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December 28, 2011

Hand Delivered

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

Re: *Reddelien Road Neighborhood Association, et al. v. DNR*, Waukesha County
Circuit Court Case No. 10CV5341

Dear Judge Davis,

For the reasons set forth in this letter, the RRNA disagrees with the DNR's letter of December 23, 2011 to this Court, and objects to the DNR's proposed Order.

Introduction

The DNR's minor scrivener objections are addressed in the revised Order, three copies of which are submitted herewith. If the Court does not receive a further objection to the within revised Order, I would request that the Court sign it and have the Court's Clerk return a conformed copy of same to me in the enclosed, self-addressed envelope.

Substantively, the DNR appears to have two objections to the RRNA's proposed Order. First, it objects to the listing of the issues, via a Supplement to the RRNA's proposed Order, that are to be the subject of the hearing that the court has ordered. Second, it objects to the wording of the RRNA's proposed Order as it pertains to this Court's retention of jurisdiction.

As discussed below, the issues delineated in the RRNA's proposed Order were explicitly set forth as long ago as November 22, 2010 and were repeated in its Petition for Judicial Review and in its briefs submitted in support of its motion to remand in this case, which the Court has now granted. Furthermore, if the issues are not expressly set forth in this Court's Order, the RRNA is concerned that at a minimum the Court's Order will be vague and non-specific and will result in arguments down the road, either before the ALJ or this Court, about the scope of the hearing on remand. Of greater importance, the issues delineated in the Supplement to the RRNA's proposed Order go to the heart of the RRNA's prayer for relief and also establish the extent of the ALJ's jurisdiction.

As to this Court's retention of jurisdiction, the RRNA does not view the Court's decision in this regard as an attempted usurpation of the administrative law process nor

was the RRNA's proposed Order intended to have that effect. As explained below, there are very valid reasons for the Court to retain jurisdiction that have nothing at all to do with the actual hearing to be conducted on remand.

I. It is Important to the Orderly Administration of Justice, and the Jurisdiction of the ALJ, for this Court to Define the Issues which will be Addressed during the Hearing the Court has Ordered.

A. The RRNA has Long Sought a Hearing on the Issues Set forth in the Supplement to the Proposed RRNA Order.

The issues set forth in the Supplement to the RRNA's proposed Order have been repeated numerous times by the RRNA and were, in fact, first enunciated more than a year ago in ¶¶ 3, 4, and 5 at pp. 32 to 33 of the RRNA's November 22, 2010 Petition for a Contested Case Hearing¹ (see highlighted language in attached Exhibit A-1 and A-2). No less an authority than the DNR itself has recognized that ¶¶ 3, 4 and 5 of the RRNA's November 22, 2010 Petition are proper subjects for a contested case hearing. According to p. 1 of the DNR's December 13, 2010 decision rejecting the RRNA's November 22, 2010 request for a contested case hearing, attached as Exhibit B:

Issues 3, 4 and 5 in your petition deal with storm water... Any disputes of fact or questions of law in issues 3, 4 and 5 **may be relevant, material or both to the issue of whether DNR should have granted [a storm water permit]** to the boat launch project under WPDES General Permit No. WI-SO678831-3; Construction Site Storm Water Runoff. However, the decision to grant Storm Water Permit coverage was not authorized by the MC Approval, but by a decision issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook. **That decision was not appealed by you or anyone or any other person and is now final** [Emphasis supplied].

Of course, this Court ruled on July 29, 2011 that the November 4, 2010 decision of DNR's Brian Hartsook to issue a storm water permit was not properly served on the RRNA, thus in effect permitting an appeal of that decision to proceed.

This Court needs only to consult its own file in this case to see how the RRNA repeatedly has sought a hearing on issues 3, 4 and 5 after the RRNA's November 22, 2010 Petition for a Contested Case Hearing. The December 20, 2010 Petition for a Contested Case Hearing regarding the Hartsook storm water permit (which is Appendix 2

¹ This is a different, and earlier, Petition for a Contested Hearing than the one attached as an Appendix to the Petition for Judicial Review in the case at bar (Case 2010CV5341). The November 22, 2010 Petition for a Contested Case Hearing was filed in response to the primary DNR November 4, 2010 Manual Code Approval (which is now the subject of pending Waukesha Case No. 5096) and was drafted and served before the RRNA had any knowledge of the DNR's "secret" November 4, 2010 decision by DNR Engineer Brian Hartsook to issue a storm water permit. The RRNA learned for the first time about the Hartsook decision when it received the December 13, 2010 DNR decision in Exhibit B, and the RRNA then filed a second Petition for a Contested Case Hearing on December 20, 2010, which is attached as an Appendix to the Petition for Judicial Review in the case at bar.

to the Petition for Judicial Review in this case, #2010CV5341) contains the very same ¶¶ 3, 4 and 5 at pages 24 to 25.² The “Wherefore Clause” of the RRNA's Petition for Judicial Review in this case (at pp. 20-22), closely paraphrases those same issues, but numbers them differently as ¶¶ 3, 4 5 and 6.³ In fact, the RRNA's August 25, 2011 Motion to Remand is a request for enforcement of the “Wherefore Clause” from its Petition for Judicial Review. This is made particularly clear in the RRNA's Reply Brief, filed on October 10, 2011 in support of its Motion to Remand, where the RRNA states:

In moving for a remand pursuant to Wis. Stats. § 227.57(1) and § 227.57(7), the RRNA was and is simply seeking to enforce the Petition for Judicial Review in this case according to its terms.⁴

RRNA Reply Brief, at p. 4.

**B. The Issues Cannot be set by the ALJ
And, in fact, Define the ALJ's Jurisdiction at the Hearing.**

In its December 23, 2011 letter, the DNR confuses the concept of “issues” with procedure and discovery. In terms of a contested case hearing, the issues to be addressed at a hearing are fundamentally different from the “procedure, discovery, etc.” which are to be employed at a hearing. The issues in a contested case hearing have always been, by practice and code (*see* NR 2.055) established before a matter is sent to the ALJ.

While the Administrative Law Judge [“ALJ”] may “clarify” those issues pursuant to NR 2.12, it is not within the power of the ALJ to formulate the issues that will govern a hearing. Here, the formulation of the issues on remand is of vital importance because DNR concedes in its letter that “some of the issues raised in RRNA's petition for judicial review may be appropriate... [while] others may not be.” This seems to imply that the DNR might contend after remand has occurred that it has the right and ability under NR 2.055 to restrict the issues to be heard.⁵ It is also important to note that the issues listed in the RRNA's proposed Supplement to its proposed Order do not include all of the issues listed in its Petition for Judicial Review in this case because in its earlier rulings this court has already addressed several of those issues and they are now the Law of the Case.

II. The Court's Retained Jurisdiction is Limited.

The DNR raises concerns about the wording of Paragraph 5 of the RRNA's proposed Order as it pertains to the court's retention of jurisdiction while this matter is on remand for a hearing. According to the DNR, the RRNA's proposed wording “could imply some kind of supervisory authority over the administrative law judge that would be

² *See* the highlighted language in attached Exhibit C-1 and C-2.

³ *See* highlighted language in attached Exhibit D-1, D-2 and D-3.

⁴ *Id.*

⁵ Wis. Admin. Code NR 2.055, deals with “Determination of Jurisdiction,” and provides that DNR, after receipt of a petition for a contested case hearing, shall transmit to DHA only petitions or portions thereof “which the Department determines meet the applicable jurisdictional requirements.”

inconsistent with the rules...." The RRNA is not seeking to have this court "supervise" the ALJ during the course of the actual hearing. Instead, the RRNA's proposed Order only seeks to address what it understood the Court to intend in issuing its ruling, and thus to avoid further disputes.

The RRNA understands that the Court is retaining jurisdiction for two primary reasons: 1) To insure this matter will return to this Court for further proceedings consistent with the judicial review process once the relevant determinations have been made by the ALJ following the hearing; and 2) to maintain jurisdiction should it become necessary to seek ancillary relief, such as an injunction to maintain the status quo, while the ALJ is conducting the required hearing on remand.

Conclusion

The Supplement attached to the RRNA's proposed Order constitutes the substance of the "request" of the RRNA which it has consistently sought in its filings with the Court in support of the motion to remand, and before. The RRNA seeks only to have this Court define the issues so that the functional equivalent of a contested case hearing regarding those issues can, at long last, proceed. A specific delineation of the issues will also insure that the ALJ is clear on the parameters of the hearing.

The RRNA agrees that the retention of jurisdiction by this Court is not intended as an effort by this Court to micro-manage the conduct of the hearing by the ALJ. Instead, the RRNA understands that the Court wishes to retain jurisdiction to insure the orderly administration of this matter and to insure that the status quo is maintained while the ALJ conducts his or her hearing.

Thank you for your attention to this letter.

Respectfully,

William C. Gleisner, III

William C. Gleisner, III
State Bar No. 1014276

William H. Harbeck,
Of Counsel

cc: Diane Milligan, Esq. (by Email & Mail)

- f) Was the mowing of the site prior to the wetlands assessment contrary to the DNR's own policy and practice?
2. Did the DNR properly assess the impact to navigable waters from the proposed development? In particular:
- a) Does the area marked in orange in attached Exhibit E contain navigable waters within the meaning of Wis. Stats. §30.10(2)?
 - i. If so, does that render the Permit invalid?
 - ii. Should the DNR be required to conduct further navigability tests?
 - b) Does the Permit identify impacted navigable waters with sufficient specificity?

3. Does the proposed development authorized by the Permit comply with Wis.

Admin. Code NR § 151.12(5)(a) ? In particular:

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

4. Does the proposed development authorized by the Permit comply with Wis.

Admin. Code §NR 151.12(5)(b)? In particular:

- a) Are the culverts proposed in the project plans adequate to handle the volume of water that will flow out of the wetland complex on and adjacent to the Kraus Site?

b) Will the proposed parking lot act as a stopper, preventing water from the wetland complex on and adjacent to the Kraus Site from draining into North Lake via the Kraus Site and instead divert it onto neighbors to the south of the Kraus Site?

c) Will this surcharge septic systems and cause flooding in the Reddelien Road Neighborhood?

5. Does the Permit comply with Wis. Stat. § 281.15 and Wis. Admin. Code

NR §§ and 299.04(1)(b)? In particular:

a) Will the storm water treatment system for the roadway remove oils and grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff?

b) Will the failure to do so increase pollution in the Reddelien Road Neighborhood and to North Lake?

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

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

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

a) Was the restriction of three minutes per commenter unreasonable?



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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December 13, 2010

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SUBJECT: **Petition for a Contested Case Hearing** Pursuant to Wis. Stats. ss. 227.42, 30.209, and Wis. Admin. Code s. NR 299.05(5) In Re. North Lake Boat Launch Manual Code 3565.1 Approval dated November 4, 2010 (IP-SE-2009-68-05745-05750)

Dear Attorney Gleisner:

I am responding to your petition for a contested case hearing on behalf of your clients Reddelien Road Neighborhood Association ("RRNA") and 40 individuals who own property and/or reside on Reddelien Road. Your petition was received by Secretary Matthew Frank, Department of Natural Resources ("Department" or "DNR") on November 22, 2010. You seek a contested case hearing under the legal authorities cited above on an agency action – a DNR approval pursuant to Manual Code 3565.1 ("MC Approval").

The MC Approval at issue authorizes 4 activities needed to build the access road, parking lot, and boat launch: (1) grading more than 10,000 square feet on the bank of the lake; (2) installing a boat ramp and 2 outfall structures on the bed of the lake; (3) installing 4 culverts crossing over wetlands; and (4) placing fill in up to .16 acres of wetland. (MC Approval Finding of Fact No. 1)

PETITION UNDER S. 227.42, STATS.

To obtain a hearing under s. 227.42 there must be a dispute of material fact. A "material fact" is a fact of consequence to the merits of the litigation, i.e. a fact that has a bearing on the decision. A petition alleging only disputes of law and immaterial facts does not meet the criterion that requires a "dispute of material fact."

Storm Water Issues: To the extent that the issues for which you seek review (Pet. Sec. IV pp. 31-34) deal with storm water, the petition for hearing under s. 227.42, Stats., is **DENIED**. Issues # 3, 4, and 5 in your petition deal with storm water. (Pet. Sec. IV Issues # 3, 4, & 5, pp. 32-33) To the extent that Issues # 3, 4, and 5 may be disputes of fact rather than issues of law, they are irrelevant and immaterial to the activities authorized by the MC Approval. When a Storm Water Permit is required for a project, storm water pollutants are considered to be adequately managed and regulated under the Storm Water Permit issued for the project. **Any disputes of fact or questions of law in Issues # 3, 4, and 5 may be relevant, material, or both to the issue of whether DNR should have granted coverage to the boat launch project under WPDES General Permit No. WI-S067831-3: Construction Site Storm Water Runoff.** However, the decision to grant Storm Water Permit coverage was not authorized by this MC Approval, but by a decision issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook. That decision was not appealed by you or any other person and is now final.

Wetland Delineation Issues: To the extent that the petition deals with the wetland delineations, the petition is **DENIED** for the reasons outlined below for the denial of your petition for hearing under s. NR 299.05(5), Wis. Admin. Code, and because any disputed facts regarding the issue of wetland delineations for a federal water quality certification under s. 401 of the federal Clean Water Act are immaterial because the federal U.S. Army Corps of Engineers is the agency making the delineational and jurisdictional determinations. Issue # 1 a, c, d, e, & f in your petition deals with wetland delineations. To the extent that Issue # 8 may deal with wetland delineations, the petition is also denied. (Pet. Sec. IV Issues # 1 & 8, pp. 31-32 & 34)

2. Was the November 4, 2010 Hartsook Decision, which was issued based on a November 1, 2010 DNR application, timely prepared and issued within the meaning of Wis. Stats. §283.39(2)?
3. 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) and 151.12(5)(a)?
 - b) Does the Permit comply with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2?
4. Does the proposed development authorized by the 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?

5. 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?

6. Did the DNR fail to conduct the required water quality certification under Wis. Stat. § 281.15 and the Federal Clean Water Act, 33 USC § 1341?

Respectfully submitted this 20th day of December, 2010.

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Counsel for the Petitioners

By: _____

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attached as App. 2, Exhibit G that is customarily issued by the DNR in other cases. The Hartsook Decision does not in any way clarify the lack of clarity in the November 4, 2010 Permit in App. 2, Exhibit A and makes it impossible for the Petitioners to ascertain whether water quality standards have been met.

21. Indeed, the absence of a meaningful water quality certification such as that contained in App. 2, Exhibit G in and of itself deprives the Petitioners of their Due Process rights because they have no way of knowing, let alone assessing, the accuracy of the claims in App. 2, Exhibit A, FOF #13.

22. In addition, the single statement in the Permit's (App. 2, Ex. A, FOF # 13), does not satisfy in any way the requirements of the DNR to act as an agent for the Environmental Protection Agency in conducting a full water quality certification under Section 401 of the Federal Clean Water Act (33 USC §1341). Nowhere is there any evidence in the Permit that the DNR conducted the type of investigation and certification process customary for such a project.

WHEREFORE, Petitioners pray for the following relief:

1. FOR AN ORDER that the thirty (30) day limitation on an appeal of the Hartsook Decision did not begin to run until December 16, 2010.

2. FOR AN ORDER that the November 4, 2010 Hartsook Decision, which was issued based on a November 1, 2010 was not timely prepared and issued within the meaning of Wis. Stats. §283.39(2), and thus should be set aside.

3. FOR AN ORDER that the Hartsook Decision be remanded so that a factual determination can be made that there is full compliance with Wis. Admin. Code NR § 151.12(5)(a) in that a factual determination is made that the access road on the Kraus Site should be considered a new “development” rather than a “redevelopment” under Wis. Admin. Code NR §§151.002(39) and 151.12(5)(a) and a factual determination is made that there will be full compliance with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2.

4. FOR AN ORDER that the Hartsook Decision be remanded so that a factual determination can be made that there will be full compliance with Wis. Admin. Code NR §151.12(5)(b) in that:

- a) the culverts proposed in the project plans are adequate to handle the volume of water that will flow out of the wetland complex on and adjacent to the Kraus Site and
- b) that the proposed parking lot will not 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.

5. FOR AN ORDER that the Hartsook Decision be remanded so that a factual determination be made that the surcharge of septic systems on Reddelien Road will not cause flooding in the Reddelien Road Neighborhood or pollution of North Lake.

6. FOR AN ORDER that the Hartsook Decision be remanded so that a factual determination can be made that there is full compliance with Wis. Stat. §281.15 and Wis. Admin. Code NR §299.04(1)(b) in that:

a) A factual determination will be made that the storm water treatment system for the roadway will remove oils, grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff.

b) A factual determination will be made that the storm water treatment system will not in fact increase pollution in the Reddelien Road. Neighborhood and North Lake.

7. FOR AN ORDER that the Hartsook Decision be remanded so that it is clear from the face of the Hartsook Decision that the required water quality certification under Wis. Stat. §281.15, Wis. Admin. Code NR Ch. 103 and Ch. 299, as well as the Federal Clean Water Act, 33 USC §1341?

8. FOR AN ORDER pursuant to Wis. Stats. §227.57(1) and to the extent evidence is adduced at the Contested Hearing pursuant to the Petition in Appendix 2 of DNR irregularities in procedure before the Agency, allowing for further testimony before this Court and also for discovery in the form of depositions or interrogatories.

9. FOR AN ORDER pursuant to Wis. Stats. §227.57(4) and based evidence adduced at the Contested Hearing pursuant to the Petition in Appendix 2, remanding this case to the DNR for further action because the fairness of the proceedings and the correctness of the DNR's actions have been impaired by a material error in procedure or a failure to follow prescribe Agency Procedures.

10. FOR AN ORDER pursuant to Wis. Stats. §227.57(8) and based on evidence adduced at the Contested Hearing pursuant to the Petition in Appendix B, remanding the case to the DNR because the DNR has