. RRNA contends that the record will establish that the DNR did not conduct an analysis under 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). And the record will reflect that there never was a NR 103.08(4) determination made, as required by the General Permit, before the permit was issued. DNR may contest the RRNA's

characterization of the record, but it should not be permitted to bury that issue on a motion to dismiss when the very purpose of the remand was to create a record in the first place and there was no way for the RRNA to raise this specific issue before the record was created when the facts relating to it were unknown.

CONCLUSION

Based on the foregoing authority and arguments, the RRNA respectfully asks that this Court deny the DNR's motion to dismiss its Resumption Petition in Case 5341 and proceed to the merits of these proceedings.

Dated this 24th day of September, 2012, at Hartland, Wisconsin.

By: William C. Gleisner, III

William C. Gleisner, III, Esq.
State Bar No. 1014276
300 Cottonwood Avenue
Hartland, Wisconsin 53029
Telephone: (262) 367-1222

Of Counsel:
William H. Harbeck, Esq.
State Bar No. 1007004
Quarles & Brady, LLP
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone: (414) 277-5853

Local Counsel:
J. Steven Tikalsky, Esq.
State Bar No. 1017880
Raasch & Tikalsky, S.C.
300 Wisconsin Avenue
Waukesha, Wisconsin 53186

APPENDIX A

STATE OF WISCONSIN CIRCUIT COURT BR. 7 WAUKESHA COUNTY

REDDELIEN ROAD NEIGHBORHOOD ASSOCIATION, INC., et al

Plaintiffs,

-vs-

Case No. 2010 CV 5341
ORAL RULING

THE DEPARTMENT OF NATURAL RESOURCES,

Defendant.

Proceedings held in the above-entitled matter on the *12th day of December, 2011*, before the ***Honorable J. MAC DAVIS***, Circuit Court Judge presiding in Circuit Court Branch 7, Waukesha County Courthouse, Waukesha, Wisconsin.

APPEARANCES:

ATTORNEY WILLIAM C. GLEISNER, III, 300 Cottonwood Avenue, Suite No. 3, Hartland, WI 53029, appearing on behalf of the Petitioners.

ATTORNEY DIANE L. MILLIGAN, 17 West Main Street, P.O. Box 7857, Madison, WI 53707-7857, appearing on behalf of the Respondent.

Gail M. Villwock

Official Court Reporter

TRANSCRIPT OF PROCEEDINGS

THE COURT: I'll call the Case of Reddelien Road Neighborhood Association, Inc. and others versus Department of Natural Resources, Case 2010 CV 5341. The appearances, please.

MS. MILLIGAN: Your Honor, appearing on behalf of the DNR, Assistant Attorney General Diane Milligan.

MR. GLEISNER: On behalf of the Reddelien Road Association, Attorney Gleisner.

THE COURT: All right. There is a request for relief from the petitioners asking that I in effect remand this for contested case hearing. The DNR resists that request. The parties have briefed it at some length. We have had a motion hearing previously that I read back through everything again.

Today was set for me to rule and I'm prepared to do so. I don't want to reinvite reargument, it might confuse me too easily. But if there is something new I would be happy to hear it.

Is there anything new from you, Mr. Gleisner?

MR. GLEISNER: No, your Honor.

THE COURT: From you, Ms. Milligan?

MS. MILLIGAN: No, your Honor.

THE COURT: All right. I'm going to grant Mr. Gleisner's request on behalf of his client. I agree with Mr. Gleisner's analysis of where *Docks* stands, the *Docks* case.

There, of course, having been no contested hearing or the like in this matter, the DNR's review in granting the permit is without any meaningful record or any meaningful way for me to review anything.

It's not required by the Court as *Barnes* cited by the DNR points out. But *Barnes* doesn't say, I can't do it, it just says, I don't have to do it, it's an act of discretion. And I'm exercising my discretion to remand the matter.

I suppose we could split hairs by remanding it for a contested case hearing case as that's prescribed for under 227.42 of the statutes. Or, am I simply remanding it to have a hearing on the merits with certain rights of the parties and calling it a contested case hearing is simply a convenient, shorthand way to describe the procedure that I'm remanding for the DNR to conduct? I'm not sure it matters either way, but that's the kind of hearing I'm anticipating the DNR will conduct the procedures and rights and process at a 227.42 contested case hearing

ab initio would have called for. But this action is under 227.57 (7) as I guess everyone is aware of from the briefs and discussion here.

To reiterate, there is no way for me to know whether the DNR's conclusions are supported or not, I know the parties have submitted that I guess those go to credibility by the submitted information and materials. But they're all kind of procedural limbo I guess if we had a, if I was doing a trial on the merits, or a summary judgment, or some other proceedings where there was some limited consideration of factual claims of the parties those things would have been useful.

I guess really what they do is exemplify or demonstrate there is some possibly reasonable basis to reach different conclusions depending on how one views the facts that might be developed on the record.

But it's the absence of the record that leads the Court to take this step.

Mr. Gleisner, you'll have to draft the Court's ruling.

MR. GLEISNER: Yes, your Honor.

THE COURT: I think the thing to do is for me to retain jurisdiction in case either side is dissatisfied with the outcome of such a hearing, or if

there is any reason along the way that it needs to be referred back here.

MR. GLEISNER: Thank you, your Honor.

THE COURT: I decline the invitation of the petitioner to try and be any more specific about discovery or procedures to be used.

THE COURT REPORTER: I'm sorry, the?

THE COURT: The shorthand of the procedure of a contested case hearing.

So is there anything else from you today, Mr. Gleisner?

MR. GLEISNER: No, your Honor.

THE COURT: You, Ms. Milligan?

MS. MILLIGAN: No, your Honor.

THE COURT: All right. Thank you.

MR. GLEISNER: Just, Merry Christmas.

THE COURT: It was quite an education by reading your briefs.

(Hearing concluded)

STATE OF WISCONSIN)
) SS
COUNTY OF WAUKESHA)

I, Gail M. Villwock, Official Court Reporter for Br. 7 Waukesha County, State of Wisconsin, do hereby certify that the foregoing transcript is a true and correct transcription of my stenographic notes reported on said date, to the best of my belief and ability.

Dated this 14th day of December, 2011.

Gail M. Villwock

Gail M. Villwock, RMR

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.

ORDER

The Court heard arguments on Petitioners' Motion to Remand and the Respondent's Motion to Strike the Affidavit of Dr. Neal O'Reilly on October 28, 2011 and the Court in addition held a December 12, 2011 hearing at which the Court issued an oral Ruling. Petitioners Reddelien Road Neighborhood Association (RRNA), et al., appeared on both dates by its counsel, William C. Gleisner, III, and Respondent, Wisconsin Department of Natural Resources, appeared on both dates by its counsel, Assistant Attorney General Diane L. Milligan.

Based on the pleadings and the record in this case, the briefs filed by the parties and the arguments by counsel for the parties during the October 28th hearing, and for the reasons stated by the Court on the record at the hearings on October 28, 2011 and December 12, 2011,

IT IS HEREBY ORDERED that:

1. The Respondent's Motion to Strike the August 23, 2011 Affidavit of Dr. Neal O'Reilly is denied.

2. Petitioners' motion for a remand under Wis. Stat. §227.57(7) for a hearing before the Wisconsin Division of Hearings and Appeals is granted.

3. The hearing on Remand shall be conducted in accordance with the provisions set forth in Wis. Stats. §§ 227.42 to 227.50.

4. In accordance with the Petitioners' Motion to Remand and the briefs in support, and ¶¶ 3 to 6 of the "Wherefore" Clause in the Petition for Judicial Review on file with this Court, the issues to be addressed on Remand shall be those as set forth in the attached Supplement to this Order.

5. This Court shall retain jurisdiction over this matter for purposes of judicial review of the remanded proceedings once they are completed and for any other reason which may arise during the period of remand necessitating the Court' further involvement.

Dated this 6th of January, 2012.

BY THE COURT:

THE HONORABLE J. MAC DAVIS
Waukesha County Circuit Court, Branch 7

SUPPLEMENT TO JUDGE DAVIS' ~~DECEMBER 2011 ORDER~~ Jan 6 2012

The following issues are to be addressed upon Remand of this matter for a Contested Case Hearing consistent with the foregoing Order:

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 §§151.002(39) and151.12(5)(a)?
    b) Does the Permit comply with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2?

    [Based on Issue 3 in the Petition for Judicial Review]

2. Does the proposed development authorized by the Hartsook Decision comply with Wis. Admin. Code NR §151.12(5)(b)? In particular:

    a) Are the culverts proposed in the project plans adequate to handle the volume of water that will flow out of the wetland complex on and adjacent to the Kraus Site?
    b) Will the proposed parking lot act as a stopper, preventing water from the wetland complex on and adjacent to the Kraus Site from draining into North Lake via the Kraus Site and instead divert it onto neighbors to the south of the Kraus Site?
    c) Will this surcharge septic systems and cause flooding in the Reddelien Road Neighborhood?

    [Based on Issues 4 & 5 in the Petition for Judicial Review]

3. Does the Hartsook Decision comply with Wis. Stat. §281.15 and Wis. Admin. Code NR §299.04(1)(b)? In particular:

    a) Will the storm water treatment system for the roadway remove oils, grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff?
    b) Will the failure to do so increase pollution in the Reddelien Road. Neighborhood and to North Lake?

    [Based on Issue 6 in the Petition for Judicial Review]

APPENDIX B

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Diane L. Milligan
Assistant Attorney General
milligandl@doj.state.wi.us
608/266-9595
FAX 608/266-2250

December 29, 2011

The Honorable J. Mac Davis
Circuit Judge, Branch 7
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188-2428

Re: *Reddelien Road Neighborhood Association, et al. v. DNR*
Case No. 10-CV-5341

Dear Judge Davis:

I have received Attorney Gleisner's proposed order submitted by letter dated December 28, 2001. I object to the form of that order for all of the reasons stated in my December 23, 2011, letter. Attorney Gleisner's proposed order goes beyond the bounds of the hearing at which the Court granted the motion remanding this matter for an administrative hearing, and has no basis in the transcript of that hearing. Attorney Gleisner's proposed order erroneously provides that this Court may exercise supervisory authority over the Administrative Law Judge prior to judicial review of the hearing. Attorney Gleisner's proposed order overrides regulations that guide the procedures, including the identification and litigation of issues, for the hearing, in the absence of any challenge to those regulations. There is no question that Attorney Gleisner has tried in every forum, whether appropriate or not, to raise the questions he asks in his Order Supplement. In this forum, at this hearing on this motion, this Court was not asked to direct that those questions be included in the scope of the hearing, and this Court did not so direct in its decision.

As a compromise, I've redrafted our proposed Order to acknowledge what the petitioners have requested and stating, consistent with the applicable law, that the Administrative Law Judge has the authority to determine the hearing's scope.

The Department respectfully requests that the Court sign the enclosed Order, which recognizes petitioners' concerns and accurately conforms to the Court's decision as recorded in the transcript.

Thank you.

Sincerely,

JOHN J. KLOPPENBURG FOR

Diane L. Milligan
Assistant Attorney General

DLM:kmr

Enclosure

c w/enc: William C. Gleisner, III
William H. Harbeck

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Diane L. Milligan
Assistant Attorney General
milligandl@doj.state.wi.us
608/266-9595
FAX 608/266-2250

December 23, 2011

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

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

Dear Judge Davis:

I have received Attorney Gleisner's draft order dated December 22, 2011, and write to object to the form of the draft pursuant to Local Rule 2.7. While there are some minor editorial errors (there were no arguments on December 12; the reference to the O'Reilly affidavit does not clarify which affidavit; there are some extra colons), my primary concerns relate to the substance of the draft order.

The Court ordered the matter remanded for a contested case hearing on the decision that is the subject of this judicial review proceeding. The Court ordered that the hearing be conducted in accordance with the procedures set forth in Wis. Stat. §§ 227.42-227.50, and it "decline[d] the invitation of the petitioner to try to be any more specific about discovery or procedures to be used." Tr. at 5:4-6.

Contrary to this directive, the draft order includes a "Supplement" by which RRNA attempts to dictate the scope of the hearing. While some of the issues raised in RRNA's petition for judicial review may be appropriate considerations in a contested case hearing on whether or not DNR should have issued general permit coverage for its boat launch construction site, others may not be. These issues were not addressed at the hearing, and they were not addressed by the Court. The scope of a contested case hearing and the procedures for conducting such a hearing are set forth in Wis. Admin. Code ch. NR 2, a copy of which is provided with this letter. Sections 2.12 and 2.13 of this chapter set forth the procedures employed by the administrative law judge to clarify issues, set the scope of discovery, etc. The prehearing process provides RRNA with the proper forum for vetting the issues it identifies in its petition for judicial review. A Supplement to the Court's order is not the proper forum.

In addition, while the Court stated that it would retain jurisdiction over the matter "in case either side is dissatisfied with the outcome of such a hearing, or if there is any reason along the way that it needs to be referred back here" (Tr. 4:24-5:2), RRNA's draft order references issues that may arise "during the period of remand." This language could imply some kind of supervisory authority over the administrative law judge that would be inconsistent with the rules and statutes that apply to contested case hearings.

Enclosed please find a revised draft order that resolves the concerns identified here in a manner that is consistent with the Court's oral ruling. I ask that the Court please sign this order instead if it receives no objection from RRNA under the Court's five-day rule.

Sincerely,

Diane L. Milligan

Diane L. Milligan
Assistant Attorney General

DLM:kmr

Enclosures

c w/enc.: Attorney William C. Gleisner, III
Attorney William Harbeck

APPENDIX C

LAW OFFICES OF WILLIAM C. GLEISNER, III

300 COTTONWOOD AVE, STE 3
HARTLAND, WI 53029

WILLIAM C. GLEISNER, III
STATE BAR NO. 01014276

e-mail: wgleisner@sbcglobal.net

PHONE (262) 367-1222
FAX (262) 367-1236

July 23, 2012

Hand Delivered
Hon. J. Mac Davis
Waukesha Courthouse
515 Moreland Blvd.
Waukesha Wisconsin

Re: RRNA v. DNR, Waukesha Circuit Court Case No. 10CV5341

Dear Judge Davis,

As Your Honor will recall, Attorney Harbeck and I represent the Reddelien Road Neighborhood Association (RRNA) in the above litigation. This past Friday, we received the enclosed decision by Administrative Law Judge (ALJ) Jeffrey Boldt. As your Honor will recall, you interrupted your judicial review of the Storm Water Permit issued by the DNR on November 4, 2010 because of the absence of a reviewable record necessary for a meaningful judicial review. More specifically, in an Order dated January 6, 2012 (the January 2012 Order) you remanded this matter for an evidentiary hearing pursuant to Wis. Stats. §227.57(7).

While you further specified that the evidentiary hearing was to be conducted according to the rules contained in Wis. Stats. §§227.42 to 227.50, based on your Bench Decision which preceded your January 2012 Order, it was clear that this remand was not for the purposes of conducting a Contested Case Hearing but for the purposes of furnishing you with a record which the parties and the Court could utilize in connection with the pending judicial review proceeding. Paragraph 5 of your January 2012 Order reinforces this conclusion by specifying that you have in fact retained jurisdiction over this matter so that you can complete your judicial review.

In the very near future we will prepare and file a Petition requesting that Your Honor reassert jurisdiction over this matter so that the judicial review proceeding can now be continued. The purpose of this letter is to address certain concerns we have pending the continuation and completion of judicial review. First and foremost, the RRNA is concerned with the maintenance of the status quo pending the completion of judicial review. By copy of this letter to Assistant Attorney General Milligan, we seek assurances that the DNR will not commence any pre-construction or construction activity on the property which is the subject of this litigation (known as the Kraus Site) until the

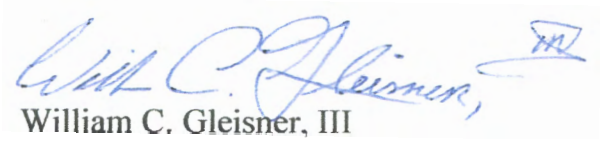
completion of your judicial review. We believe that the Administration of the DNR has made it clear that it will not commence any such work, but we do not have an order or injunction to that effect and that is why we seek assurances from Ms. Milligan.

Concerning relevant statements made by the DNR Administration, we are also enclosing a copy of a letter from State Senator Richard Zipperer whereby he forwarded to me a copy of an email from Deputy DNR Secretary Matt Maroney. In his email, Mr. Maroney states that other than mowing the DNR will not commence work at the Kraus Site until the "last legal decision comes." If Ms. Milligan cannot furnish us with the requested assurances, then we will have no alternative but to seek injunctive relief, but obviously we would prefer not to waste legal and judicial resources if possible.

There is one other reason that we are writing this letter to Your Honor. As noted above, it was clear to us that the purpose of the remand in this matter was to develop a record. Unfortunately, ALJ Boldt stated at the conclusion of a hearing April 18 to 19, 2012 that he would not agree to furnish a transcript of that hearing for the purpose of post-hearing briefs. Obviously, the testimony and other proceedings before the ALJ this past April are integral to the creation of the record contemplated by your remand under §227.57(7). By copy of this letter to Ms. Milligan, we wish to also confirm that a full transcript will be included in the eventual record to be submitted to this Court.

Thank you for your attention to this letter.

Yours very truly,



William C. Gleisner, III
State Bar No. 1014276

Of Counsel:
William Harbeck, Esq.
State Bar No. _____
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone: (414) 277-5853

cc: Diane Milligan, Esq. (by email and U.S. Mail)

APPENDIX D

From: William C. Gleisner, III [mailto:wgleisner@sbcglobal.net]
Sent: Saturday, September 22, 2012 11:32 AM
To: wgleisner@sbcglobal.net
Subject: Fw: Response Re: Heads up

----- Forwarded Message ----
From: "wgleisner@sbcglobal.net" <wgleisner@sbcglobal.net>
To: "Milligan, Diane L." <MilliganDL@DOJ.STATE.WI.US>; "William.Harbeck@quarles.com" <William.Harbeck@quarles.com>
Sent: Thu, August 16, 2012 2:44:21 PM
Subject: Response Re: Heads up

Hi Diane,

I am in Door County on our first vacation in 2 years. I have checked with Bill H. and he is in depositions through Monday. We'll get back to you mid-week of next week.

Bill
Sent from my U.S. Cellular BlackBerry® smartphone

From: "Milligan, Diane L." <MilliganDL@DOJ.STATE.WI.US>
Date: Thu, 16 Aug 2012 11:01:56 -0500
To: William C. Gleisner, III<wgleisner@sbcglobal.net>; William.Harbeck@quarles.com<William.Harbeck@quarles.com>
Subject: Heads up

Bill and Bill,
I am now getting to the "Petition for resumption of Judicial Review". When I spoke with Bill H last month, he asked me to give you all a heads up regarding what I intend to do, and I said I was not yet sure what I would do because I believe there are several procedural problems that got us into this procedural posture. Even though we are clearly under no mutual obligation to preview our motions with one another, I send this email as a courtesy pursuant to that conversation.

I have realized that I must move to dismiss 5341 because the Court lacked the authority to retain jurisdiction after remanding under 227.57. The case law is provides that reviewing courts only have the authority to retain jurisdiction under 227.56(1), not 227.57. Compare *Soo Line R. Co. v. Revenue Dep't*, 143 Wis. 2d 874 (Ct. App. 1988) with *Giminez v. State Med. Exam. Bd*., 229 Wis. 2d 312 (Ct. App. 1999). See also *Bearns v. Dept. of Industry Labor and Human Relations*, 102 Wis. 2d 70, 306 N.W.2d 22 (1981) (ALJ's decision is the final decision).

If you agree that my position arguably has merit, I would ask that you stipulate to dismissal of 5341 as a non-final decision, withdraw the motion to consolidate and we jointly request a scheduling conference to set the briefing for 1751. If you move to consolidate a new action challenging the ALJ's storm water decision with the manual code approval review proceeding, I will oppose it. Separate petitions challenging separate agency decisions could never be brought as one action, so I think such a motion would lack any legal basis. But we can fight over that if and when it comes up.

Diane L. Milligan

Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857
(608)266-9595 (tel)
(608)266-2250 (fax)