

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,

Petitioners,

vs.

Case No. 10CV5096
Case Code: 30607
Administrative Agency Review

The Department of Natural Resources (“DNR”),
an agency of the State of Wisconsin,

Respondent.

SUPPLEMENTAL PETITION FOR JUDICIAL REVIEW

Petitioners, by counsel, hereby file a Supplemental Petition for Judicial Review supplementing their Petition for Judicial Review filed on December 3, 2010 pursuant to Wis. Stats. §§30.209(3), 227.52, and 227.57. This Supplemental Petition seeks judicial review of DNR’s denial, set forth in its December 13, 2010 Response (in attached Appendix 1), of most of the issues upon which Petitioners’ sought a contested case hearing in their November 22, 2010 Petition for a Contested Hearing. As described in their initial Petition for Judicial Review, this proceeding, and the Contested Case Petition, arise out of DNR’s November 4, 2010 “North Lake Boat Launch Manual Code 3565.1 Approval” (the

“Permit”) (a copy of which is attached as Appendix 2) approving the construction of a public boat launch on North Lake property owned by the DNR.

I. PRELIMINARY ALLEGATIONS

A. This Petition Arises out of the Same Circumstances Surrounding the December 3, 2010 Petition for Judicial Review.

1. On November 22, 2010, Petitioners served DNR with a Petition for Contested Hearing (the “Contested Case Petition”), seeking an administrative hearing on DNR’s issuance to itself of the Permit under which DNR approved its own proposal to construct a public boat launch on a wooded area owned by DNR on North Lake in Waukesha County known as the “Kraus Site.” (A copy of the November 22nd Contested Case Petition is an appendix to the original December 3, 2010 Petition for Judicial Review now before this Court).
2. In addition to the Contested Case Petition, and in order to preserve their rights to judicial review, on December 3, 2010, Petitioners also commenced an action for judicial review regarding the Permit which is presently pending before their Court. (See 12/3/10 Judicial Review Petition ¶ 4).
3. On December 13, 2010, the DNR issued its response to the Contested Case Petition (the “12/13/10 DNR Response” in attached Appendix 1), denying Petitioners a hearing on almost all of the issues upon which the Petitioners sought administrative review.
4. As a consequence, Petitioners are hereby supplementing their 12/3/10 Petition for Judicial Review to now include a request for judicial review of DNR’s decision denying a contested hearing on certain issues.

**B. The December 3, 2010 Issues Addressed
by The December 13, 2010 DNR Response.**

5. The Contested Case Petition sought a contested hearing on the following eight issues:

ISSUE 1. Does the wetlands delineation used by the DNR in connection with the Permit understate the impact to wetlands? In particular:

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

ISSUE 2. Did the DNR properly assess the impact to navigable waters from the proposed development? In particular:

- a) Does the area marked in orange in attached Exhibit E contain navigable waters within the meaning of Wis. Stats. §30.10(2)?
 - i. If so, does that render the Permit invalid?
 - ii. Should the DNR be required to conduct further navigability tests?
- b) Does the Permit identify impacted navigable waters with sufficient specificity?

ISSUE 3. Does the proposed development authorized by the Permit comply with Wis. Admin. Code NR § 151.12(5)(a)? In particular:

- a) Should the access road proposed in the Permit be considered a new “development” rather than a “redevelopment” under Wis. Admin. Code NR §§151.002(39) and 151.12(5)(a)?
- b) Does the Permit comply with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2?

ISSUE 4. Does the proposed development authorized by the Permit comply with Wis. Admin. Code §NR 151.12(5)(b)? In particular:

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

ISSUE 5. Does the Permit comply with Wis. Stat. § 281.15 and Wis. Admin. Code NR §§ and 299.04(1)(b)? In particular:

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

ISSUE 6. Did the DNR's repeated denial of access to the publically owned Kraus Site prevent the Petitioners and NLMD from providing meaningful comments pursuant to Wis. Admin. Code §§. NR 150.01(5) and 310?

- a) Did this denial of access violate the statutory and due process rights of the Petitioners and NLMD?

ISSUE 7. Did the DNR's conduct at and following the public informational hearing on September 30, 2010 violate the Petitioners' and the public's statutory and due process rights? In particular:

- a) Was the restriction of three minutes per commenter unreasonable?
- b) Did the DNR fail to adequately respond to questions and issues raised at the public hearing?

ISSUE 8. Did the DNR fail to conduct the required water quality certification as required under Wis. Stat. § 281.15, Wis. Admin. Code §§ NR 103 and 299, and Section 401 of the Federal Clean Water Act (33 USC § 1341) and/or Wis. Stat. §281.36?

II. THE DNR'S 12/13/10 RESPONSE DENYING A CONTESTED CASE HEARING ON MOST OF THE ISSUES RAISED BY PETITIONERS.

6. On December 13, 2010, the DNR issued its response to the Contested Case Petition.

Its response is broken down into three sections:

- “Petition Under S. 227.42 Stats.”
- “Petition Under S. 30.209 Stats.”
- “Petition Under S. NR 299.05, Wis. Admin. Code”

7. As described below, the DNR denied a contested hearing on the bulk of the issues presented, including Petitioners’ request for review under Chapter 30, Wis. Stats., and Chapter NR 299, Wis. Admin. Code. The only issue upon which a contested case hearing was granted was Issue 2 relating to Petitioners’ contention that the DNR did not properly assess the impact to navigable waters from the proposed boat launch development.

8. For the reasons set forth below, the DNR’s denial of a contested case hearing on the remaining issues was arbitrary and capricious and/or without basis in fact or law.

9. The first Section of the DNR’s 12/13/10 Response, entitled “Petition under S. 227.42, Stats.,” denies the Petitioners the right to a Contested Hearing as to issues 3, 4, and 5. The basis for this denial is that “the decision to grant Storm Water Permit coverage was not authorized by this MC Approval [the Permit], but by a decision issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook [the “Hartsook Decision”].” The DNR goes on to say, “That decision was not appealed by you ... and is now final.”

10. Prior to Petitioners' receipt of the DNR's 12/13/10 Response, Petitioners had not been served with, nor were they aware of, the Hartsook Decision. Almost immediately, Petitioners filed a Petition for a Contested Hearing and Judicial Review of the Hartsook Decision. The Petition for Judicial Review of the Hartsook Decision (filed December 20, 2010) is currently pending before this Court as Circuit Case No. 10CV5341 and attaches as Appendix 2 the petition filed with the DNR seeking a contested hearing on that decision.

11. For the reasons set forth in both the 12/20/10 Petition for Judicial Review of November 4, 2010 Storm Water Permit and the petition for a contested case hearing on that permit, which are incorporated by reference, Petitioners submit that the DNR's denial of a Contested Hearing as to issues 3, 4, and 5 is arbitrary and capricious and/or without basis in law or fact. Petitioners thus ask that this Court reverse and set aside the DNR's denial and remand Issues 3, 4 and 5 to the DNR for a Contested Hearing. Petitioners further request a stay of all proceedings until the completion of that Contested Hearing.

III. THE DNR IMPROPERLY DENIED THE PETITIONERS' REQUEST FOR A HEARING CONCERNING WETLAND DELINEATION.

12. In its December 13, 2010 Decision, the DNR denied Petitioners' request for a Contested Hearing on Issue #1 a, c, d, e, and f on the grounds that the wetland delineation on the Kraus Site was made by the U.S. Army Corps of Engineers ("USACE"), not the DNR. (December 13, 2010 DNR Decision, p. 1, ¶5).

13. This ignores two important facts: First, the DNR conducted the initial wetland delineation which was then approved by the USACE during its visit to the Kraus Site on

May 5, 2010, and second, Wisconsin has a different, broader standard for determining wetlands than does the USACE.

14. 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 differs from the federal wetland standard in that it does not require the actual presence of aquatic or hydrophytic vegetation for an area to be deemed a wetland. As a result, a “site may not meet the federal definition of wetlands, but it would meet Wisconsin’s statutory definition of wetlands.” Thomas A. Meyer’s Basic Guide to Wisconsin Wetlands and Their Boundaries, p. 54, located online at Web address: <ftp://doafpt04.doa.state.wi.us/doadocs/Guide%20to%20Wisconsin%20Wetlands.pdf>.
15. Because of this difference, the DNR cannot rely on the USACE for its wetland delineations. It is the responsibility of the DNR, not the USACE, to correctly apply Wisconsin’s wetland definition. A Contested Hearing is needed on Issue #1 a, c, d, e and f in order to develop a record on which an Administrative Law Judge (or ultimately, this Court on judicial review) can determine whether the Kraus Site meets the Wisconsin definition of a wetland.
16. In addition, a Contested Hearing is the proper venue to develop a record and determine whether and to what extent the DNR’s mowing of the Kraus Site prior to its and the USACE’s wetland delineations deviated from the DNR’s past policy and practice. (See, e.g., 12/3/10 Petition for Judicial Review at ¶¶ 49-54).

**IV. DNR’S DENIAL OF A STAY UNDER CHAPTER 30,
WIS. STATS., WAS ARBITRARY AND CAPRICIOUS
AND/OR WITHOUT BASIS IN LAW OR FACT.**

17. In the second section its 12/13/10 Response, entitled “Petition Under S. 30.209,” the DNR denied Petitioners’ request for a stay under Wis. Stats. §30.209(1m)(a) and (c) on the basis that, “Authorizations issued under Manual Code 3565.1 are not individual permits issued under Ch.30, Stats., because *the Department of Natural Resources is not subject to ch. 30, Stats., or rules promulgated thereunder.* (December 13, 2010 DNR Response, p. 2, ¶5 and p. 3, ¶2) (emphasis added). To support this assertion, the DNR cites the principle that “Statutes in general terms in which the state is not named, or which apply expressly to private rights, do not bind or affect rights of the state, since it must be presumed the Legislature does not intend to deprive the state of any prerogative, rights, or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible.” (*Id.* at p. 2, ¶5)
18. The Petitioners take issue with the DNR’s assertion that it is not subject to Chapter 30 of the Wisconsin Statutes for the following reasons.
- a. It has long been part of the Common Law that “the [state] is embraced by general words of a statute intended to prevent injury and wrong.” *Nardone v. United States*, 302 U.S. 379, 384 (1937). In fact, this is an ancient precept of the English Common Law. *See United States v. Herron*, 87 U.S. 251, 263 (1874), where the Court recognized this well established English Common Law precept in these words. “Where an act of Parliament is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the king is bound by such act.” *Id.* at 255.

- b. The Wisconsin Supreme Court discussed this general principle in *State Dep't of Natural Resources v. City of Waukesha*, 184 Wis. 2d 178 (Wis. 1994) (overruled in part by *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996)). In *City of Waukesha*, the state argued that because Wis. Stat. §893.80(1) did not explicitly refer to the state, the state was not bound by the statute's notice requirements. Our Supreme Court disagreed and adopted the following reasoning:

The stringency of the rule [excluding the state from coverage by a statute] should be relaxed where the demands of a contrary policy include the government within the purpose and intent of a statute. Such a policy may be reflected from one or both of two sources: First, where the objective of a statute could not be accomplished without including the government. ... Second, a contrary policy is indicated where the inclusion of a particular activity within the meaning of the statute would not vitally interfere with the processes of government. ... In this case, we find that the objective of sec. 893.80(1), Stats., would be frustrated if the state did not have to comply with the notice requirements

Id. at 194-195.

19. Here, the DNR must be included within the purpose and intent of Wis. Stat. Ch. 30. First, the objectives of Ch. 30 could not be accomplished without subjecting the DNR to its requirements, and second, subjecting the DNR to Ch. 30 will not vitally interfere with the processes of government.

A. The Objectives of Ch. 30 Could Not be Accomplished Without Subjecting the DNR to its Requirements.

20. Navigable waters in Wisconsin are held in trust for the public. Wis. Stat. Ch. 30 was passed to prevent injury to said navigable waters, and the Supreme Court has made it clear that the protection of navigable waters takes precedence over any administrative decisions of the DNR. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628

(1998) (“Neither the text nor the legislative history of Wis. Stat. § 30.294 indicates that a citizen's right to abate public nuisances is contingent on the DNR's actions or enforcement decisions or is circumscribed by the procedures set out in Wis. Stat. § 30.03 (4) (a).” *Id.* at 832).

21. In fact, Wis. Admin. Code NR §1.90 states:

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

22. The objective of Ch. 30, i.e. protecting navigable waters, cannot be accomplished without subjecting the DNR – especially when it seeks approval for its own project – to Ch. 30. Simply put, Ch. 30 cannot protect navigable waters if the DNR is free to destroy them. Furthermore, as trustee of navigable waters, the DNR has a fiduciary duty to subject itself to Ch. 30 when seeking approval for its own project.

B. Subjecting the DNR to Ch. 30 Will Not Significantly Interfere With the Processes of Government.

23. Although the DNR asserts that it is not bound by Wis. Stat. Ch. 30, the DNR has nevertheless acknowledged that the MC Approval process in Manual Code 3565.1 is used in order to ensure that all DNR proposed projects that may affect waters of the State are environmentally sound. (12/13/10 DNR Response, p. 2, ¶6). The DNR states “Decisions [on DNR projects that may affect waters of the state] will be based on the standards in the appropriate statutes and administrative rules that would apply to similar privately sponsored projects.” *Id.*, p. 3, ¶1.

24. Since the DNR claims its MC Approval process is the equivalent of the Ch. 30 review process which governs any non-governmental entity, it cannot be argued that including the DNR under Ch. 30 would significantly interfere with the processes of government. The DNR already acknowledges that it is subject to the equivalent of Ch. 30, but then asserts that it is not subject to Ch. 30 in order to gain an unfair advantage when its projects are under review.
25. Not including the DNR within the ambit of Ch. 30, when evaluating its own proposed project, would render the entire MC Approval process a farce. The DNR would be able to merely go through the motions of basing its decisions regarding DNR proposed projects on Ch. 30 until challenged, at which point it would simply end the charade and ignore Ch. 30 altogether.
26. The Petitioners sought an automatic stay under Wis. Stats. §30.209 pending a contested hearing under Wis. Stats. §30.209(1m)(a) because the Permit was issued contrary to Wis. Stats. §281.31 and Ch. 30, Stats. (Contested Petition, p. 25, et seq.). The DNR has set aside that automatic stay in its 12/13/10 Response.
27. For all of the foregoing reasons, the Petitioners assert that the DNR is subject to Ch. 30 and the Petitioners thus request that this Court restore the automatic stay under Wis. Stats. §30.209 until such time as an administrative law judge has an opportunity to determine the appropriateness of that stay.

**V. THE DNR IMPROPERLY DENIED A
CONTESTED HEARING ON THE CONSTITUTIONAL ISSUES.**

28. The DNR claims on p. 2 of its December 13, 2010 Decision that “as an administrative agency the Division of Hearings & Appeals is not authorized to decide

constitutional issues.” However, the DNR overlooks the fact that the Petitioners have also filed a Petition for Judicial Review as another component of its Permit Petitions. At some point the Court will be called upon to pass judgment on the constitutional issues raised by the Petitioners. Constitutional issues can only be decided based on a full factual record. Pursuant to Wis. Stats. §227.55, the Circuit Court must look to the ALJ for such a factual record. If the ALJ declines to develop an appropriate factual record the Circuit Court cannot properly rule on Constitutional challenges and this will in turn amount to a separate violation of the Petitioners’ Due Process rights.

VI. THE DNR IMPROPERLY DENIED A CONTESTED CASE HEARING ON WATER QUALITY CERTIFICATION ISSUES.

29. Pursuant to §401 of the Clean Water Act, 33 U.S.C. §1341(a), a federally issued permit, such as a wetlands permit issued by the Army Corps of Engineers, does not take effect in Wisconsin until the DNR "certifies" that the permit will meet state water quality standards and otherwise complies with applicable state water quality related rules. This is commonly referred to as a "Water Quality Certification."
30. In Wisconsin, the water quality standards for wetlands are found in NR 103 Wis. Admin. Code. That Chapter requires, among other things, that before the DNR issues a Water Quality Certification for a project involving potential wetland impacts, the DNR must conduct an extensive evaluation of the project, including whether there are any "practicable alternatives" which avoid the impacts to the wetlands.
31. The procedures and criteria by which the DNR reviews and issues Water Quality Certifications, including the procedures as to how the DNR assesses compliance with state water quality standards such as those in NR 103, are contained in NR 299 Wis.

Admin. Code. That Chapter also contains the procedures under which interested parties can object to DNR determinations in a contested case hearing, including DNR determinations under NR 103.

32. NR 299.05(5) provides that a person may request a contested case hearing if the person's "substantial interests may be affected" by the Water Quality Certification. By its terms, NR 299.05(5) contains three elements which must be included in the written request for hearing: (1) specific reasons why the proposed activity would violate applicable state water quality related standards and rules under NR 299.04(1)(b); (2) information explaining why the petitioners' interests would be adversely affected; and (3) a statement that the petitioner will appear at the contested case hearing and present evidence in support of the objections to the Water Quality Certification.
33. As set forth below, Petitioners' Contested Case Petition satisfied all three elements in NR 299.05(5), and the DNR's decision to deny a hearing under that section is arbitrary and capricious and without basis in fact or law.

**A. The Contested Case Petition Included Specific Reasons Why
the Proposed Activity Would Violate State Water Quality Standards.**

34. The Contested Case Petition asserted several separate and distinct claims that the proposed project did not comply with certain water quality standards and rules:
- a. The storm water treatment system for the proposed two-lane roadway through the woods and wetlands was not designed to remove various contaminants such as oils and grease, de-icing compounds, and similar chemicals found in roadway runoff
Contested Case Petition, Section II.C(iii), p. 12);

- b. The November 4, 2010 Permit (Appendix 2) did not include a proper or correct “practicable alternatives” analysis that the DNR is required to undertake, whenever wetlands are involved, pursuant to NR103.08 (Contested Case Petition, Section II.F(i), pp. 15-19);
 - c. In issuing the November 4, 2010 Permit, the DNR failed to put its own application to the same rigorous assessment to which it subjects private parties with respect to the DNR's analysis of the potential impacts from the proposed project on floral diversity, water quality, and wildlife habitat (Contested Case Petition, Section II.F(ii), pp. 18-19); and
 - d. The Water Quality Certification in the Permit fell well short of the standards and methodology that the DNR typically employs when assessing impacts to water quality in permit applications submitted by others. (Contested Case Petition, Section E, pp. 14-15).
35. The third section of the DNR’s 12/13/10 Response (Appendix 2), entitled “Petition Under S. 299.05, Wis. Admin. Code,” denied the contested case hearing request under NR 299, but in doing so, the DNR dealt only with Petitioners’ contention pertaining to storm water runoff. The DNR overlooked and failed to address Petitioners’ remaining water quality certification contentions.
36. With respect to the first NR 299 issue concerning the storm water requirements, the DNR says that the “decision to grant coverage” to the boat launch project under the DNR’s General Permit for Construction Site Storm Water Runoff “was issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook [the “Hartsook Decision”] and is now final.” The DNR goes on to state that the Hartsook Decision thus “may not be

collaterally attacked in a contested case hearing on this MC Approval.” (12/13/10 DNR Response, p. 4, 3rd paragraph from bottom). For the reasons set forth above, the DNR’s denial of a hearing on the Permit’s non-compliance with the pertinent storm water requirements was arbitrary and capricious and without basis in fact or law.

37. Storm water issues aside, the third section of the DNR’s 12/13/10 Response under NR 299 is silent with respect to Petitioners’ request for a hearing on the remaining grounds.

38. For instance, rather than specifically addressing the contention that the DNR’s “practicable alternatives” analysis under Chapters NR 103 was deficient, the DNR’s response instead strays to the issue of wetlands delineation, asserting: “The determination regarding the presence, area, and federal vs. non-federal character of the wetlands on the DNR site is a decision of the U.S. Army Corps of Engineers” (12/13/10 DNR Response, p. 4, last paragraph). DNR continues, “Since the Corps is the agency that made this determination, any dispute regarding the *delineated area and federal vs. non-federal character* of wetlands is within the jurisdiction of the Corps, not DNR.” (*Id.*, p. 5, first paragraph) (emphasis added).

B. The DNR’s Focus on Wetlands Delineation is Misplaced.

39. The DNR’s focus on the wetlands delineation completely misses the point. Petitioners’ request for a contested case hearing on the “practicable alternatives analysis” issue (or other NR 299 issues) does not hinge on the dispute regarding the “delineated area,” or the “federal vs. non-federal character” of the wetlands at the Kraus Site. While the Petition does include the contention that the wetlands delineation was deficient because it grossly understates the wetlands impact, this issue is contained in

Section II.A of the Contested Case Petition. It is entirely independent of the “practicable alternatives analysis” issue raised in Section II.F(i) of the Contested Case Petition, a section which the DNR’s 12/13/10 Response under NR 299 simply overlooks.

40. Regardless of whether the wetlands themselves have been properly *delineated*, the DNR must still make a determination under NR 103.08(4)(a)1 that: “No practicable alternative [to the proposed project] exists which would avoid adverse impacts to wetlands.”
41. The Contested Case Petition specifically contends that the DNR’s determination in this regard was flawed and seeks a hearing on this issue. For example, it recites that the DNR did not fairly compare the wetlands impact from the proposed construction of a boat launch at the Kraus Site with the wetlands impact to locating the boat launch at the “Kuchler Site,” another site located on North Lake which has been proposed by the North Lake Management District (“NLMD”) as an alternative public access site. Rather than comparing the Kraus Site wetlands loss – 0.16 acres using the DNR’s understated calculation – with the Kuchler Site wetlands loss – 0.137 acres – the DNR instead compared the Kraus Site 0.16 acres wetlands loss to *a combined* Kraus and Kuchler Site wetlands loss of 0.208 acres based upon the NLMD’s dual site approach. (See Contested Case Petition, Section II.F(i), pp. 16-18). By not making a direct comparison of the wetlands loss at each potential site *standing alone*, the DNR’s analysis was flawed. (*Id.*)
42. Petitioners raised their contentions regarding the DNR’s inadequate water quality certification based upon the improper “alternatives analysis” both in the body of the

Contested Case Petition (Section II.F) and again in Section IV delineating the issues upon which contested case review was sought. (See the Contested Case Petition, Issues 1(b) and 8, pp. 31, 34).

43. Even though Petitioners' claim pertaining to the DNR's deficient "practicable alternatives analysis" falls under Chapters NR 299 and 103, the DNR makes a passing reference to this issue in the first section of its 12/13/10 Response entitled "Petition Under S. 227.42 Stats." Under the subheading "Issues of Law," DNR states:

To the extent that the petition alleges that...DNR failed to properly apply applicable law in its determination (including its practicable alternatives analysis) that water quality certification should be granted for activities authorized by the MC Approval, the petition is DENIED because those issues are purely issues of law rather than disputes of material fact. Issues #1. b and 8 of your petition are purely issues of law.

44. First, there is nothing on the face of NR 299.05 that says that issues of law are not appropriate for contested case review.
45. Nevertheless, the basis for Petitioners' claim here is not legal but is purely factual. Simply, was the DNR's "practicable alternatives analysis" flawed because it did not make an apples-to-apples comparison of the impacts to wetlands, as NR 103 requires, between the Kraus Site and the Kuchler Site.
46. There is no dispute that, by law, NR 103.08(4)(a)1 requires the DNR to make a finding that the project proponent (here, the DNR) has shown that no practicable alternative exists which would avoid adverse impacts to wetlands.
47. Petitioners' claim is that, as a matter of fact, the DNR loaded the dice in making this determination because it never considered the Kuchler Site, standing alone, in its "practicable alternatives analysis" of the Kraus Site.

48. Had it done so, it would have had to conclude that, even using its understated wetlands impact at the Kraus Site, locating the boat launch at the Kuchler Site instead would have resulted in significantly less impact to wetlands.
49. Because the issue is one of fact, not law, Petitioners are entitled to contested case review, and the DNR's denial should be reversed and set aside.
50. As to the third issue arising under NR 299, the Contested Case Petition alleges that the DNR failed to put its own Kraus Site application to the same rigorous assessment to which it subjects private parties who seek a permit with respect to the DNR's analysis of the potential impacts from the proposed project on floral diversity, water quality, and wildlife habitat. (Contested Case Petition, Section II.F(ii), pp. 18-19). The DNR's response does not address this contention.
51. Finally, the DNR's 12/13/10 Response also fails to address Petitioners' additional contention in Section II.E of their Contested Case Petition that the Water Quality Certification in the 11/4/10 Permit falls well short of the standards and methodology that the DNR normally employs when assessing impacts to water quality in permit applications submitted by others. (Contested Case Petition, Section II E, pp. 14-15 and Issue 8, p. 34).
52. In summary, the Contested Case Petition contains a number of specific reasons why issuance of the Water Quality Certification violated applicable Wisconsin water quality related standards and rules.

C. Why Petitioners' Substantial Interests are Threatened.

53. The Contested Case Petition explained why the substantial interests of the Petitioners are threatened by the DNR's action. For example at pages 24-25, the

Petitioners state that the project could cause Petitioners' homes to flood and septic systems to be surcharged. In addition Petitioners cited the diminished ability to use and enjoy their properties and the surrounding wetlands and navigable waters.

54. The DNR's 12/13/10 Response does not challenge the statements that substantial interests of the Petitioners are at stake here.

**D. The Petitioners Presented
Evidence in Support of Their Objections.**

55. This element of NR 299.05(5) was satisfied with the following statement at page 36 of the Contested Case Petition: "As required by Wis. Stats. §30.209(1m)(b)3 and Wis. Admin. Code NR §299.05(5), Petitioners' representatives will appear at the requested contested case hearing and will present information and evidence supporting their objections."

56. For the reasons set forth above, the Contested Case Petition filed by Petitioners satisfied all three criteria in NR 299.05(5), and the DNR's decision to deny a hearing under that section is arbitrary and capricious and without basis in fact or law.

WHEREFORE, Petitioners pray for the following relief:

1. FOR AN ORDER reversing the DNR's 12/13/10 Response and ordering that, in addition to Issue 2, the Petitioners be accorded a Contested Hearing on Issues 1, 3, 4, 5, 6, 7 and 8 of the Contested Case Petition.
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, until the Contested Hearings have been concluded.

3. FOR AN ORDER reversing the DNR's 12/13/10 Response and reinstating the automatic stay under Wis. Stat. §30.209(1m)(c) until the administrative law judge assigned to this case can rule on whether to continue that stay.

Dated at Hartland, Wisconsin this 11th day of January, 2011.

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

By: _____

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

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